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July 9, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

ERRATUM

Re: In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Dortch:

On behalf of tw telecom inc., I am filing an erratum to the redacted version of a letter filed today in the above referenced docket. The modification removes one instance of proprietary data, which was inadvertently left in the document when filed.

Please let us know if you have any questions.

Respectfully submitted,

/s/

Jonathan Lechter
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Re: In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Dortch:

On behalf of tw telecom inc., please find enclosed two copies of the redacted version of materials filed today in the above-referenced docket pursuant to the protective order in this proceeding.¹ An electronic copy of the redacted version has also been filed electronically via ECFS. Two copies of the confidential version of the same materials have also been provided to Margaret Dailey under separate cover. One copy of the confidential version of the materials has also been filed with the Secretary's Office under separate cover.

Please let us know if you have any questions with respect to this submission.

Respectfully submitted,

/s/

Thomas Jones
Jonathan Lechter

WILLKIE FARR & GALLAGHER LLP
ATTORNEYS FOR TW TELECOM INC.

cc: Margaret Dailey

¹ *Special Access Rates for Price Cap Local Exchange Carriers, Order*, 20 FCC Rcd 10160 (2005).

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VIA ELECTRONIC DELIVERY

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Dkt. No. 05-25

Dear Ms. Dortch:

tw telecom inc. ("TWTC"), by its undersigned counsel, hereby files this letter to respond to the letter filed by AT&T on February 6, 2009¹ in the above-referenced docket. AT&T's purpose in filing its February 6th letter was to distract the Commission from the evidence in the record (which AT&T admits is "enormous") that demonstrates the urgent need for reasonable constraints on the prices, terms and conditions under which AT&T and other incumbent LECs offer special access. As explained below, the FCC has more than enough information to support re-regulation of incumbent LEC special access right now. Nevertheless, if, as it seems likely, the FCC were to seek more information in this proceeding, TWTC will obviously fully cooperate, as it always has, to supply the information the FCC requests.² But any information gathering effort should focus primarily on obtaining the incumbent LEC cost information needed to determine the incumbents' special access profit margins. As Dr. Stanley Besen explains in the declaration attached hereto, the incumbents' profit margins are the best measure of the extent to which incumbents have market power in the

¹ See *Ex Parte* Letter of Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Feb. 6, 2009) ("*AT&T Letter*").

² In fact, TWTC and several other parties have proposed a detailed roadmap for an FCC data request in this proceeding. See *Ex Parte* Letter of CCIA, Ad Hoc Telecommunications Users Group, tw telecom inc., Sprint *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed June 3, 2009). That proposal calls for competitors to submit detailed information regarding the location and capabilities of their network facilities.

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provision of special access.³ That is why legacy AT&T itself relied on a profit margin analysis as the basis for its petition that led to the instant proceeding.⁴

In its February 6th letter, AT&T strenuously insists that the special access market has “all the hallmarks of an intensely competitive market.” *AT&T Letter* at 3. If this is so, then AT&T’s profit margins should be relatively low, and AT&T should welcome the opportunity to prove once and for all that it lacks market power in the provision of special access. But AT&T has done everything in its power to *prevent* the FCC from obtaining reliable cost information and to *avoid* any analysis of its profit margins. A reasonable inference is that AT&T’s special access profit margins are extremely high, and the FCC should require AT&T and other incumbent LECs to submit the information needed to confirm that this is the case.

In the absence of such an analysis, competitors like TWTC have submitted abundant secondary source evidence that shows that AT&T and other incumbent LECs have market power in the provision of special access, that their prices are set far above cost, and that their volume and term contracts are exclusionary. AT&T’s attempts to discredit this evidence are without merit.

I. Incumbent LECs Are Exercising Market Power To Set Supracompetitive Special Access Prices.

The available evidence demonstrates that the incumbents’ profit margins in the provision of special access continue to be extremely high. In 2007, TWTC submitted comparisons between the prices it charges, the prices other competitors charge, incumbent LEC prices made available to TWTC under volume/term agreements and TELRIC-based prices.⁵ That comparison showed that incumbent LECs price at least their DS1 and DS3 services well above competitors and even higher above TELRIC. This analysis yielded the conclusion that incumbent LECs are exercising market power in the provision of special access services.

A. AT&T’s Criticisms Of TWTC’s TDM Pricing Charts Are Without Basis

In an attempt to hide the extent of its profit margins, AT&T has tried, unsuccessfully, to discredit the methodology TWTC used to compare competitors’ prices and incumbent LECs’ special access prices. Each of AT&T’s arguments is addressed below.

³ See Declaration of Stanley M. Besen (“*Besen Declaration*”), attached hereto as Attachment B.

⁴ See Petition of AT&T Corp., *Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, at 9 (filed Oct. 15, 2002) (“[T]he very definition of monopoly profit is a return in excess of normal profits. And there can be no serious claim that the Bells must earn 50 percent rates of return to attract capital.”).

⁵ See Letter of Thomas Jones, Counsel, Time Warner Telecom Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Oct. 11, 2007) (“*2007 Pricing Charts*”) (attaching charts comparing competitors’ prices and RBOCs’ term/volume prices).

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First, AT&T argues that the information TWTC submitted regarding its own prices is unreliable because the TWTC prices represented an average of TWTC's standard book price offers and the discounted prices that TWTC salespeople may offer without receiving prior approval from their superiors (so-called "flex prices"). These offer prices, AT&T argues, do not reflect the prices TWTC actually charges in the marketplace. *See AT&T Letter* at 6. In fact, TWTC's use of an average of its current one-year term, no volume book prices and flex prices was completely reasonable. TWTC could not provide an average of its actual wholesale prices because the company records such actual prices in a manner that, while efficient for business purposes, does not enable TWTC to conduct a reliable, apples-to-apples comparison with incumbent LEC special access prices. But this information is not necessary. The purpose of submitting competitor pricing information is to provide the Commission with a reliable indication of above-cost prices that can be compared to incumbent LECs' prices for purposes of estimating incumbent LEC profit margins. TWTC provided exactly that information. Thus, AT&T's overwrought assertion that TWTC's pricing information is "completely counterfeit" need not be taken seriously.⁶

Second, AT&T challenges the composite prices for non-incumbent LEC wholesalers in TWTC's charts by arguing that these prices are merely "undocumented [] offers" that did not reflect the actual prices at which TWTC could buy the facilities at issue. *See AT&T Letter* at 6. In fact, the competitors' prices were actual firm offers made by competitive wholesalers to TWTC at dozens of locations and that were available to TWTC at any time. The competitors' prices did not generally vary by market or by address within each market.⁷

Third, AT&T complains that TWTC's previously filed charts did not provide an apples-to-apples pricing comparison in part because "AT&T has discount offerings that do not require long term commitments or minimum spending requirements." *AT&T Letter* at 7. That is true. TWTC compared incumbent LEC prices that TWTC actually pays under restrictive volume and term agreements with prices offered to TWTC by non-incumbent LEC wholesalers under no volume/single-year term commitments. Such a price comparison is favorable to AT&T because, in a competitive market, one would expect prices offered subject to costly contractual restrictions (such as those in incumbent LECs' multi-year volume/term agreements) to be lower than prices for services offered free of those

⁶ If anything, TWTC's methodology is likely skewed in AT&T's favor because TWTC's actual average wholesale special access prices are probably lower than the average of its book and flex price. This is because TWTC, unlike AT&T, always faces a formidable competitor when seeking to serve customers (i.e., AT&T or another incumbent LEC), and TWTC must sometimes charge prices below its flex prices.

⁷ The composite competitor price represents an average of five competitors' prices: (1) actual firm offers made by four competitive wholesalers to TWTC at dozens of locations and that are available to TWTC at any time and (2) TWTC's price (an average of TWTC's "book" and "flex" prices). TWTC's wholesale contracts contain confidentiality provisions which preclude TWTC from providing the names of the non-incumbent LEC wholesalers used in the charts or the specific locations for which the offers used in the charts were made.

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restrictions. But, as the charts showed, this was not the case. The incumbent LECs' prices under the volume and term agreements were still well in excess of CLECs' prices in nearly every instance.

Nevertheless, in order to accommodate AT&T's demand for an apples-to-apples comparison, TWTC has attached hereto updated charts that compare the incumbent LECs' prices for DS1s and DS3s under terms and conditions that closely resemble those offered by TWTC and other CLECs: one-year contracts⁸ with no volume or minimum dollar spending requirements. Unsurprisingly, as the new charts show, TWTC would pay AT&T and other incumbent LECs far more for a DS1 or DS3 circuit offered on a one-year term but not subject to a minimum volume or dollar spending requirement than TWTC would be pay a non-incumbent LEC for the same facilities offered under similar terms and conditions. This is particularly true of special access services that include a mileage component, no doubt a reflection of AT&T's willingness to exploit its exclusive control over transmission facilities that reach outside of downtown areas. In any event, AT&T can at least take heart that, while its one-year, no volume prices are bad and clearly show that it exercises market power, Verizon's and Qwest's prices, including their mileage prices, are even worse.⁹

Fourth, in a 2008 filing cited in its February 6th letter, AT&T asserted that "some of the circuit prices that TWTC reported for AT&T were inflated by hundreds or even thousands of dollars."¹⁰ This assertion seems to have been (apparently incorrectly) directed at the Ethernet and OCn prices provided by TWTC.¹¹ AT&T did not attempt to challenge the accuracy of the prices TWTC pays for AT&T's

⁸ In some instances the incumbent LECs only offer month-to-month prices and two- or three-year prices, but not one-year prices. *See* Attachment A. In those instances, the shortest incumbent LEC term longer than month-to-month was selected for comparison.

⁹ It is not beyond AT&T to try to discredit an analysis of its prices under one year contracts by asserting that (presumably) it sells most of its special access services pursuant to longer-term contracts. This argument should be rejected. As explained, AT&T's prices under multi-year term agreements are still much higher than competitors' prices, and such longer term agreements harm competition and consumer welfare, as discussed below.

¹⁰ *See* Letter of Gary L. Phillips, General Attorney and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Mar. 3, 2008) ("*AT&T 2008 Letter*").

¹¹ This *ex parte* focuses on issues related to TDM-based special access. TWTC cannot fully respond to AT&T's assertions regarding AT&T's and TWTC's Ethernet and OCn prices because AT&T has not described the service elements that comprise its Ethernet and OCn services. TWTC filed such an explanation along with its pricing charts. *See 2007 Pricing Charts*. An explanation of the service elements at issue is necessary because OCn and Ethernet pricing is much more complex than DSx pricing and the elements and levels of service vary by service class and carrier. Nevertheless, it is worth emphasizing that incumbent LECs' high wholesale Ethernet prices have the effect of artificially limiting the size of TWTC's addressable market for Ethernet, and they allow AT&T and other incumbents to control the pace and locations where Ethernet is introduced to American businesses.

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DS1 and DS3 services (a remarkable fact in itself given AT&T's scorched earth approach to FCC advocacy). Rather, with respect to DS1 and DS3 services, AT&T merely argues that the FCC should ignore high incumbent LEC rates for circuits with mileage because TWTC allegedly "purchases very few such circuits from AT&T" and instead relies almost exclusively on high capacity transport multiplexed to multiple channel terminations. *See AT&T 2008 Letter* at 3.

But the truth is that TWTC purchases a substantial number of DS1 circuits with mileage from AT&T. A review of TWTC's records showed that, as of February 2009, TWTC leased **[confidential begin] [confidential end]** special access DS1 channel termination circuits from AT&T. Of those **[confidential begin] [confidential end]** circuits, **[confidential begin] [confidential end]** were purchased with DS1 mileage (*i.e.*, TWTC purchased a DS1 channel termination plus interoffice DS1 mileage) and between **[confidential begin] [confidential end]** circuits were purchased with mileage multiplexed to hubbed DS3s (*i.e.*, TWTC purchased multiple DS1 channel terminations multiplexed to AT&T DS3 transport).¹² If these two categories are added together, between **[confidential begin] [confidential end]** of the DS1 circuits that TWTC purchased from AT&T included substantial mileage charges.

For the **[confidential begin] [confidential end]** of DS1 channel terminations that TWTC purchases with DS1 mileage, the incumbent LECs' prices are well above competitive levels, and can therefore be assumed to be well above AT&T's costs.¹³ To illustrate this point, assume that TWTC purchases 10 DS1 channel terminations with five interoffice miles each (*i.e.*, DS1 channel terminations plus DS1 mileage). In 2007, under its volume/term agreement with AT&T for the former SBC territory, TWTC paid \$1851.40 in price cap areas for this combination of facilities. *See 2007 Pricing Charts*. If TWTC were to purchase the combination of facilities at issue in this example from

¹² TWTC is able to determine that it had purchased DS1 special access channel terminations with and multiplexed to **[confidential begin] [confidential end]** DS3 mileage circuits from AT&T. However, TWTC's systems cannot support a calculation of the actual average fill rate for special access DS3 mileage facilities. Accordingly, TWTC relied on assumptions regarding the average fill rate of the multiplexed DS3s to estimate the range of DS1 channel terminations multiplexed to DS3 mileage circuits purchased from AT&T. For example, if each DS3 is filled with the maximum 28 DS1s, then there were **[confidential begin] [confidential end]** DS1 channel terminations purchased with the **[confidential begin] [confidential end]** mileage circuits. However, if each DS3 mileage circuit is filled with 10 DS1s, then there were **[confidential begin] [confidential end]** DS1 channel termination circuits associated with the **[confidential begin] [confidential end]** DS3 mileage circuits. Ten DS1s is a reasonable minimum fill rate because it only makes economic sense to switch from DS1s with mileage to a multiplexed DS3 arrangement when there are between 8-10 DS1 channel terminations on a single interoffice path.

¹³ No comparison is provided here between competitor and incumbent LEC prices for DS3 transport mileage multiplexed to multiple DS1 channel terminations because differences in the manner in which competitors (including TWTC) and incumbent LECs price the elements of those services make it difficult to conduct a reliable comparison between service providers.

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AT&T under a one-year Term Payment Plan in the Southwestern Bell Telephone Company operating company region in price cap areas, TWTC would pay AT&T \$2825. In contrast, if TWTC were to pay a rate equal to the composite competitor price depicted in the attached pricing charts under a one-year, no volume term agreement, the price would be [confidential begin] [confidential end].

B. Incumbent LECs' Prices In Pricing Flexibility Areas Are Almost Universally Higher Than In Areas That Remain Subject To Price Caps.

As a further illustration of incumbent LECs' market power, TWTC demonstrated that the incumbents' special access rates are higher in areas where they have been granted pricing flexibility than where they are subject to price caps in most cases. *See 2007 Pricing Charts*. In making this demonstration, TWTC was obviously showing the consistent trend in pricing across the many incumbent LECs in the country, a trend that shows that incumbents increase prices when freed from regulation. In fact, the pricing charts attached hereto demonstrate that that trend continues today.

AT&T asserts that its rates in pricing flexibility areas "are at or below its capped rates for the same services and will remain so at least through 2010." *See AT&T Letter* at 6. But this equivalence is the result of regulation (*i.e.*, merger conditions), not competition.¹⁴ Moreover, AT&T's own access tariff already lists prices that it plans to charge following the expiration of the merger commitments, and states that these were the same prices that AT&T charged prior to "temporary reductions" mandated by the merger commitments.¹⁵ For these reasons, TWTC, in 2007 and in the charts attached hereto, compared AT&T's DS1 and DS3 rates that will be in effect after the merger conditions expire with competitor prices. As the charts attached hereto demonstrate, the prices that AT&T's will charge after expiration of the merger conditions in price flex areas are equal to or higher than the prices AT&T charges in price cap areas.¹⁶

¹⁴ *See AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, Appendix F, Condition 6 (Special Access) (2007) (requiring the equalization of price cap and price flex DS1 and DS3 rates).

¹⁵ *See e.g.*, Ameritech FCC Tariff No. 2 § 21.4(F) ("Certain rates in Section 21.5.2.7 reflect interstate rate reductions that are temporary and will remain in effect through June 30, 2010. These rates are being reduced pursuant to Merger Commitment No. 6. Customers currently subscribing to, or that subscribe to, interstate term pricing plans for DS1/DS3 local distribution channel services and/or mileage services, in areas where the Telephone Company has obtained Phase II Pricing Flexibility, will pay the rates in Section 21.5.2.7 for those term plans through June 30, 2010, except as provided below. Effective July 1, 2010, such Customers will pay the rates set forth in Section 21.5.2.7.1, for these services. Customers subscribing to or renewing term plans while temporary rate reductions are in effect may experience rate increases as of July 1, 2010 when temporary rate reductions are no longer in effect.").

¹⁶ To the extent that AT&T charges TWTC lower prices in pricing flexibility areas than in price cap areas under TWTC's volume/term agreement with AT&T, this can hardly be said to be a benefit of

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AT&T argues further that it is reasonable for incumbent LECs to have increased rates in *some* pricing flexibility areas above levels in price cap areas because the price cap rules *may* have required incumbent LECs to price services below cost in certain areas. *See AT&T Letter* at 6. While it is at least theoretically possible that price cap regulation yielded below-cost incumbent LEC rates in some areas, there is no evidence (and AT&T certainly offers none) that this actually occurred anywhere at any time. It is worth noting that the FCC's rules permit incumbent LECs to make a showing that they are unable to obtain a reasonable rate of return under price caps.¹⁷ TWTC is unaware of any instance in which AT&T or any other price cap incumbent LEC has attempted to make such a showing in recent years.

Moreover, in the cost assignment forbearance proceeding, AT&T acknowledged and the FCC recognized that eliminating the cost assignment rules would make it more difficult for a price-cap carrier to support a claim of under earning. Neither AT&T nor the FCC appeared concerned about this prospect, implying that under earnings rarely (or never) occurred.¹⁸ It is highly unlikely that AT&T or any other carrier would severely handicap its ability to make such a claim if it believed that it was under earning to any substantial degree. This is especially so because AT&T asserted that it cost only \$7 million per year to comply with the accounting rules¹⁹ compared with the billions of dollars in revenue at stake in the special access market.

competition. As explained below, incumbent LECs use volume/term agreements as a means of preventing competition from developing in the special access market.

¹⁷ In its 1999 Pricing Flexibility Order, the FCC eliminated the "low-end" adjustment mechanism for price cap LECs that obtained Phase I or Phase II pricing flexibility. *See Access Charge Reform*, Fifth Report & Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 168 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001). Under that provision, incumbent LECs were essentially guaranteed a 11.25 percent rate of return if price caps were set too low. *See id.* An incumbent LEC may still make a request for an above-cap tariff filing if it believes it is under earning under price caps. *See* n.418.

¹⁸ *See Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, Memorandum Opinion and Order, 23 FCC Rcd 7302, ¶ 19 (2008) ("Because these changes have eliminated ongoing tinkering with price caps, we no longer routinely need the accounting data derived from the Cost Assignment Rules for rate regulation functions."). In support of that assertion, the FCC cited to AT&T's reply comments where AT&T admitted that "a price cap ILEC raising a confiscation claim may find it more difficult to prove such a claim without separated cost data." *See id.* n.71 (*citing* "AT&T Reply" at 17).

¹⁹ *See Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Dkt. No. 07-21, at 39 (filed Jan. 25, 2007).

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C. AT&T's Attempt To Defend Its Special Access Price Levels Is Little More Than A Diversionary Tactic.

Finally, rather than attempt to defend the reasonableness of its profit margins in the provision of special access service, AT&T attempts to confuse the analysis by relying on irrelevant historic pricing trends and specious claims regarding the consequences of carrier-of-last-resort obligations. The Commission should reject these arguments.

First, AT&T tries to distract the Commission from the issue of profit margins by asserting that its allegedly declining special access rates demonstrate that it no longer has market power. *See AT&T Letter* at 3. But AT&T's and other RBOCs' claims of declining prices are based on faulty metrics²⁰ and any such declines are likely largely the result of mandated regulatory action. Even if AT&T's and other incumbent LECs' assertions regarding price declines are accurate, such declines are irrelevant. As Professor Besen explains in the attached declaration, a decline in a firm's prices, by itself, says absolutely nothing about whether that firm is exercising market power to set supra-competitive prices.²¹ AT&T no doubt knows this because legacy SBC argued (in response to legacy-AT&T's petition for special access rulemaking and allegations of rising special access rates) that special access price *increases* were not evidence of the exercise of market power.²² As Professor Besen explains, the

²⁰ AT&T's proffered evidence of "average revenue per unit" declines for DS1s and DS3s submitted in the 2005 and 2007 special access comment cycles has no bearing on whether its prices have actually declined or the extent to which any such declines are the result of FCC mandates. *See Reply Comments of The Ad Hoc Telecomm. Users Comm., WC Dkt. No. 05-25, at 6 (filed July 29, 2005)* ("[A]verage revenue is governed by a number of factors unrelated to price, such as the mix of service capacities carriers offer and customers order; changes in customer demand for different term plans; changes over time in the relative relationship of channel termination quantities, entrance facilities, and interoffice facilities comprising the average circuit configuration; changes in the average length of circuit where distance-sensitive channel mileage rate elements apply; and the functioning of the Commission's required reductions under the price caps plan.").

²¹ *See Besen Declaration* ¶ 4 ("[I]t would be incorrect to infer that a monopolist is in a competitive industry from the fact that its price has fallen just as it would be incorrect to infer that the competitive industry is not competitive because its price has increased. The monopolist is still a monopolist and the competitive industry is still competitive.").

²² *Opposition of SBC Communications Inc., RM No. 10593, at 23 (filed Dec. 2, 2002)* ("[A]n increase in prices, revenue and demand volumes is not necessarily evidence that a large firm possesses market power...[Legacy] AT&T has repeatedly raised its basic service schedule rates for long distance services, but SBC doubts that AT&T would concede that it has market power for these services.") (citing *Declaration of Alfred E. Kahn & William E. Taylor on behalf of BellSouth Corp., Qwest Corp., SBC Comm., Inc., and Verizon, at 14*). The Phoenix Center recently made the same point. *See George S. Ford and Lawrence J. Spiwak, The Need For Better Analysis Of High Capacity Services, PHOENIX CENTER POLICY PAPER NUMBER 35 at 34 (June 2009) (last visited July 1, 2009), at <http://www.phoenix-center.org/pcpp/PCPP35Final.pdf>* ("As important as the use of real, not nominal,

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monopoly price in any industry may rise and fall for reasons that have nothing to do with a firm's market power. See *Besen Declaration* ¶ 5. The key measure of a firm's market power is the firm's profit margin (the difference between prices and costs): "[T]he difference between a competitive and monopolistic industry is not the direction of, or rate at which, their respective prices *change* during a given period but the fact that a monopolist charges a higher price relative to its marginal cost than does a competitive firm." *Besen Declaration* ¶ 5.

Second, AT&T argues (as other incumbent LECs have also) that its prices are higher than non-incumbent LEC wholesalers' prices because incumbents, unlike CLECs, cannot "cherry pick" customers in low cost urban areas; they must instead serve all customers in their service areas. See e.g., *AT&T 2008 Letter* at 2, 5-6. AT&T thus implies that high costs in rural areas preclude incumbent LECs from charging rates equivalent to competitors in the lower cost urban areas. But this is incorrect. Incumbent LECs have many ways to disaggregate prices by geographic area, by customer, or both, permitting incumbent LECs to charge high prices in high cost areas and low prices in low cost areas such as the ones in which AT&T sells special access to TWTC.

For example, incumbent LECs can target increases in special access prices to higher cost areas by utilizing the disaggregated zone system which allows up to seven different special access price zones. *Pricing Flexibility Order* ¶ 62. Indeed, the FCC specifically designed the zone system so that higher costs in rural areas would have little impact on urban prices.²³ In addition, incumbent LECs may (and do) offer contract tariffs in the many areas in which they have received Phase I or Phase II pricing flexibility. See *Pricing Flexibility Order* ¶ 128. Contract tariffs permit incumbent LECs to target price reductions to particular customers (such as TWTC) in areas where the incumbent LEC has lower costs, faces competition, or both. Furthermore, once granted Phase II pricing flexibility, incumbent LECs can increase or reduce prices in their general tariffs subject to few meaningful constraints.

Given its substantial flexibility, there is every reason that AT&T could target price reductions in the relatively low-cost, denser urban areas in which TWTC purchases special access from AT&T. Yet, as TWTC's charts show, the prices that AT&T charges TWTC for special access are far higher than the prices charged by competitors. AT&T's refusal to lower its prices is therefore a result of its power to unilaterally sustain high prices, not the result of regulation. Indeed, AT&T has not provided

prices is the fact that simple price trends are generally not useful at all (adjusted for inflation or not), and for many reasons including changes in costs and quality over time.").

²³ *Pricing Flexibility Order* ¶ 59 ("We will permit price cap incumbent LECs to define both the scope and number of zones, provided that each zone, except the highest-cost zone, accounts for at least 15 percent of the incumbent's trunking basket revenues in the study area, and we no longer require LECs to demonstrate that the zones reflect cost characteristics. Granting incumbent LECs more flexibility to deaverage these rates enhances the efficiency of the market for those services by allowing prices to be tailored more easily and accurately to reflect costs and, therefore, promotes competition in both urban and rural areas.").

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a single example of a geographic area or a category of special access for which it has insufficient pricing flexibility to adjust prices to costs.

II. The Limited Reach Of Competitors' Networks Demonstrates That Incumbent LECs Continue To Control Bottleneck Facilities Needed To Provide Special Access Service.

AT&T asserts that the FCC should require competitors to provide extensive information regarding the location and potential reach of their networks and that such information will show that the special access market is competitive. *See AT&T Letter at 4.* This is a red herring since, as explained, the incumbents' profit margins are the most probative evidence of the extent to which they have market power. Incumbent LECs' margins reflect their ability to charge supra-competitive prices in light of the limited competition they face in the market. That limited competition is in turn largely a function of the limited coverage of competitors' networks. An analysis of the incumbents' profit margins therefore obviates the need to engage in an onerous and costly assessment of non-incumbent LECs' network coverage.

In any event, AT&T is incorrect that competitors' existing and potential network coverage in any way shows a diminution of AT&T's control over bottleneck facilities. On the contrary, every government assessment of this issue has yielded the conclusion that the incumbents own the only business broadband connection to the vast majority of commercial buildings in the U.S. Information submitted by competitors and the FCC's own analysis and experience confirm the soundness of this conclusion. The dispositive questions, therefore, are not about where the competitors' networks are, but where they are not. Literally hundreds of thousands of commercial buildings across the country today are untouched by competitors' networks even though some such buildings are relatively near competitors' transport networks. The reason is simple: while it may be profitable for competitors to deploy transport facilities into some downtown areas, it is unprofitable for competitors to deploy loop facilities to most commercial buildings, even to most commercial buildings in downtown areas. Since this stubborn reality is unlikely to change in the foreseeable future, the incumbents LECs' market power in the provision of special access service is unlikely to diminish in the foreseeable future.

A. AT&T's Criticisms of DOJ, GAO, and FCC Findings That Incumbent LECs Retain Control Over Bottleneck Facilities Are Unpersuasive.

AT&T bitterly disputes the relevance and reliability of government assessments of the extent to which competitors have deployed network facilities to commercial buildings in the U.S. Not only are AT&T's assertions unpersuasive, it is significant that AT&T cannot point to a single government assessment of competitors' network deployment that supports its view that the market is competitive.

First, AT&T argues that the Justice Department's assessment of the market for business loop connections undertaken in the RBOC/IXC mergers is irrelevant to an assessment of AT&T's market power in the provision of business broadband service. AT&T states in particular that "the DOJ made no findings regarding the overall state of competition for special access (and, indeed, did not have the data to make any such findings); rather, it alleged that the SBC-AT&T and Verizon-MCI mergers might reduce competition in a few hundred buildings." *AT&T Letter at 4.* The truth is that the Justice

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Department was obligated to assess the level of competition in the special access market to determine the extent of consumer harm caused by eliminating legacy AT&T as a competitor in SBC's territory and by eliminating MCI as a competitor in Verizon's territory. The Department therefore conducted an extensive and disciplined study of the coverage of competitors' networks. Based on that study, the DOJ concluded that, "[f]or the vast majority of commercial buildings in its territory, [SBC -- now AT&T -- and Verizon are] the only carrier[s] that own[] a last-mile connection to the building."²⁴ There is simply no basis for questioning the soundness of this conclusion.

Second, AT&T attacks the GAO special access study²⁵ by asserting that some of the competitor lit building data used by the GAO was "incomplete". See *AT&T Letter* at 5. But the GAO did not base its conclusions on competitors' data *per se*, but rather on competitive deployment data from GeoResults and Telecordia. Based on those data, the GAO found that competitive providers deployed facilities to only six percent of commercial buildings with demand of a DS1 or greater and 15 percent of commercial buildings with demand of a DS3 or greater in the 16 markets studied. See *GAO Report* at 12. Even if GeoResults' data undercount competitive lit buildings to the extent that AT&T and other incumbent LECs assert, the GAO determined that one of its key conclusions would remain unchanged: there are few, if any, competitive alternatives to incumbent LEC special access service.²⁶

Despite its criticisms of the GAO's reliance on GeoResults data, AT&T has itself relied on and defended GeoResults' data when it is to their advantage to do so.²⁷ For example, in the *TRRO* proceeding, the incumbent LECs argued that the availability of and widespread use by CLECs of

²⁴ Compl., *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05-CV-02102, ¶ 15 (D.D.C. Oct. 27, 2005) (finding that "[f]or the vast majority of commercial buildings in its territory, SBC [now AT&T] is the only carrier that owns a last-mile connection to the building"); Compl., *United States v. Verizon Communications Inc. and MCI, Inc.*, No. 1:05-CV-02103, ¶ 15 (D.D.C. Oct. 27, 2005) (finding that "[f]or the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to the building").

²⁵ See *GAO, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) ("*GAO Report*").

²⁶ See *id.* at 22 ("One price-cap incumbent has suggested that the database may be underreported by 30 percent, although representatives of GeoResults disagreed that the data are underreported to that extent. If the data were underreported by 30 percent, we would find a competitive presence in 8 percent of buildings with demand greater than DS-1; 20 percent of buildings with demand of DS-3, and about 32 percent of buildings with demand greater than 2 DS-3s. These estimates still suggest that competitive alternatives exist in a relatively small subset of buildings, with more moderate levels of competition in buildings where demand is higher.").

²⁷ See Letter of Genevieve Morelli & Brad E. Mutschelknaus, Counsel, Covad Comm. Group & XO Comm., LLC, to Marlene H. Dortch, WC Dkt. No. 06-172 (filed Nov. 13, 2007) (describing the ways in which both incumbent LECs and the FCC have relied on GeoResults data.).

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special access services demonstrated that access to UNEs was no longer necessary. To that end, legacy SBC and other RBOCs filed many maps of downtown areas based on GeoResults and GeoTel data showing the number of CLEC locations served via incumbent LEC special access facilities on or next to CLEC fiber transport.²⁸ SBC defended the accuracy of the GeoResults data, arguing that it was reliable enough to identify impaired and unimpaired locations under the *TRO*'s building-by-building impairment triggers.²⁹ According to AT&T, GeoResults data is credible when it supports the incumbent LECs' objectives and unreliable when it does not serve these interests.

AT&T alleges further that the GAO "severely overstated the total number of buildings where incumbents have fiber (it assumes falsely that any building with 18 or more telephone lines has incumbent special access fiber)" and that the GAO did not take into account the number of buildings where competitive fiber laterals could "readily be connected." *AT&T Letter* at 5. But these assertions are specious. Incumbent LECs provide DS1 and DS3 services to many buildings to which they have not deployed fiber. This is because incumbent LECs routinely provide DS1 and DS3 services to commercial buildings served by incumbent LEC copper loop facilities (facilities that have been in the ground for decades and are fully depreciated).³⁰ Moreover, as explained below, the number of buildings in each market that can "readily be connected" to non-incumbent LECs' fiber rings is extremely small.

Third, AT&T argues that TWTC's assertion that the incumbent LECs retain a 94.1 percent share of the special access market is wrong because it is based on Sprint's purportedly faulty use of interstate private line revenues reported on Form 499-A. *See AT&T Letter* at 4. It may be that, as AT&T contends, some carriers have underreported private line revenue on their Form 499-A. But Sprint's special access market share calculation was based upon the *relative* interstate revenues of

²⁸ Notably, legacy SBC argued that these maps show the "prevalence of CLEC use of ILEC special access, *even in urban areas where other CLECs have deployed their own fiber.*" Reply Comments of SBC Comm., Inc., WC Dkt. No. 04-313, CC Dkt. No. 01-338, at 38-39 (filed Oct 19, 2004) (emphasis added) ("*SBC Reply Comments*").

²⁹ *See* Joint Declaration of Scott J. Alexander & Rebecca L. Sparks on Behalf of SBC Comm., Inc., ¶ 63 (attached to *SBC Reply Comments*).

³⁰ AT&T admits that in "the vast majority of buildings with demand for a single DS1 (or a handful of DS1s) are served over copper facilities...." Supplemental Comments of AT&T, WC Dkt. No. 05-25, RM-10593, at 52-53 (filed Aug. 8, 2007). Many vendors sell equipment that enables carriers to provide DS3s over copper twisted pairs. *See e.g.*, Aktino, Aktino: Long Range Broadband Over Copper Solutions, (last visited July 1, 2009), at http://www.aktino.com/Products/AK3000_DS3_Platform.aspx ("The Aktino AK 3000 product family enables the point-to-point transport of DS3 and fractional DS3 (Channelized, ATM and Clear Channel) services over bonded copper pairs. The AK3000 products bond together 2 to 14 copper pairs creating a symmetrical high-bandwidth link capable of delivering carrier-grade services out to 12 Kft/3.7 Km.").

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incumbent LECs and competitors.³¹ There is no reason to believe that competitors underreported their interstate revenues more than incumbent LECs, and the FCC has never made such a finding. In any event, competitors would need to have understated their interstate revenues to an implausibly large degree for the incumbent LECs' market share to decline from 94.1 to anything close to a non-dominant share.

B. AT&T Ignores Prior FCC Findings And The Substantial Data Showing That Non-Incumbent LEC Facilities Deployment Is Extremely Limited

AT&T does not even attempt to dispute the soundness of the other evidence demonstrating incumbent LECs' enduring control of bottleneck facilities. For example, outside of the politically charged special access proceeding, the FCC has numerous times concluded that the incumbent LECs retain control over bottleneck loop inputs needed to provide business broadband service. In the *TRO*, the FCC found that competitive facilities were available in only about 5 percent of commercial buildings.³² The FCC reached a similar conclusion in the *TRRO* finding, based on incumbent LEC and CLEC data, that it was almost always uneconomical for competitive carriers to deploy DS1 and DS3 loop facilities. See *TRRO* ¶ 166. Based on that evidence, the FCC adopted unbundling rules under which competitors are deemed impaired without access to DS1 and DS3 loop facilities in the overwhelming majority of wire centers in the country. Similarly, in the *271 Classification Order*, the FCC assumed that, in the absence of evidence to the contrary (and there was none), the incumbent LECs continue to retain "bottleneck control" over local special access facilities.³³

In addition, numerous wireline competitors and wireless carriers have shown that they have no choice but to purchase the vast majority of their special access circuits from the incumbent LEC and that they are unable to construct DS1 or DS3 facilities in most cases. For example, TWTC, the most

³¹ See Ex Parte presentation at 2-3, attached to Letter of Anna Gomez, Vice President-Federal Regulatory, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-25 *et al.*, (filed Aug. 31, 2007).

³² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, n.856 (2003) ("*TRO*") ("Both competitive LECs and incumbent LECs report that approximately 30,000, *i.e.*, between 3% to 5%, of the nation's commercial office buildings are served by competitor-owned fiber loops.").

³³ *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 64 (2007) ("We find, however, that the BOCs have failed to present persuasive evidence that they no longer possess exclusionary market power within their regions as a result of their control over ubiquitous telephone exchange service and exchange access networks.").

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prolific builder of end-user connections to commercial buildings,³⁴ continues to rely on incumbent LECs for most of its end user connections. Of the [confidential begin] [confidential end] customer locations that TWTC served as of the end of 2008, only [confidential begin] [confidential end] were served on-net while [confidential begin] [confidential end] were served off net, and the vast majority of TWTC's off net locations were served *via* loops (mostly special access) leased from incumbent LECs. It is important to emphasize that, given the obvious disadvantages associated with purchasing special access at extremely high prices from its most formidable competitors, tw telecom has a powerful incentive to obtain end user connections from sources *other than* the incumbent LECs. The fact that tw telecom has continued, year after year, to purchase most of its loop inputs from incumbents illustrates the incumbents' continued stranglehold over this market.

Other carriers have emphasized their overwhelming reliance on incumbent LEC special access facilities. Covad explained that "less than [confidential begin] [confidential end] of Covad's loop access needs are met by using competitive alternatives or ILEC special access."³⁵ Similarly, NuVox explained that, "[c]urrently, less than 1% of NuVox's loop access needs are met through the use of circuits or facilities obtained from competitive providers."³⁶ T-Mobile obtains 92 percent of its special access loops from the incumbent LEC.³⁷ In 2006, Sprint purchased 98 percent of its DS1s in the top 50 MSAs³⁸ and 84 percent of its DS3s from incumbent LECs. *See Sprint Nextel 2007 Ex Parte* at 23. Similarly, Paetec stated that, despite "vigorous and concentrated" efforts to find alternative loop providers, it continues to buy 98 percent of its special access circuits from incumbent LECs in the allegedly more competitive markets in which incumbent LECs have received pricing flexibility.³⁹

C. The FCC Cannot Make A Predictive Judgment That Incumbent LECs Will Soon Lose Their Market Power Over Special Access Facilities

AT&T implies that, even if the incumbent LECs currently hold a dominant position of the special access market today, the FCC should not further regulate special access because intramodal

³⁴ *See* Time Warner Telecom Inc., 2007 Annual Report 5 (2008) ("Our fiber connects more commercial buildings to local metro networks than any other non-incumbent carrier in the U.S.").

³⁵ *See* Declaration of Michael Clancy on Behalf of Covad ¶ 7, attached to Joint Comments of Covad Comm. *et al.*, WC Dkt. No. 05-25, RM-10593 (filed Aug. 8, 2007) ("*Covad et al. Comments*").

³⁶ *See* Declaration of Keith Coker on Behalf of NuVox ¶ 5, attached to *Covad et al. Comments*.

³⁷ *See* Declaration of Dave Mayo ¶ 5, attached to Reply Comments of T-Mobile USA, WC Dkt. No. 05-25, RM-10593 (filed Aug. 15, 2007).

³⁸ *See Ex Parte* Presentation of Sprint Nextel, WC Dkt. No. 05-25, at 21 (Oct. 5, 2007) (attached to Letter of Gil M. Strobel, Counsel, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Oct 5, 2007)) ("*Sprint Nextel 2007 Ex Parte*").

³⁹ Comments of Paetec, WC Dkt. No. 05-25, RM-10593, at 5-7 (filed Aug. 8, 2007).

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and intermodal competitors will soon deploy business broadband network facilities on a massive scale. *AT&T Letter* at 3-4. There is no basis for such a prediction.

1. **AT&T Has Not Provided Evidence That Substantial Additional Competitive Entry Is Likely In The Near Future**

AT&T asserts that non-incumbent LECs can easily extend their fiber laterals to buildings near their transport rings in downtown areas. *See AT&T Letter* at 5. AT&T does not bother to provide any support for this proposition. For example, it does not provide any analysis of the costs it incurs to deploy loop facilities for its out-of-region operations as compared to the costs it incurs to serve a customer within its incumbent LEC region. This is not surprising, however, because any such analysis would yield the conclusion that competitors have no realistic opportunity to deploy loops in the future to any but a small subset of commercial buildings.

The small number of buildings suitable for future deployment of loop facilities by competitors is largely a function of the substantial expense of constructing fiber laterals and the substantial revenue that must be captured in order to justify that construction. Carriers, including TWTC, often perform an internal analysis of where and in what cases it is economically feasible to build end user connections based on expected costs and revenues (*i.e.*, build-buy studies). In unbundling rulemakings, the FCC has analyzed potential competition for DS1s and DS3s by examining these studies. Indeed, the FCC relied heavily on such studies when it determined in the *TRRO* that it was almost always uneconomic for competitors to deploy DS1 and DS3 facilities.⁴⁰ Given the barriers to construction, it is unlikely that non-incumbent LECs' future networks will be much more extensive than they are today.

This conclusion is confirmed by TWTC's own build-buy studies performed in markets in which incumbent LECs have sought forbearance from unbundling requirements. In 2007, Stephanie Pendolino, who was then Director of Business Intelligence Reporting and Analytics for TWTC, conducted a build-buy analysis for TWTC in the Minneapolis, Phoenix, Denver and Seattle MSAs. Based on her analysis, Ms. Pendolino concluded that TWTC must earn **[confidential begin]** **[confidential end]** in monthly recurring revenue at a building in order to justify construction of loop facilities to that building.⁴¹ As a result, TWTC could usually only deploy fiber lateral facilities to a customer location demanding **[confidential begin]** **[confidential end]** of service. *See Pendolino Decl.* ¶ 6. Because of the high costs of loop deployment, as of mid-2007, TWTC was able to deploy last-mile facilities to **[confidential begin]** **[confidential end]** percent (depending on the geographic

⁴⁰ *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 148-154 (2004) ("*TRRO*"); *see also id.* n.431 (describing substantial evidence placed on the record regarding CLECs' build/buy analyses).

⁴¹ *See Declaration of Stephanie Pendolino on Behalf of TWTC* ¶ 8 ("*Pendolino Decl.*"), attached to Opposition of Time Warner Telecom Inc., Cbeyond, Inc. and Eschelon Telecom, Inc. (Erratum), WC Dkt. No. 07-97 (filed Sept. 13, 2007) ("*TWTC Opposition*").

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market) of commercial buildings with at least two DS1s⁴² of demand in the four markets examined. *TWTC Opposition* at 4; *Pendolino Decl.*, Table 3. Given the substantial construction costs and the often limited revenue available in commercial buildings, Ms. Pendolino determined that TWTC could only deploy loops in the future to an additional [confidential begin] [confidential end] percent of buildings with demand for two DS1s or more in the four MSAs studied. *See Pendolino Decl.*, Table 3. That left a total of [confidential begin] [confidential end] such buildings in the four markets to which it is unlikely ever to be economic for TWTC to build loop facilities. It is thus unsurprising that TWTC can only connect approximately 1,000 buildings to its network each year out of the what are likely the hundreds of thousands of commercial buildings in its 75 markets across the country.⁴³

XO recently submitted a description of its build-buy analysis in the special access proceeding that resembles TWTC's. XO explained that its fiber transport rings pass through only [confidential begin] [confidential end] or [confidential begin] [confidential end] of the commercial buildings in the markets that it serves.⁴⁴ XO explained that it would cost [confidential begin] [confidential end] to construct a 500 foot lateral to a building off of its metropolitan transport ring. *See Govil Decl.* ¶ 16. Assuming a [confidential begin] [confidential end] month return on capital, XO stated that it does "not [] consider the addition of a building to its network unless customer demand at that location exceeds at least 3 DS3s of capacity." *Id.* ¶ 19.

Moreover, there are numerous factors that prevent competitors from deploying loops even where a build-buy analysis indicates that deployment is feasible. Such factors include building access problems (i.e., either the inability to obtain access to a building or a particular floor within a building), the inability to obtain access to rights of way, poles and conduits in a timely fashion and customer demands for quick installation that cannot be met through facilities construction. These cost and other factors will apply equally to the cable companies as they seek to extend fiber networks into commercial buildings. These realities render meaningless the incumbents' claim that the Commission should look to predictive intermodal competition in the special access markets.

In contrast to competitors, incumbent LECs generally do not need to conduct a build/buy analysis or account for the factors that further reduce the addressable market just described because incumbent LECs have already deployed copper or fiber loop facilities to the vast majority of office buildings in the country. An incumbent LEC's incremental costs of service delivery are therefore

⁴² The universe of commercial buildings is defined by GeoResults demand data, indicating buildings where there is greater than 2 DS1s of demand. To our knowledge, the incumbent LECs have never challenged the accuracy of GeoResults demand data.

⁴³ *See tw telecom inc.*, 2008 Annual Report, at 4 (Form 10-K), (filed Feb. 24, 2009) ("In 2008, we extended our fiber network by approximately 1,000 route miles and into approximately 1,100 additional buildings in our markets.").

⁴⁴ *See Declaration of Ajay Govil on Behalf of XO Comm.* ¶ 15, attached to Covad *et al.* Comments ("Govil Decl.").

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usually limited to the cost of new electronics needed to deliver the service demanded by the customer. The cost of such electronics is relatively small in comparison with the cost of deploying fiber to the customer.⁴⁵

2. The Available Evidence Shows That Fixed Wireless And Cable Providers Do Not, And Likely Will Not, Impose Significant Competitive Pressure On Incumbent LEC Special Access Offerings.

Given that intramodal competitors serve a miniscule number of commercial locations and such competitors' potential for last-mile facilities expansion is severely limited, AT&T is reduced to arguing that intense intermodal competition from cable and wireless is about to burst onto the scene. *See AT&T Letter* at 2-3. But business broadband services are not widely available today from intermodal competitors and, even where available, such offerings are often unsuitable for most businesses. Nor is there any reason to believe that this situation will change dramatically in the near future.

As XO, itself a provider of fixed wireless service, has explained, fixed wireless is not robust enough to replace wireline transmission services demanded by most businesses.⁴⁶ Potential buyers of fixed wireless service have made similar observations.⁴⁷ Nor is fixed wireless suitable for backhauling mobile voice traffic from cell sites to the mobile wireless carriers' network aggregation points. As explained, Sprint and T-Mobile continue to rely almost exclusively on incumbent LEC special access facilities rather than fixed wireless for backhaul. If fixed wireless were a viable substitute for special access services, CMRS providers would not continue to rely on the incumbent LECs for backhaul to

⁴⁵ *See TRRO* n.493 ("As we found in the *Triennial Review Order*, dark fiber loop construction involves substantial fixed and sunk costs. The primary costs associated with fiber deployment lie in the substantial sunk costs associated with physically laying the fiber cable, rather than with the electronics that must be added to serve customers.").

⁴⁶ *See Ex Parte* Letter of Genevieve Morelli, Counsel, XO Comm., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 08-24 & 08-49, at 2-4 (filed May 7, 2009).

⁴⁷ *See WiMAX said to Offer Less Bang Than Fiber, Panelists Say*, Wash. Internet Daily, Mar. 31, 2009 ("While wireless broadband holds significant promise, it's not a true substitute for fiber connections... We've looked very hard at wireless,' [ValleyFiber president Timothy] Nulty said. 'The capability is 1 percent of the fiber we can get in today, never mind what we can easily retrofit five years from now.' While a WiMAX service would have 6 to 8 Mbps of throughput, service would degrade quickly, he said. 'You all know about DSL and cable modem -- it works great at 3 in the morning, but at 8 it's lousy,' he said. 'It's the same thing with WiMAX, same problem... Dirk van der Woude, program manager of municipal broadband policy in Amsterdam, said the city drew the same conclusions. 'Do we want more wireless in Amsterdam? Yes,' said van der Woude. 'What do you need for wireless? You need a lot of access points. What do these access points need? They need backhaul. How are you going to get backhaul? ... We need fiber.'")

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the extent that they do today. In any event, fixed wireless providers themselves still must utilize wireline backhaul in their networks. *See id.*

AT&T also fails to offer evidence that cable companies' networks are capable of providing alternatives to incumbent LEC wireline special access services on a widespread basis. TWTC and others have explained that hybrid-fiber-coaxial ("HFC") based cable modem services appear not to constitute true substitutes for DS1 and DS3 services.⁴⁸ To the extent that cable companies are offering a substitute for DS1 and DS3 services, the FCC has found that they are doing so with their fiber-based, not HFC, networks.⁴⁹ It is possible that the very smallest businesses find that some form of cable modem service is a suitable broadband service, but such businesses generally do not purchase special access facilities today. Given the barriers to last-mile construction, there is no reason to believe that cable companies' fiber-based last-mile networks are now or will in the future be more ubiquitous than CLECs' networks.

Moreover, recent experience demonstrates that it would be extremely unwise for the FCC to base its policy decisions on a prediction of future competition from intermodal competitors. For example, in the Omaha UNE forbearance proceeding, the FCC relied on a prediction that Cox would expand its presence in the business market and would discipline Qwest's wholesale DS1 and DS3 loop and transport prices.⁵⁰ But this prediction proved to be incorrect, thus causing McLeodUSA to discontinue its operations in Omaha if the Commission does not modify the *Omaha Order*.⁵¹

⁴⁸ *See* Opposition of Time Warner Telecom Inc., Cbeyond Inc., and One Comm. Corp., WC Dkt. No. 06-172 (Mar. 5, 2007); *Govil Decl.* ¶ 22 ("To my knowledge, no cable television company has ever offered to provide DS-1 and DS-3 level loops to XO over its cable television plant. That should not be surprising, since cable television systems simply were not designed to provide this type of service.").

⁴⁹ *See TRRO* ¶ 193 ("It is therefore reasonable to infer that most of the businesses that cable companies serve, or are likely to serve, are home offices or very small stand-alone businesses, neither of which typically requires high-capacity loop facilities. In addition, the record suggests that where cable companies do provide service to business customers, they provide cable modem service, rather than service that is comparable to service provided over high-capacity loops.").

⁵⁰ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 83 (2005) ("Here, too, we predict that Qwest's market incentives will prompt it to make its network available – at competitive rates and terms – for use in conjunction with competitors' own services and facilities. We will monitor the accuracy of this prediction in the wake of our decision....").

⁵¹ *See* Petition for Modification of McLeodUSA Telecomms. Servs., WC Dkt. No. 04-223, at 14 (July 23, 2007) ("The nine affected wire centers represent the vast majority of revenue opportunity of McLeodUSA's current and prospective customer base. Accordingly, McLeodUSA is being forced to exit all Omaha wire centers because there is simply not enough revenue potential in the unaffected Omaha wire centers to justify the ongoing operating costs of the local switching center and related expenses."). McLeodUSA recently sought FCC approval to withdraw from certain parts of the Omaha

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Moreover, as a direct consequence of McLeodUSA's difficulty in negotiating reasonable pricing from Qwest, Integra abandoned its plans to enter Omaha.⁵²

Similarly, in the 2005 *Wireline Broadband Order*, the FCC relied on nascent growth of "new and innovative" broadband technologies such as Broadband Over Power Lines ("BPL"), satellite, fixed wireless broadband and mobile wireless broadband to justify deregulation of incumbent LEC transmission facilities.⁵³ But four years later none of these intermodal competitors has developed into a robust alternative to wireline broadband. There are fewer than 5,000 BPL subscribers.⁵⁴ Satellite broadband⁵⁵ and mobile wireless broadband service⁵⁶ (e.g., EV-DO) are both more expensive and less

market, thereby confirming that it will largely abandon that geographic area. *See* Comments Invited on Application of McLeodUSA Telecommunications Services, Inc. D/B/A Paetec Business Services to Discontinue Domestic Telecommunications Services, WC Docket No. 09-107 (rel. June 22, 2009).

⁵² *See* Comments of Integra Telecom, Inc., WC Dkt. No. 06-172, at 4-5 (filed Mar. 5, 2007).

⁵³ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report & Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 57 (2005) ("In addition, the threat of competition from other forms of broadband Internet access, whether satellite, fixed or mobile wireless, or a yet-to-be-realized alternative, will further stimulate deployment of broadband infrastructure, including more advanced infrastructure such as fiber to the home.").

⁵⁴ *See High-Speed Services for Internet Access: Status as of December 31, 2007*, Ind. Analysis and Tech. Div., Wireline Competition Bureau, FCC, at Table 2 (Jan. 2009) ("*2009 HSI Report*").

⁵⁵ *See Speed, Affordability Are Obstacles to Satellite Access to Broadband Funding*, Comm. Daily, Apr. 3, 2009, at 10-11 ("Satellite broadband companies advertise down stream speeds as high as 1.5 Mbps, but even some satellite industry officials acknowledge they're much slower, depending on the number of people on-line. 'I pay \$80 a month for WildBlue satellite,' said Joan Spencer, who lives in southern Oregon, in a comment to the NTIA. 'Its speed varies significantly, depending upon how many people are on-line. No phone or streaming video is possible.'"). WildBlue's highest level of service ("Pro Pak") costs \$79.95 per month (for 24 months) for a 1.5Mbps download/256kbps upload service. *See* WildBlue Comm., Inc., Packages & Pricing (last visited June 4, 2009), at <http://www.wildblue.com/getWildblue/availability.jsp>. HughesNet, another satellite broadband provider, offers its premium Internet service up to 5.0Mbps upload/128 kbps download (Premium Elite) for \$349.99/month. *See* Hughes Network Sys. LLC, High-Speed Internet Service Plans & Pricing (last visited June 4, 2009), at <http://go.gethughesnet.com/plans.cfm>.

⁵⁶ For example, Verizon's premium mobile broadband data plan costs \$59.99 per month but caps monthly downloads at 5 GB. *See* Verizon Wireless, High-Speed Access - Mobile Broadband (last visited June 4, 2009), at http://www.verizonwireless.com/b2c/store/controller?item_planFirst&action_viewPlanDetail&sortOption=priceSort&catId_409&typeId_5&subTypeId_13&lid_//global_plans_mobile+ broadband+ plan. Moreover, Verizon offers maximum speeds comparable to low-end DSL service. *See id.* DSx-based services offered to businesses do not have a similar download cap.

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robust than wireline broadband services, restricting these products to niche markets. As discussed above, fixed wireless has not developed into a viable technology for most purposes.⁵⁷ It is quite clear, therefore, that the FCC's past reliance on the imminent development of broadband competition has proved to be unreliable. There is no reason to think that a similar prediction would be any more reliable in this proceeding.

III. The Incumbent LECs' Volume And Term Contracts Harm Consumer Welfare

AT&T asserts further that the FCC should not concern itself with the effect of incumbent LEC volume and term special access agreements on competition since there is nothing inherently wrong with volume and term agreements. *See AT&T Letter* at 7. Like so much of AT&T's advocacy in this proceeding, this is simply a diversionary tactic. No one disputes that volume and term agreements can be unobjectionable, even worthwhile, where offered by firms subject to meaningful competition. But, as explained, AT&T and other incumbents possess substantial and persisting market power in the provision of special access. That persisting market power has permitted the incumbents to turn otherwise unobjectionable volume and term discounts into monopoly-sustaining tools. Under these circumstances, the incumbents' volume and term agreements result in real and substantial harms to consumer welfare.

A. The Incumbent LECs' Contracts Lock-Up Competitive Demand

The incumbents' volume and term contracts result in two harms. *First*, although the incumbents tout the "discounts" offered in those contracts, those arrangements are in fact a means of locking-in customers to paying the dominant firms' profit maximizing supra-competitive prices. As the attached charts show, the incumbents' rates for DS1s and DS3s at one-year, no volume commitment prices are extremely high. In fact, if TWTC were forced to pay these prices, it would likely purchase far less special access from incumbent LECs than it purchases today, and the incumbents would likely earn less money overall from the sale of special access. Not only would carrier customers like TWTC forego purchasing special access, but many of the small business customers served via incumbent LEC special access might well do the same. Thus, it appears that the incumbents' one-year, no volume rates are actually set *above* the profit-maximizing level for a dominant firm. This is not surprising. As former chief FCC Economist Dr. Joseph Farrell has explained, "when a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level.)."⁵⁸

⁵⁷ In fact, according to the most recent FCC data from mid-2007, fixed wireless and satellite together have captured only 1.24 percent of the total broadband market. *See 2009 HIS Report*, at Table 2.

⁵⁸ *See Reply Declaration of Joseph Farrell on Behalf of CompTel ¶ 4*, attached to Reply Comments of Global Crossing *et al.*, WC Dkt. No. 05-25, RM-10593 (filed July 29, 2005).

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TWTC and other purchasers have no choice but to sign up for volume/term plans so they can receive a “discount” from the incumbents’ “off the shelf” one-year, no volume prices. But, as Dr. Farrell explained, it is likely that the “discounted” price in most cases is set close to the dominant firm’s profit maximizing price, and it is not therefore a discount in any meaningful sense. For example, as discussed above, TWTC’s comparison of incumbent LEC DS1 and DS3 prices offered under volume and term contracts with competitive wholesalers’ prices for the same services offered under *one-year, no volume contracts* shows that even the prices that incumbents charge under their volume and term contracts are almost always significantly higher than competitive wholesalers’ “off the shelf” rates.

Second, the incumbent LECs’ volume and term agreements are exclusionary. TWTC and others have explained in detail how circuit and revenue commitments, substantial penalties for non-compliance, bans on the use of UNEs and other conditions harm competition.⁵⁹ The net effect of the incumbent LECs’ volume and term agreements is to force customers to purchase large volumes of special access from incumbents in areas in which competitive entry might be possible as a condition for obtaining the so-called “discount” off of the incumbents’ prices in the many areas where incumbents are the sole providers of special access. Moreover, because competitive wholesalers’ network footprints are far smaller than incumbents’ network footprints, any discount that a competitive wholesaler might offer on the limited number of commercial buildings connected to its network would be dwarfed by the penalty and forgone discounts that TWTC would face for failing to meet its minimum volume commitments with the incumbent. As economist Michael Pelcovitz has explained, “[t]he key to successful exclusionary pricing is to condition the pricing of the monopoly portion of the customer’s demand on the choices the customer makes for the competitively sensitive portion of demand. The customer then pays a higher price on the monopoly demand if he deals with a competitor on the competitively sensitive demand.”⁶⁰ Indeed the lock-in effect of that “higher price” is especially strong for competitors like TWTC that have made large volume commitments under volume/term agreements with incumbent LECs. That is because, as volume commitments increase, so do corresponding foregone discounts and penalties that the purchaser incurs if it fails to meet the required minimum volume.⁶¹

⁵⁹ See, e.g., Comments of Time Warner Telecom Inc. & One Comm. Corp., WC Dkt. No. 05-25, at 36-42 (filed Aug. 8, 2007); Comments of Global Crossing, WC Dkt. No. 05-25, at 8-10 (filed Aug. 8, 2007).

⁶⁰ Declaration of Michael D. Pelcovitz, at 7, attached to Reply Comments of WorldCom, RM-10593 (filed Jan. 23, 2003) (“*Pelcovitz Declaration*”).

⁶¹ It is also important to note that incumbent LEC volume-term agreements can have the effect of locking competitors and their customers into older, less efficient technology. This would likely be the case, for example, if a purchaser could only meet its volume commitment by purchasing TDM-based special access services. Such a requirement would likely cause the purchaser to forego upgrading customers to more efficient Ethernet technology so as to avoid the financial penalties and lost discounts that would be the consequences of failing to meet applicable minimum volume

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AT&T protests that the FCC should not be concerned about volume and term contracts because firms in many industries offer services subject to similar arrangements. It is of course true that volume and term discounts can be efficient when offered by firms subject to *competition* and where the associated pricing reflects the presence of such competition. But as the evidence described herein makes clear, incumbent LECs are the only providers of special access in many locations and in general are the only providers that can supply a customer's entire demand for loop and transport facilities. Where this is the case, volume and term contracts are harmful to competition because they lock-up demand and prevent wholesale competition from developing.⁶²

B. Courts Have Found That, When Such Contracts Are Offered By Dominant Firms, They Violate The Antitrust Laws

Courts have found that exclusionary discount contracts offered by dominant firms violate the antitrust laws. The courts have held that such contracts are best analyzed as illegal tying arrangements in which the monopolist ties the portion of the demand that only it can fulfill to the portion of the demand that is subject to competitive supply.⁶³ For example, in *Lepage's*, 3M was found to have a dominant position in the market for branded transparent tape due to the brand advantage afforded by its Scotch tape brand. *See Lepage's*, 324 F.3d at 144. The court held that 3M illegally leveraged that dominance to induce stores to purchase other 3M product lines which were subject to competitive supply from Lepage's and others. 3M accomplished this leveraging by providing a discount on Scotch tape only if the store bought certain volumes of its other product lines, including store-branded tape, that were subject to competition. *See id.* The court found that the stores could not forego offering Scotch tape, and 3M's competitors could not match 3M's discount because of their small size and limited product portfolios.⁶⁴

commitments. Therefore, the FCC must ensure that incumbent LECs are not allowed to structure their volume-term agreements in such a way that penalizes carriers for migrating to new technologies.

⁶² *Pelcovitz Declaration* n.6 (“[Volume and term contracts] do not have exclusionary effects in a competitive environment, because each seller is able to supply a customer's entire needs. Exclusionary or anticompetitive possibilities only arise when one firm, the incumbent monopolist, can supply each customer's entire demand.”); *see id.* at 7 (arguing that a discount contract will be exclusionary if the customer is “faced with the risk of a substantial (usually lump sum) penalty when dealing with a competitor to a dominant firm. The competitor then has to compensate the customer for this penalty....The exclusion works, and is very effective, because the required compensation is a real cost to the entrant of making a sale. For the dominant firm, the cost of the rebate or discount plan can be essentially zero.”).

⁶³ *See Lepage's, Inc., v. 3M*, 324 F.3d 141, 155 (3rd Cir. 2003) (“[Bundled discount offers] are best compared with tying, whose foreclosure effects are similar”) (citing Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* P 794, at 83 (Supp. 2002)).

⁶⁴ *See id.* at 155 (“The principal anticompetitive effect of bundled rebates as offered by 3M is that *when offered by a monopolist* they may foreclose portions of the market to a potential competitor who

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Similarly, in *SmithKline*, the court found that Lilly violated Section 2 of the Sherman Act by conditioning a three-percent discount for two cephalosporin antibiotics over which it had a monopoly due to patent (Keflin and Keflex) on the hospital purchasing quantities of the cephalosporin Kefzol which was subject to competition from SmithKline's Ancef product.⁶⁵ The effect of the discount was to drive SmithKline out of the cephalosporin market.⁶⁶ If a hospital bought too much of SmithKline's Ancef, the hospital would lose its three-percent discount across all of Lilly's cephalosporins. See *SmithKline*, 575 F.2d at 1061-62. In order to match the dollar discount provided by Lilly's three percent across-the-board price reduction, Smithkline would have to sell Ancef at a 16-35 percent discount, an implausibly large amount. The court concluded that Lilly's conduct violated the Sherman Act because, through the bundled discount, Lilly linked "products on which Lilly faced no competition -- Keflin and Keflex -- with a competitive product, Kefzol. The result was to sell all three [of Lilly's] products on a non-competitive basis in what would have otherwise been a competitive market for Ancef and Kefzol." *Id.* at 1065.

The incumbents' volume and term agreements are harmful to consumer welfare for the same reasons that the courts found the arrangements at issue in *Lepage's* and *SmithKline* to be unlawful. In all of these cases, the dominant firm ties the availability of the monopoly service to the purchase of a competitive service. The result is that the dominant firm continues to earn extraordinarily high returns even in markets where competition might be possible and prospective competitive wholesalers have little chance of gaining market share.

IV. The FCC Need Not Find That Every Incumbent LEC Special Access Tariff Rate Is Unjust Or Unreasonable Before Acting To Reduce Special Access Rates Industry-Wide

Finally, AT&T argues that, pursuant to Section 205 of the Act, the FCC may not recalibrate special access rates unless it finds that every special access rate is unjust and unreasonable through hundreds of ratemaking proceedings. See *AT&T Letter* at 8. But this is nonsense. *First*, as the FCC has held, the requirements of Section 205 may be met through a rulemaking (or less formal proceeding), not a formal ratemaking proceeding.⁶⁷ Indeed, the FCC has recalibrated industry-wide

does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer.") (emphasis added).

⁶⁵ See *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1060-61 & n.3 (3rd Cir. 1978).

⁶⁶ See *id.* at 1065 ("The effect of the [discount plan] was to force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products...[T]he court found SmithKline's prospects for continuing in the cephalosporin market under these conditions to be poor.").

⁶⁷ *AT&T v. Business Telecom*, Memorandum Opinion and Order, 16 FCC Rcd 12312, ¶ 16 (2001) ("[E]ven if some type of notice and comment rulemaking procedures were required by section 205, we find that the procedures employed here more than adequately met those requirements...Here BTI...had actual notice of this proceeding and full opportunity to submit data, views and arguments.

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price cap x-factors through industry-wide notice and comment proceedings.⁶⁸ *Second*, rates may be recalibrated pursuant to Section 205 as long as the prescribed rates are within a “zone of reasonableness.”⁶⁹ In none of the proceedings in which the FCC reset its x-factor did the FCC examine every incumbent LEC rate to determine whether each rate was unjust and unreasonable. The FCC no doubt declined to examine every rate because, as AT&T notes, such an undertaking would be “enormously complex” (*AT&T Letter* at 8) and would effectively preclude the FCC from ever resetting rate levels.⁷⁰ It is clear, therefore, that a finding that an incumbent LEC earns unreasonable profit margins in the provision of special access as a whole (or of a subset of special access services) is a sufficient basis for the Commission to reset the overall revenue cap to which incumbent LEC special access services (or the identified subset) are subject.

V. Conclusion

The incumbent LECs’ pricing and conduct in the broadband business market harms the U.S. economy. Internet service providers, mobile wireless service providers, health care companies, financial services companies and many, many other critical sectors of the economy rely on business broadband services, and every one of them experiences higher costs as a result of the incumbents’ high prices. This leaves fewer resources for those companies to invest in new jobs and innovation. Moreover, by artificially constraining the size of the competitive wholesale market, the incumbents are ensuring that U.S. businesses will not benefit from competition to the extent they should in the broadband business market in the future. Like all dominant firms, the incumbents would rather prevent competitors from investing in new facilities and in innovation. Thus, AT&T’s view of the

We thus have ample authority under sections 205 and 208 of the Act to prescribe a tariffed access rate that BTI must charge in the future.”).

⁶⁸ See *1997 Annual Access Tariff Filings*, Memorandum Opinion and Order, 13 FCC Rcd 3815, ¶¶ 146, 148 (1997) (“We find that prescribing expense assignments on the basis of an RBOC average, as we do in this order, is consistent under Section 205 (a) of the [Act]...Our decision in this investigation to make rate prescriptions on the basis of average expense assignments is consistent...with the methodologies we use to (1) establish a unitary rate of return for ILECs’ interstate access services, (2) create a productivity factor for price cap ILECs, (3) determine the reasonableness of depreciation rates for price cap ILECs; and (4) prescribe direct costs for physical collocation service.”).

⁶⁹ *Id.* ¶ 146 (finding that, in setting rates, the FCC may “make any reasonable selection from the available alternatives” and the FCC evaluates “whether an established regulatory scheme produces rates that fall within a zone of reasonableness.”) (internal cites omitted).

⁷⁰ While courts have rejected x-factors in the past, they did not do so because the FCC’s failed to comply with an alleged Section 205 requirement to examine every incumbent LEC rate. Rather, the courts analyzed whether the decision to adopt a particular x-factor was arbitrary and capricious. See *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 329 (5th Cir. 2001); *USTA v. FCC*, 188 F.3d 521, 525 (D.C. Cir. 1999) (“The LECs argue that the FCC did not give a rational explanation of that choice [of a 6 percent x-factor], and we agree. None of the reasons for choosing 6.0 percent holds water.”).

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world leaves U.S. businesses with higher costs and slower innovation for a critical part of our nation's infrastructure both *today and in the future*. This cannot be what President Obama, members of Congress and Chairman Genachowski have in mind when they express the desire to establish an efficient broadband plan for the United States. Rather, this country needs and deserves appropriate regulation of incumbent LEC special access prices and contract terms, regulations that will reduce U.S. businesses' costs and unlock competition in the business broadband market.

Respectfully submitted,

/s/ Thomas Jones

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ATTACHMENT A

**PRICING CHARTS AND METHODOLOGY
FOR PRICING CHARTS**

(CHARTS REDACTED IN PUBLIC VERSION)

Tariffs and Methodology Used For Pricing Charts

The enclosed charts compare (1) an average of competitors' one year, no volume commitment prices; (2) RBOCs' one year (if available)¹, no volume commitment prices in the zone/band in both price cap and price flex areas in which special access prices are lowest; and (3) UNE rates in zones within the relevant states in which the UNE rates are lowest. The prices for six different circuit types are compared for the following services: (1) zero-mile (i.e., channel terminations) DS1s; (2) 5-mile (i.e., channel terminations plus five interoffice miles) DS1s; (3) 10-mile DS1s; (4) zero-mile DS3s; (5) 5-mile DS3s; and (6) 10-mile DS3s.

The average competitor price was calculated using a straight average of four competitors' prices and TWTC's prices. As was the case in its previously filed charts, TWTC's prices used in the competitive average are themselves an average of TWTC's "book" prices (i.e., list prices) and "flex" prices (i.e., prices that incorporate the largest discount a salesperson may offer without receiving prior approval from a supervisor) in its lowest price "Tier 1" markets.² As TWTC explained in the ex parte filed herewith, the use of such an average is a reasonable reflection of the actual prices that TWTC charges given that it cannot calculate a reliable average price for each circuit type.

The non-TWTC competitors whose prices were used as inputs to the competitor average are the same four competitors whose prices comprised the "competitor" average in TWTC's previously filed pricing charts. The non-TWTC competitors' prices used in the enclosed charts were obtained from these carriers' "Master Service Agreements" ("MSA") with TWTC (as was the case with TWTC's previously filed charts). These agreements contain "firm offers" for on-net facilities (not resold ILEC facilities) that TWTC can opt into at any time. The prices by element are the same or nearly the same at all of the locations served by each carrier. The charts use the price that is available at the vast majority of a carrier's locations. TWTC in many cases is able to obtain even lower prices than those listed in the MSA by committing to buy several circuits at a time, or more circuits in the future. TWTC did not use these lower prices in the chart.

To the extent that competitors assess separate charges for mileage, those charges are incorporated into the amounts set forth in the charts. Of the five carriers that comprise the competitor average, **[confidential begin] [confidential end]**

The RBOC prices are sorted by operating company. All RBOC mileage charges contain a fixed and variable mileage component. In some instances (e.g., Qwest), the RBOC offers the

¹ Where a particular RBOC does not offer one year prices with no volume commitments, the shortest term available greater than month-to-month was used for the charts. We describe the particular tariffs selected below. We have also not included AT&T's tariffs for its SNET and Nevada Bell regions or Verizon's tariffs 14 and 16 because of their relatively small scope. Verizon might serve a particular portion of a state under tariffs 14 and 16, but, in many instances, few wire centers in that state receive service under these tariffs.

² **[confidential begin] [confidential end]**

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same price on a one year, no volume basis in all of the states in its service territory. In other cases, the RBOC offers different prices in each state. The tariff definitions below explain how variable state-by-state prices were combined into an operating company-wide average for the purposes of the charts. Verizon offers percentage discounts off of its month-to-month rates while not providing the actual discount price in its tariffs. Rather, purchasers must calculate the price given the percentage discount offered. These discount prices are listed below and are incorporated into the pricing charts. Finally, as explained in detail below, BellSouth charges for DS3 channel termination mileage. Those prices were not included in the chart.

The UNE rates are the same as those included in TWTC's previously-filed charts in 2007. TWTC is not aware of any reason why the UNE rates would have materially changed since 2007. The UNE rate in each chart is a straight average of the UNE rates in the lowest-priced zones in states in each operating company's territory. For example, the DS1 zero-mile UNE rate for Verizon North consists of an average of the DS1 zero-mile UNE rates in the lowest-priced zones in Massachusetts, New York, Connecticut and Rhode Island.

AT&T

Southwestern Bell Telephone ("SWBT") (Access Tariff is FCC No. 73)

SWBT offers service under FCC No. 73 in Arkansas, Kansas, Missouri, Oklahoma and Texas. Rates do not differ by state.

DS1

Price Caps A zero mile DS1 under a one year Term Payment Plan ("TPP") (7.2.22) in the least expensive zone one costs \$160. 7.3.10 (F). Adding a single interoffice mile costs an additional \$64.50 (\$50 fixed, \$14.50 per mile) 7.5.9(B).

Price Flex Following the expiration of the BellSouth/AT&T merger conditions, a zero mile DS1 under a one year TPP in zone 1 will cost \$200. 39.5.2.7.1(E)(1). Adding a single interoffice mile will add an additional \$80 (\$65 fixed, \$15 per mile). 39.5.2.7.1(E)(2).

DS3

Price Caps A zero mile DS3 under a one year TPP in the least expensive zone one costs \$1900. 20.5.2. Adding a single interoffice mile costs \$740 (\$650 fixed, \$90 per mile). 20.5.3-20.5.4.

Price Flex Following the expiration of the BellSouth/AT&T merger conditions, DS3 rates under a one year TPP will remain at levels currently charged in price cap areas (see DS3 price cap price above). 39.5.2.12.1 (c)-(d).

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Ameritech (Access Tariff is FCC No. 2)

Ameritech offers service under FCC No. 2 in Illinois, Indiana, Michigan, Ohio and Wisconsin. Ameritech's prices in the enclosed charts were obtained by calculating a straight average of Ameritech's state-by-state prices.

DS1

Price Caps Under a one year Optional Payment Plan ("OPP") (7.4.10), a zero mile DS1 in the least expensive zone one costs between \$190 and \$212 depending on the state. 7.5.9(B)(1). Adding an additional mile costs between \$92 and \$94.50 (\$68 to \$70 fixed and \$24 to \$24.15 per mile depending on the state). 7.5.9.(B)(3)(4).

Price Flex Following the expiration of the BellSouth/AT&T merger conditions, a zero mile DS1 under a one year OPP in zone one will cost between \$196 and \$212, depending on the state. 21.5.2.7.1(A)(1)(a). Adding an additional mile will cost between \$102.15 and \$105.35, depending on the state (\$78 to \$81 fixed and \$24.35 to \$24.45 per mile depending on the state) 21.5.2.7.1(A)(3)-(4).

DS3

Price Caps. Under a one year OPP, a zero mile DS3 in zone one costs between \$2200 to \$2270, depending on the state. 7.5.9(c)(1)(A). Adding a single interoffice mile costs between \$404 and \$424 (\$300 to \$320 fixed, \$100 to \$104 per mile, depending on the state). 7.5.9(c)(2)-(3).

Price Flex Following the expiration of the merger conditions, a zero mile DS3 under a one year OPP in zone one will cost between \$2370 and \$2450 depending upon the state. 21.5.7.1(B)(1). Adding a single interoffice mile will cost between \$431 and \$448 (\$328 to \$341 fixed and \$103 to \$107 per mile depending upon the state). 21.5.2.7.1(B)(2)-(3).

Pacific Bell (Access Tariff is FCC No. 1)

Pacific Bell Offers service under FCC No. 2 in California.

DS1

Price Caps Under a one year Term Payment Plan ("TPP") (7.4.18) a zero mile DS1 in the least expensive zone one costs \$126. 7.5.9(I)(1). Adding an additional mile costs \$58 (\$48 fixed and \$10 per mile). 7.5.9(I)(2).

Price Flex Following the expiration of the merger conditions, a zero mile DS1 under a one year TPP in zone one will cost \$140. Adding an additional mile will cost \$67.25 (\$55 fixed, \$12.25 per mile). 31.5.2.7.1(C)(1).

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DS3

Price Caps Under a one year Rate Stability Payment Plan ("RSPP") a zero mile DS3 in zone one costs \$1600. 7.5.9(A)(3)(a). Adding a single mile costs \$429 (\$410 fixed, \$19 per mile). 7.5.9(B)(4).

Price Flex Following the expiration of the merger conditions, a zero mile DS3 on a one year RSPP in zone one will cost \$1950. 31.5.2.7.1(A)(3)(a). Adding an additional mile will cost \$530.96 (\$500 fixed, \$30.96 per mile). 31.5.2.7.1(B)(2).

BellSouth (Access Tariff is FCC No. 1)

BellSouth offers service under FCC No. 1 in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, Tennessee, North Carolina and South Carolina. Rates do not differ by state.

BellSouth, unlike any of the other RBOC operating companies, charges channel termination mileage for DS3 channel terminations in excess of .5 miles. 7.4.6. These charges are not included in the attached pricing charts. Such charges were also not included in the pricing charts filed previously by TWTC. However, such charges substantially increase BellSouth's effective rates. For example, in price cap areas, under a Transport Payment Plan ("TPP"), each half mile per DS3 channel termination mile in excess of the first half mile costs \$131.75. 7.5.9(A)(3)(ao).

DS1

Price Caps Under a two year (shortest period available greater than month-to-month) Channel Services Payment Plan ("CSPP") (2.4.8(A)), a zero mile DS1 in zone one costs \$124. 7.5.9(A)(1). Adding a single interoffice mile costs \$74.90 (\$70 fixed, \$4.90 per mile). 7.5.9(B)(2).

Price Flex Following the expiration of the merger conditions, under a two year CSPP, a zero mile DS1 in zone one will cost \$126. 23.5.2.9.1(A)(1). Adding a single interoffice mile will cost \$80 (\$70 fixed, \$10 per mile). 23.5.2.9.1(B)(2).

DS3

Price Caps Under a one year TPP, a zero mile DS3 in zone one costs \$1232.50. 7.5.9(A)(3)(v). Adding a single interoffice mile costs \$828.75 (\$782 fixed, \$46.75 per mile). 7.5.9(B)(5)(h).

Price Flex Under a one year TPP, a zero mile DS3 in the least expensive zone one costs \$1590. 23.5.2.9.1 (A)(2)(c). Adding a single interoffice mile costs \$1045 (\$975 fixed, \$70 per mile). 23.5.3.9.1(A)(2)(c).

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Qwest (Access Tariff is FCC No. 1)

Qwest provides services under FCC No. 1 in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. Rates do not differ by state.

DS1

Price Caps Under a one year term, a zero mile DS1 in zone one costs \$108.95. 7.11.4(a)(1). Adding a single interoffice mile costs \$76.65 (\$67.90 fixed, \$8.75 per mile). 7.11.4(A)(1).

Price Flex Under a one year term, a zero mile DS1 in zone one costs \$156. 17.2.11(A)(1). Adding a single interoffice mile adds \$104 (\$89 fixed, \$15 per mile). 17.2.11(C)(1)(a).

DS3

Price Caps Under a one year term, a zero mile DS3 in zone one costs \$1344. 7.12.4(A)(1)(a). Adding a single interoffice mile costs \$359 (\$320.10 fixed, \$39.77 per mile). 7.12.4(A)(3).

Price Flex Under a one year term, a zero mile DS3 in zone one costs \$2200. 17.2.12(A)(1)(a). Adding a single interoffice mile (on a one year term) costs \$682 (\$600 fixed, \$82 mile). 17.2.12 (A)(3).

Verizon

Verizon does not offer single year contract terms under its Verizon North and Verizon South tariffs, only month-to-month and two year and greater terms.

Verizon FCC Tariff No. 1 (Verizon South)

Verizon South provides service under FCC Tariff No. 1 in Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and New Jersey. Rates do not vary by state.

DS1 rates under a two year (the shortest period available greater than month-to-month) "Term Pricing Plan" ("TPP") (7.4.17(B)) are set out directly in the tariff. Agreeing to a three year (the shortest period available greater than a month) TPP provides for a 10% discount off of month-to-month rates for DS3 channel terminations and mileage. 7.4.13(B).

DS1

Price Caps A zero mile DS1 under a two year TPP in the least expensive zone 1 costs \$167.45. 7.5.16(A). Adding a single interoffice mile costs \$59.06 (\$42.77 fixed, \$23.26 per mile) 7.5.16(A).

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Price Flex. A zero mile DS1 under a two year TPP in pricing flexibility “band 4” (the least expensive) costs \$191.79. A single interoffice mile in band 4 costs \$70.01 (\$46.75 fixed, \$42.77 per mile). 7.5.16(A)

DS3

Price Caps Under a three year TPP, a zero mile DS3 in the least expensive zone 1 is \$2079 (\$2310 minus \$231.50). 7.5.9.A(1)(a). Adding a single interoffice mile on a three year term costs \$749.11 (\$631.12 fixed (\$701.25 minus \$70.13) and \$118.60 per mile (\$131.78 minus \$13.18)). 7.5.9(B)(1)(d).

Price Flex Under a three year TPP, a zero mile DS3 in band 4 costs \$2722.50 (\$3025 minus \$302.50), 7.5.9.A1(a). A single interoffice mile costs \$882.03 (\$742.5 fixed (\$825 minus \$82.50) plus \$139.53 per mile (\$155.03 minus \$15.50)) 7.5.9(B)(1)(d).

Verizon FCC Tariff No. 11. (Verizon North)

Verizon North provides service under FCC Tariff No. 11 in Massachusetts, New York, Rhode Island and Connecticut. The tariff provides separate rates for DS1 service to Massachusetts, Rhode Island, and New York/Connecticut. The rates for New York and Connecticut are the same and are listed in the tariff as a single New York/Connecticut rate. Therefore, to calculate a DS1 average for the enclosed charts, the New York/Connecticut rate was added twice along with the rate for Massachusetts and Rhode Island. That number was then divided by four to create an average across the operating company.

Agreeing to a two year month (the shortest period available) “Service Discount Plan” (“SDP”) (7.4.10) provides for a 15% discount off of month-to-month rates for DS1s (7.4.10(B)(1)(b), 7.4.10(B)(2)(b)) and a 5% discount off of month-to-month rates for DS3s (7.4.10(B)(1)(a), 7.4.10(B)(2)(a)).

DS1

Price Caps Under a two year SDP, a zero mile DS1 in zone 1 is \$196.77 in Rhode Island (\$231.49 minus \$34.72), \$167.45 in Massachusetts (\$197.00 minus \$29.55) and \$150.55 in New York/Connecticut (\$177.12 minus \$26.57). 31.7.9(A)(1)(a). A single interoffice mile costs \$56.26 (\$40.05 fixed (\$47.12 minus \$7.07) plus \$16.29 per mile (\$19.17 minus \$2.88)). 31.7.9(B)(2).

Price Flex Under a two year SDP, a zero mile DS1 in the least expensive “band 4” costs \$249.10 in Rhode Island, \$191.79 in Massachusetts and \$164.89 in New York/CT after applying a 15 percent discount to the applicable month-to-month rates. 30.7.9(A)(1)(a) Adding a single interoffice mile in all four states costs \$70.01 (\$46.75 fixed (\$55 minus \$8.25) plus \$23.26 per mile (\$27.37 minus \$4.11)). 30.7.9(B)(2).

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DS3

Price Caps Under a two year SDP in New York, Massachusetts and Connecticut, a zero mile DS3 costs \$2194.50 (\$2310 minus \$115.5) in zone 1. 31.7.9(A)(1)(c)(i). The same circuit in Rhode Island costs \$2413.95 (\$2541 minus \$127.05) 31.7.9(A)(1)(c)(iv). Adding a single interoffice mile in all four states costs \$791.38 (\$666.19 fixed (\$701.25 minus \$35.06) plus \$125.19 per mile (\$131.78 minus \$6.59)). 31.7.9(B)(4).

Price Flex Under a two year SDP, a zero mile DS3 in the least expensive band 4 in New York, Massachusetts and Connecticut costs \$2431.95 (\$2541 minus \$127.05). 30.7.9(A)(1)(a). In Rhode Island, the same circuit sells for \$2655.35 (\$2795.10 minus \$139.76). 30.7.9(A)(1)(c)(ii). Adding a single interoffice mile in all four states costs \$931.13 (\$783.75 fixed (\$825 minus \$41.25) plus \$147.38 per mile (\$155.03 minus \$7.75). 30.7.9(B)(4)(a).

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ATTACHMENT B

DECLARATION OF STANLEY A. BESEN

REDACTED FOR – PUBLIC INSPECTION

Declaration of Stanley M. Besen

1. I, Stanley M. Besen, am a Senior Consultant at CRA International, Washington, D.C. I previously served as a Brookings Economic Policy Fellow, Office of Telecommunications Policy, Executive Office of the President; Co-director, Network Inquiry Special Staff, Federal Communications Commission; Coeditor, RAND Journal of Economics; and a Senior Economist at the RAND Corporation. I currently serve as a member of the Editorial Board of Economics of Innovation and New Technology. I have taught at Rice University, where I was the Allyn M. and Gladys R. Cline Professor of Economics and Finance; at Columbia University, where I was the Visiting Henley Professor of Law and Business; and at the Georgetown University Law Center, where I was Visiting Professor of Law and Economics. I have published widely on telecommunications economics and policy, intellectual property, and the economics of standards, and have consulted to many companies in the telecommunications and information industries. I hold a Ph.D. in Economics from Yale University. A copy of my resume is attached.

2. tw telecom has asked me to respond to the claim by AT&T and others that declining prices for special access service is necessarily evidence that the market for this service is competitive, or becoming increasingly so.¹ For example, AT&T has claimed that

¹ I understand that there is an ongoing dispute about whether, and the extent to which, such prices have, in fact, declined. I take no position on that issue. Although this Declaration focuses on prices, its general points also pertain to change in product quality, since improvements or deterioration in the services offered can be thought of as affecting “quality-adjusted” prices.

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...the special access marketplace exhibits all of the hallmarks of an intensively competitive market: falling prices...²

...in response to this intense competition, the data confirm that incumbent LECs have lowered prices....³

The prices AT&T's customers pay for even the lowest capacity DS1 services, which proponents of increased regulation contend face the least competition, continue to fall.⁴

Or is it a market in which competition is substantial and rapidly growing, in which customers are receiving lower prices...each year...?⁵

Increased competition not only has reduced prices that customers pay....⁶

3. Is it the case that falling prices necessarily mean that a market is competitive? The short answer is "no." To see why this is so, consider two industries, one that is a monopoly and the other that is composed of a very large number of small firms, none of which is large enough to have an appreciable effect on the market price, *i.e.*, it satisfies the textbook conditions for perfect competition. Assume that the monopolist experiences a reduction in its marginal cost, say because the price of an important input has declined. Assume further that, at the same time, the perfectly competitive firms experience an increase in their marginal costs, say because the price of

² *Ex Parte* Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (Feb. 6, 2009).

³ *Id.*

⁴ *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Supplemental Comments of AT&T Inc., WC Dkt. No. 05-25, RM-10593, at 2 (Aug. 8, 2007).

⁵ *Id.* at 7.

⁶ *Id.* at 23.

an input that is important to them has increased. In this case, we would observe a decline in the price charged by the monopolist and an increase in the price charged by the competitive firms.⁷ However, it would be incorrect to infer that the monopolist is in a competitive industry from the fact that its price has fallen just as it would be incorrect to infer that the competitive industry is not competitive because its price has increased. The monopolist is still a monopolist and the competitive industry is still competitive.

4. Taylor and Zona, in the context of an analysis of competition in the long-distance telephone market, make the same point.⁸

Regulated competition in the interstate toll market has not yet led to the price reductions that would be expected from vigorous price competition. *While prices for some services have been reduced substantially*, the price reductions have been caused, in large measure, by changes in carrier access prices.⁹

...AT&T still retains some form of market power in the interstate long-distance market. *Although prices have fallen* ... some measures of AT&T's rate of gross profits have not fallen; rather, they have increased.¹⁰

5. The important point here is that the difference between a competitive and a monopolistic industry is not the direction of, or rate at which, their respective prices *change* during a given period but the fact that a monopolist charges a *higher* price

⁷ Oxford Economic Research Associates (OXERA) cite the “standard textbook monopoly model” for the proposition that “even monopolists will pass [a portion] of their cost savings on to consumers (not out of good will but in order to maximise profits).” OXERA, *Competing Ideas, Cost Pass-Through: What Constitutes a ‘Fair Share’?* at 1 (Jan. 2004), available at http://www.opta.nl/download/cost_pass_through_jan2004.pdf. The precise portion will depend on the specific factors in a particular market.

⁸ W.E. Taylor & J.D. Zona, *An Analysis of the State of Competition in Long-Distance Telephone Markets*, 11 *J. of Regulatory Econ.* 227-255 (1997).

⁹ *Id.* at 242 (emphasis added).

¹⁰ *Id.* at 249-250 (emphasis added).

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relative to its marginal cost than does a competitive firm. It does not necessarily increase its price *more rapidly*.

6. Bain, in a classic treatise, makes the point as follows:

...the monopolist will tend, costs and other things being equal, to produce less and *charge more* than an atomistically competitive industry would. Output will be smaller and selling prices *higher* relative to cost...¹¹

7. Of course, a decline in prices *could* reflect a decline in market or monopoly power. For example, a monopolist could be forced to lower its price if it were to find itself faced with competition from firms that supply products or services that its existing customers regard as good substitutes for its own products or services.¹² Just as changes in input costs can result in changes in price, so can changes in the competitive conditions faced by a firm. The important point, however, is that one cannot infer the source of a price change simply by observing that it has occurred.¹³

8. Prices can change for a large number of reasons, only one of which is a change in competitive conditions. For example, prices could change because new methods of production have been discovered, or increased cumulative production reduces costs through “learning,” or the demand for the product has increased or decreased as

¹¹ Joe S. Bain, *Industrial Organization*, at 30 (New York : Wiley, 1959) (emphasis added). Bain also identifies “the *height* of price relative to the average cost of production,” not the change of price, as one of the aspects or dimensions of market performance. *Id.* at 12 (emphasis added).

¹² Note that, as in the case of the *changes* in input prices, this, too, involves a *change* in the competitive conditions faced by the firm. In this case, prices could decline but the firm could still retain some market power if some of its customers do not regard the products or services of other firms as good substitutes. Indeed, as discussed below, prices to the customers that firm retains could even *increase*.

¹³ In somewhat more technical terms, a monopolist can be expected to charge the price at which its profits are maximized given underlying cost and demand conditions. It will change its price only if these conditions change and these changes may be unrelated to changes in the competition that it faces.

consumer tastes change,¹⁴ or product quality has improved or deteriorated, among other reasons.

9. Note, too, that, in some cases, a firm that loses customers because new substitutes become available may have even greater market power over its remaining customers than it did initially, although its profits would, nonetheless, decline. This can occur if the customers that the firm retains are less sensitive to price increases than those that had switched to the substitutes. In such cases, the *increase* in competition can actually lead to an *increase* in price.¹⁵

10. Finally, I note that the explanation that I have provided here is *symmetric*. Firms may raise price not because they do not face competition, or because the competition that they face has become less intense, but because of changed conditions in their markets. For example, a firm may raise prices because its costs have increased or consumer demand for its product has grown, but that would not necessarily indicate that the firm has monopoly power.

¹⁴ By an *increase in demand*, I mean that a larger quantity is demanded at every price, *i.e.*, the demand curve has “shifted” to the right. This is to be distinguished from an *increase in the quantity demanded*, which occurs when the price is reduced along a given demand curve. By a *decrease in demand*, I mean that a smaller quantity is demanded at every price. An increase in demand could result either in an increase in price, if marginal cost increases with output, or a decrease in price, if marginal cost declines as output increases.

¹⁵ A widely cited claim is that pharmaceutical companies may be able to raise prices to customers who insist on branded products after suppliers of generics have attracted many of their other customers. This can occur if customers who strongly prefer the branded product are also less sensitive to price increases than the customers who switched to generics. As a possible example of this phenomenon, D.R. Work & M.E. Domino, *The Cost of Prescription Drugs: Rising Concerns over Equity, Fairness and Access to Essential Care*, 64 N.C. Med. J. 270, 271 (Nov./Dec. 2003), claim: “Many years ago when the patent expired on Valium® the price of the brand name product increased rather than decreased....”

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11. Indeed, SBC has made the same point in the past. After contending that an increase in its special access prices could be explained by “the rapid increase in demand for data services,”¹⁶ it quotes a Declaration by its economic experts as follows: “...an increase in prices...does (sic) not necessarily evidence that a large firm possesses market power.”¹⁷ They go on to state that “AT&T has repeatedly raised its basic schedule rates for long distance services, but SBC doubts that AT&T would concede it has market power.”¹⁸

12. Just as rising prices are not necessarily evidence of the presence of market power, neither are falling prices necessarily evidence of its absence. As the old proverb states: “What is sauce for the goose is sauce for the gander.”

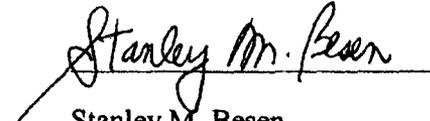
¹⁶ *In the Matter of AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Opposition of SBC Communications Inc., RM No. 10593, at 23 (Dec. 2, 2002).

¹⁷ *Id.* (citing attached Declaration of Alfred E. Kahn & William E. Taylor on behalf of BellSouth Corp., Qwest Corp., SBC Comm. Inc., and Verizon, at 14). The full quotation is “an increase in prices, revenue and demand volumes is not necessarily evidence that a large firm possesses market power.... Supply and demand are normally equilibrated in unregulated markets as demand expands by increases in prices and revenue until additional capacity can be brought on line, in reaction to the increased prices.”

¹⁸ *Id.*

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on April 22, 2009


Stanley M. Besen

STANLEY M. BESEN

EDUCATION

City College of New York
B.B.A., Economics (1958)
Yale University
M.A., Economics (1960)
Ph.D., Economics (1964)

PROFESSIONAL EXPERIENCE

2008- Senior Consultant, CRA International, Inc.

1992-2008 - Vice-President, CRA International, Inc.

1980-1992 - Senior Economist, The Rand Corporation, Washington, D.C.

1990-1991 - Visiting Professor of Law and Economics, Georgetown University Law Center

1988-1989 - Visiting Henley Professor of Law and Business, Columbia University

1985-1988 - Coeditor, Rand Journal of Economics

1978-1980 - Co-Director, Network Inquiry Special Staff, Federal Communications Commission

1971-1972 - Brookings Economic Policy Fellow, Office of Telecommunications Policy, Executive Office of the President

1965-1980 - Assistant Professor, Associate Professor, Professor of Economics, Allyn R. and Gladys M. Cline Professor of Economics and Finance, Rice University

1963-1965 - Economist, Institute for Defense Analyses

1962-1963 - Acting Assistant Professor of Economics, University of California, Santa Barbara

CONSULTANCIES

The Rand Corporation, 1972-1978

Office of Telecommunications Policy, Executive Office of the President, 1972-1977

Department of Defense, 1967

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PROFESSIONAL ACTIVITIES/HONORS

Member, National Research Council Board on Earth Sciences and Resources, Division on Earth and Life Studies, Committee on Licensing Geographic Data and Services, 2002-2004

Member, The National Academies Computer Science and Telecommunications Board Committee on Internet Searching and the Domain Name System, 2001-2004

Member, Editorial Board, Economics of Innovation and New Technology, 1989-present

Member, Editorial Board, Information Economics and Policy, 1992-2004

Member, U.S. National Committee on Data for Science and Technology (CODATA), National Academy of Sciences/National Research Council, 1993-1996

Member, Office of Technology Assessment Advisory Panel on Communications Systems for an Information Age, 1986-1988

Member, Regional Telecommunications Planning Advisory Committee, City of Cincinnati, 1985

Member, Office of Technology Assessment Advisory Panel on Intellectual Property Rights in an Age of Electronics and Information, 1984-1985

Expert, World Intellectual Property Organization/UNESCO Meeting on Unauthorized Private Copying of Recordings, Broadcasts and Printed Matter, 1984

Who's Who in America, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008

Member, Editorial Board, Southern Economic Journal, 1979-1981

Member, Task Force on National Telecommunications Policy Making, Aspen Institute Program on Communications and Society, 1977

Brookings Economic Policy Fellow, 1971-1972

Member, Technical Advisory Committee on Business Development, Model City Program, City of Houston, 1969-1971

Wilson University Fellow, 1959-1961

Overbrook Fellow, 1958-1959

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Beta Gamma Sigma, 1958

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“Regulating Intellectual (Property) Monopolies,” Australian Competition and Consumer Commission Conference on Revisiting the Rationale for Regulation, July 2008.

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Panelist, DOJ/FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, Session on Licensing Terms in Standards Activities, April 18, 2002.

Panelist, Federal Communications Commission Roundtable on Media Ownership Policies, Session on Ownership Policies and Competition, October 29, 2001.

Panelist, Federal Trade Commission Hearings on Global and Innovation-Based Competition, November 30, 1995.

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