Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	
Special Access Rates for Price Cap Local Exchange Carriers	WC Docket No. 05-25
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	RM-10593

COMMENTS OF THE NOCHOKEPOINTS COALITION

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COMMENTS OF THE NOCHOKEPOINTS COALITION

I. INTRODUCTION AND SUMMARY.

The NoChokePoints Coalition commends the Federal Communications Commission ("FCC" or "Commission") for seeking comment on the analytical framework needed to reform special access regulation. Reform is greatly needed and long past due. Every day without reform is another day that special access purchasers are forced to overpay millions of dollars in unreasonable and supra-competitive special access prices. The NoChokePoints Coalition urges the Commission to act quickly to bring the benefits of reform—more broadband deployment, jobs, and innovation—to reality.

The Commission should adopt a two-part analytical framework to assess the special access market and to evaluate the Commission's rules.

- First, the Commission should analyze the extent to which price cap LECs dominate the market for special access services by determining incumbent market share and assessing the likelihood of competitive entry, distinguishing product and geographic markets that are not competitive from any markets that may be competitive.

- Second, the Commission should analyze price cap LECs' use of market power. In particular, the Commission should analyze: (a) special access prices and their relationship

to cost, (b) the rates of return that price cap LECs are earning on special access services, and (c) the price cap LECs' imposition of terms and conditions in "discount" plans that undermine competition.

If this analysis shows that price cap LECs dominate special access markets and are abusing their power by imposing supra-competitive prices, reaping supra-competitive rates of return, or imposing terms and conditions that would not be accepted in a competitive market, it will have demonstrated that the Commission's current price cap rules have failed. Importantly, unreasonably high LEC prices and rates of return, and unreasonable terms and conditions are not only indicators of the abuse of market power—they also powerfully confirm the existence of market power, thus supplementing the Commission's market share analysis.

While the NoChokePoints Coalition believes that the Commission already possesses the data needed to immediately reform its special access regulations, it understands that the FCC intends to collect additional data. We stand ready to assist the Commission in this exercise. As the Commission considers what data it may seek, we urge it to recognize that price cap LECs, which are far and away the largest providers of special access services, are the entities in the best position to provide most of the data that would prove useful to the Commission. For example, only price cap LECs have information about their own costs and profits for special access services. This data is needed to assess the reasonableness of prices and to analyze rates of return. Nonetheless, the NoChokePoints Coalition is committed to assisting the Commission. Therefore, should the FCC decide that it needs more than what the price cap LECs can provide, these comments also include specific proposals for data the FCC could collect from others parties, as well.

There can be little question that there is a great and urgent need for reform. Every month that reform is delayed represents hundreds of millions of dollars in overpayments and further

injury to broadband deployment, innovation, and job growth. The Commission should therefore not limit itself to questions on whether there is a failed market. It should also immediately seek the data it needs to put in place a comprehensive, permanent remedy that will address unreasonably high prices and anticompetitive terms and conditions so it is prepared to act as soon as possible. That is, the Commission should not first obtain data that confirms the existence of a problem that clearly has existed for years and then, once that data has been collected, issue yet another request for data to help design an appropriate remedy. The NoChokePoints Coalition supports careful analysis—but this analysis can occur in parallel with a study of potential remedies. The Coalition also recommends that the Commission obtain information necessary to modify existing price cap regulations to set new price cap indexes for special access services as well as information necessary to modify the pricing flexibility triggers to accurately distinguish areas where competition is present from areas where it is not.

Finally, whatever data the Commission might request should be collected with appropriate safeguards in place to maintain the confidentiality of proprietary information. Ensuring appropriate confidentiality will maximize the scope and quality of data that is submitted. The Commission has expressed its desire to "arrive at fact-based answers,"[1] and providing appropriate confidentiality for data submitted will help it to meet that goal. The NoChokePoints Coalition therefore repeats its recommendation that the Commission aggregate highly sensitive business-specific information in such a way to permit meaningful review while still protecting the integrity of the information the Commission collects.

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[1] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the* Special Access NPRM, WC Docket No. 05-25, RM-10593, Public Notice, at 3, 2009 FCC LEXIS 5701 (rel. Nov. 5, 2009).

II. THE NOCHOKEPOINTS COALITION AND THE NEED FOR SPECIAL ACCESS REFORM.

The NoChokePoints Coalition represents Fortune 500 companies, educators, wireless carriers, public interest groups, Internet innovators, and competitive providers of telecommunications services. Our members include the New America Foundation, Public Knowledge, Media Access Project, ACUTA (Association for Information Communications Technology Professionals in Higher Education), the Ad Hoc Telecommunications Users Committee, CCIA (Computer & Communications Industry Association), Deltacom, Inc., Cbeyond, BT Americas Inc., One Communications, Sprint Nextel, T-Mobile, U.S. Cellular, Cellular South, Clearwire, Integra Telecom, and tw telecom.

The Coalition is a broad group. While members have different perspectives on some of the issues raised in this proceeding or the appropriate remedy, these comments represent a general consensus among the members of the Coalition. Several Coalition members will file separate comments in response to the Public Notice to elaborate on their own views.

The NoChokePoints Coalition was formed to urge the Commission to act to reform special access regulation. The Commission's regulation of special access services is predicated on the idea that a competitive market for special access services will keep prices and terms just and reasonable. But as Coalition members know all too well, competition for most special access services is essentially nonexistent in most areas. As a result of this lack of competition, prices are unreasonably high and terms and conditions often preclude competition in the few places where it might someday grow.

Reform of special access is important not just to the customers who for years have paid the price cap LECs' unreasonable rates, but to the Nation as a whole. Special access services are critical inputs for broadband services provided by rural telecommunications carriers and wireless

carriers, and therefore are essential for broadband deployment and competition. Special access is also the foundation of dedicated high-speed broadband for businesses, universities, hospitals, public safety organizations, and government agencies throughout the country. Reducing prices to a just and reasonable level will generate billions of dollars in cost savings for these entities. Rural carriers will be able to invest in bringing high-speed Internet access to more consumers. Wireless carriers will be able to upgrade data facilities at more cell sites. Universities will have additional funds to restrain tuition increases, hire more educators, and pay for new facilities. Hospitals will have more money to invest in advanced medical technologies or hire additional staff. And businesses will be able to use money saved on their telecommunications bills to invest in new products and hire workers.

III. THE COMMISSION SHOULD ANALYZE PRICE CAP LEC MARKET DOMINANCE.

The Commission's current special access regulations were based on a prediction that competition would arise to restrain price cap LEC market behavior.[2] As the Commission itself noted in the *2005 Special Access NPRM*, it must reassess its rules to determine whether its predictions have proved to be correct.[3] The proper place to start such an analysis is to identify the relevant geographic and product markets. Next, the Commission should gather data about the extent and nature of competition in these markets to see how overwhelmingly price cap LECs dominate those markets. In addition, the Commission should obtain data regarding the "build-buy" decision models of competitive providers in order to assess the role that potential competition can play in the market. And, the Commission should also reexamine, in light of the

[2] *See* Access Charge Reform, *Sixth Report and Order*, 15 FCC Rcd 12962, 12977, 13031 ¶¶ 36, 166 (2000) ("*CALLS Order*").

[3] Special Access Rates for Price Cap Local Exchange Carriers, *Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 1994, 1996 ¶ 4 & n.10 (2005) ("*2005 Special Access NPRM*").

information it gathers regarding competition in properly defined markets, how its pricing flexibility triggers fail to measure competition for special access services, enabling price cap LECs to escape the constraints of even the inadequate price cap regulation that exists.

A. Defining The Relevant Geographic And Product Markets.

As a first step of analyzing market dominance, the Commission should define the relevant markets for analysis. It should distinguish different geographic and product markets and identify customers who are similarly situated with respect to the competitive alternatives available to them.[4]

1. The Relevant Geographic Market.

The relevant geographic market for special access services is the route connecting the two points that a prospective purchaser seeks to link. For example, if a business wishes to link two of its office locations, a wireless carrier wishes to link a cell tower to a point of interconnection with its own network, or a competitive carrier wishes to establish a transport link between two LEC central offices, the relevant geographic markets are the three different particular routes that connect these locations. The Commission has previously endorsed this conclusion.[5]

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[4] *Id.* at 2023 ¶ 87 ("To define the relevant market, we typically determine not only the relevant product market, but also the relevant geographic market(s).").

[5] *See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, 12 FCC Rcd 15756, 15793 ¶ 65 n.176 (1997) ("*LEC Classification Order*").

As a practical matter, this means that the most useful way to analyze special access geographic markets is to analyze competition at individual buildings and cell sites.[6] When the Government Accountability Office ("GAO") conducted its analysis of the Commission's regulation of the special access market, it agreed, analyzing competition on a building-by-building basis.[7] Likewise, the Department of Justice, in its review of the SBC/AT&T and Verizon/MCI mergers, also assessed competition on a building-by-building basis.[8] This approach makes perfect sense. Generally speaking, a potential special access customer is constrained to purchase from providers that either do or can quickly and easily serve that customer's address. Moving to a new address in order to obtain better special access pricing from a competitive provider is not generally an option for most purchasers.

This does not mean, however, that the Commission needs to analyze competition separately for each individual building in the United States, at least for the purpose of assessing ILEC dominance of the special access market. Rather, the Commission could compare buildings that "exhibit sufficiently similar competitive characteristics."[9] As the Department of Justice found, those characteristics include the total bandwidth demand that the building represents as well as proximity of the building to competitive fiber.[10] The Department of Justice's analysis

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[6] The first "point" would be the customer's premises and the second "point" would typically be a point on the network, such as the central office. Thus, looking at the competitive alternatives at each building is a reasonable manner of considering the point-to-point connections available.

[7] United States Government Accountability Office, Report, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services at 22 (Nov. 2006) ("*GAO Report*").

[8] *See* United States' Notice of Public Filing of Redacted Submission, Redacted Declaration of W. Robert Majure at 11 n.17, *United States v. SBC Commc'ns, Inc.*, Case No 1:05-cv-02102, D.E. #133 (D.D.C. Aug. 9, 2006) ("*Majure Declaration*").

[9] *LEC Classification Order*, 12 FCC Rcd 15794 ¶ 66.

[10] *Majure Declaration* at 11 n.17. As an approximation of the proximity to competitive fiber, the Commission could focus on the extent of competitive deployment of fiber within the wire center

was focused on the likelihood of a new competitor offering service to a building; an analysis of the extent of competition in a building would also take into consideration the presence of competitive providers already serving the building.

If there is a practicable way to gather and analyze special access data by focusing on competition at the individual building or cell site level, the Commission should do so. Some members of the NoChokePoints Coalition will make more particularized suggestions in this regard in separate filings.

However, if the Commission determines that conducting an analysis focused on individual buildings would be not be practicable, the Commission can further aggregate similarly situated point-to-point connections or use a sampling method. Such aggregation or sampling will capture the information the Commission needs to produce a rigorous and accurate picture of the state of competition for special access services.[11] Members of the NoChokePoints Coalition have varying perspectives on the correct manner of aggregation, including whether to do so on a geographic basis, and, if so, the size of the appropriate geographic area for analysis. But all agree that high-density areas should be analyzed separately from areas of low density. On this point, even the price cap LECs seem to agree. They readily acknowledge that the market for special access services is one in which much of the demand is concentrated in certain high-density areas.[12] High-density areas are the areas most likely to attract competitive entry because

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serving area. This would allow the Commission to focus on characteristics of similarly situated buildings without the need to know how close each building actually is to competitively deployed fiber.

[11] *See LEC Classification Order*, 12 FCC Rcd at 15794 ¶ 67 n.181 (discussing appropriateness of examining market share in a "geographic group of point-to-point markets in which competitive conditions are reasonably homogeneous").

[12] *See*, e.g., Patrick Brogan & Evan Leo, US Telecom, *High Capacity Services: Abundant, Affordable and Evolving* at 4 (July 2009).

they offer the greatest likelihood for competitors to find enough demand to justify the expense of investing in facilities.

In addition, some members of the NoChokePoints Coalition suggest that the Commission differentiate between buildings or areas where competitors are already present from buildings or areas where no competitor is already present. That is, since the Commission is attempting to measure the level and effectiveness of competition for special access services, the actual presence of competitors may be a useful way to distinguish geographic markets. Such an approach tracks the Commission's "impairment" analysis for UNEs, in which the Commission distinguished wire centers by both number of business lines (measuring density) as well as the number of fiber-based collocators.[13]

2. The Relevant Product Market.

A product market encompasses products among which purchasers would switch in response to a small but significant non-transitory increase in price of one product.[14] The Commission should use this definition to differentiate product markets in the special access context.

Applying this definition, channel termination and interoffice transport services are in different product markets. Interoffice transport cannot be substituted for a channel termination, and vice versa. The Commission's existing pricing flexibility triggers already recognize this fact, essentially establishing transport and channel termination as separate markets, noting that

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[13] *See* Unbundled Access to Network Elements, *Order on Remand*, 20 FCC Rcd 2533, 2631 ¶ 176 (2005) ("*TRRO*") (high-capacity loops will not be unbundled where there are 38,000 business lines and four fiber-based collocators, and noting that the mere presence of competitors indicates only that competitors are likely offering competitive transport).

[14] *See* U.S. Department of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.11 (1992, revised 1997).

competitive providers are more likely to offer transport than to offer channel termination services. This difference led the Commission to set a higher trigger threshold for pricing flexibility for channel termination products than for transport products.[15]

Special access services with different capacities are also in different product markets. That is, a DS-1, which offers 1.544 megabits (Mbps) per second of throughput, is not a substitute for a DS-3, which offers 28 times that capacity, or over 44 Mbps of throughput—though not at 28 times the price. A customer needing DS-3 level capacity will not purchase 28 DS-1s in response to a small but significant non-transitory increase in price for DS-3 service. And the Commission has found that where demand for high-capacity loops (equivalent to channel terminations) exists only at the DS-1 level, such demand is insufficient for competitive suppliers to deploy DS-3 facilities and channelize those facilities to offer DS-1 loops, even though it is technically possible to do so.[16]

While these various special access services—DS-1 transport, DS-1 channel terminations, DS-3 transport, and DS-3 channel terminations—are all in different product markets, other services, such as Ethernet services (offered at various speeds), can be substitutes for these DS-n services for certain, though by no means all, applications. That is, point-to-point Ethernet service offering comparable transmission throughput to a DS-3 (around 44 Mbps) could be a substitute for a DS-3 circuit for at least some customers. And 10 Mbps Ethernet service would be a reasonable substitute for 6 DS-1s for some applications. Accordingly, the Commission can at least in some circumstances consider Ethernet services of similar capacities as part of the relevant markets.

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[15] *See* Access Charge Reform, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14278-79 ¶¶ 101-02 (1999) ("*1999 Pricing Flexibility Order*").

[16] *See TRRO*, 20 FCC Rcd at 2625, 2627-28 ¶¶ 166, 170-171. Of course, a customer that needs only DS-1 level capacity does not view a full DS-3 as a substitute.

B. To Analyze Market Dominance, The Commission Should Gather Data On The Extent Of Actual Competition.

As discussed above, before the Commission analyzes market dominance, it should: (1) establish that the proper geographic market is the point-to-point connection; (2) either (a) determine that it can practicably conduct an analysis of competition at the building level, or (b) aggregate similarly situated routes into analytically rigorous but realistically analyzable groups or samples; and then (3) establish different product markets, differentiating (a) channel terminations from transport services, and (b) services of different capacities.

Once the Commission has accomplished these steps, it should analyze the level of price cap ILEC market dominance. To ensure that it has the data needed to do this, the Commission should primarily gather data from sellers of special access, the parties with the most ready access to such data. The FCC should also analyze whether market entry by non-ILEC competitors is disciplining ILEC behavior in markets where ILECs hold dominant market shares. The Commission should also determine whether existing pricing flexibility triggers are adequately differentiating competitive from non-competitive geographic areas.

In order to establish market shares within geographic and product markets the Commission should seek: (1) the address of each building or cell site that sellers of special access serve, over facilities that the seller itself owns or controls;[17] and (2) the products, and the

[17] That is, ILEC services resold would not be sold over facilities the seller itself owns or controls, but if the seller itself owns the fiber or has an indefeasible right of use to the fiber, it does actually control the fiber. Of course, if a seller merely has an indefeasible right of use, then eventually that seller may cease to control that facility. The focus on owner-operated facilities is particularly important because mere resale of ILEC facilities does not provide any competition that would discipline ILEC pricing. While in certain limited circumstances, competitors may be able to use Unbundled Network Elements (UNEs) as components of their own product offerings to compete with special access services, UNEs are not a realistic tool for competitive providers to use on an extensive basis, for reasons including, among other things, the fact that the Commission prohibits CMRS providers from obtaining special access services as UNEs.

number of units of each product, these sellers are currently providing at each of these locations, distinguishing between (a) channel termination and transport products and (b) products of different capacities. Together, this data will allow the Commission to determine the market share of each seller, in each geographic area, for each different product. This will, of course, merely confirm what has already been demonstrated in this docket—price cap LECs dominate the special access markets.

C. To Determine Whether Potential Competitive Entry Is Disciplining Price Cap LEC Behavior In Dominant Markets, the Commission Should Analyze Supply Elasticity.

ILECs suggest that even in markets where an incumbent has overwhelmingly dominant market share, the potential for competitive entry might restrain the monopolist's actions.[18] Competitive providers can discipline ILEC competitive behavior, however, only if they can quickly and inexpensively extend capacity to provide competition to ILEC-serviced buildings and cell sites. But competitive providers of special access face significant barriers to entry that essentially foreclose the possibility that potential competition, as opposed to actual competition, could play a substantial role in restraining price cap LEC conduct. The record in this long-pending proceeding demonstrates that potential competition is not disciplining ILEC behavior in special access markets. Prices and rates of return remain supra-competitive in many areas across the country.

The Commission recognized one of the barriers that competitive providers face in the *2005 Special Access NPRM*, explaining that "[s]pecial access services have significant

[18] *See* Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, Competitive Issues in Special Access Markets 48-49 (rev. ed. 2009) ("*NRRI Report*") (discussing the general theory of contestable markets).

economies of scale and scope."[19] As the Commission observed, "[m]ost of the cost of providing a special access line is in the support structure, *i.e.*, the trenches, manholes, poles and conduits, the rights-of-way, and the access to buildings."[20] The Commission further noted that these costs "vary little" with different capacity needs.[21] Trenching costs, for example, do not depend on how many strands of fiber optic cable will be placed into that trench. That is why, as the Commission has explained, LECs do not typically even bother to construct loops at lower-capacity levels, even DS-3 levels, but instead deploy much-higher-capacity facilities and channelize those facilities to serve customers with more modest needs.[22] Moreover, it is relatively simple, frequently a matter of merely exchanging electronics, for LECs with facilities already in place to upgrade those facilities to provide higher-capacity service.[23]

These costs, moreover, are sunk costs to any potential competitor. That is, an investment in digging up a sidewalk to install facilities cannot be reused to dig up a different sidewalk later. The money is spent and gone. Yet for a market to be contestable—for potential competition to be capable of restraining the conduct of an incumbent with a large market share—the market cannot be one in which a competitor must make large sunk cost investments.[24]

Additionally, potential competitors must face an additional cost not generally faced *at all* by the ILECs. A competitor wishing to obtain access to a building to serve a potential customer must obtain permission from the building's owner. Even under the best of circumstances, obtaining access can be time-consuming (as well as expensive given the costs of deploying the

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[19] *2005 Special Access NPRM*, 20 FCC Rcd at 2004 ¶ 26.

[20] *Id*.

[21] *Id*. at 2005 ¶ 26.

[22] *TRRO*, 20 FCC Rcd at 2616 ¶ 150.

[23] *2005 Special Access NPRM*, 20 FCC Rcd at 2005 ¶ 26.

[24] *NRRI Report* at 48.

facilities, as discussed above). But building owners may also seek substantial payments for permitting the competitor access to the building. ILECs' ubiquitous networks, however, were connected to buildings as a matter of course, without such obstacles.

All of these obstacles make it much more difficult for a potential competitor to offer service than for an incumbent to do so, and they help to explain why competitors are able to compete only in very limited segments of some geographic areas. They also explain why no effect from "potential competition" in the special access market has ever been shown.

Nonetheless, to the extent that the Commission still wishes to analyze supply elasticity further, it can do so by seeking from facilities-based competitors a description of the analysis they conduct in deciding whether to deploy a new transmission facility to a building—their so-called "build/buy" analysis. The Commission should also seek information, for a representative subset of areas in which the competitor operates, about the number of commercial buildings that meet the competitor's criteria for deploying transmission facilities under that build/buy analysis but to which the competitor has nevertheless *not* deployed facilities. The Commission should ask competitors to discuss the factors that prevent them from deploying facilities to buildings that otherwise meet the competitor's build criteria.

Finally, to explore how competitors' need to use ILEC-controlled facilities in certain situations limits their ability to compete (and thus limits supply elasticity), the FCC should seek from non-ILEC facilities-based competitors, on an MSA basis, data on buildings they serve using ILEC facilities. In particular, the Commission should ask competitors to provide: (1) the total number of buildings and cell sites the competitor serves via transmission facilities purchased from ILECs; (2) the type of services purchased from ILECs, breaking out various special access services and UNE units separately, and the number of each such service

purchased; (3) the total number of buildings and cell sites served via transmission facilities purchased from *non*-ILECs; and (4) the type of such services purchased from non-ILECs, and, again for each service, the number of units purchased.

D. The Commission Should Analyze Whether Pricing Flexibility Triggers Accurately Indicate The Presence Of Competition.

The Commission's Phase I and Phase II pricing flexibility triggers depend on the existence of collocated facilities at ILEC wire centers as a proxy for special access competition.[25] But the Commission itself has recognized that competitor collocation is a poor proxy for special access competition, especially for competition for channel termination services.[26] As the Commission explained, "collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations."[27] Indeed, it provides no evidence at all—there is nothing but surmise behind the prediction that any amount of collocation indicates the presence of any competitive deployment of channel terminations.[28]

The record leaves no doubt that the current pricing flexibility triggers do not reliably distinguish between areas where competition is sufficient to restrain ILEC behavior and areas where adequate competition does not exist. In 2002, even AT&T, at the time a victim rather than a beneficiary of monopoly behavior, demonstrated that the triggers permitted pricing flexibility

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[25] *See* 47 C.F.R. §§ 69.709, 69.711.

[26] *1999 Pricing Flexibility Order*, 14 FCC Rcd at 14279 ¶ 103.

[27] *Id*.

[28] For that matter, the use of collocation as a trigger would also fail to take into account instances where competitors *have* deployed facilities but have chosen not to collocate, as the Commission recognized when it established the triggers. *Id*. at 14275 ¶ 95.

in areas where competitive entry did not occur.[29] Many others agree, and they have filled the record with evidence of the problems with collocation-based triggers.[30] While these and other parties will provide a fuller recitation of this evidence in their individual responses to this public notice, one point bears emphasis here. The collocation-based triggers purport to predict competition for special access services as a whole, including DS-1 channel terminations. But a collocation-based trigger could never predict competition for DS-1 channel terminations. This is the case because, as the Department of Justice recognized when examining the AT&T/SBC and Verizon/MCI mergers, it is fundamentally uneconomic to provide competition for DS-1 channel terminations, or even a single DS-3 channel termination, even if competitors have facilities as close as 1/10th of a mile away.[31] As Sprint, which largely uses DS-1s to serve its cell sites, noted in 2007: "virtually no competitive providers collocate for purposes of providing channel terminations to serve cell sites."[32] A pricing flexibility trigger that does not account for this basic fact—that collocators do not and will not provide facilities to supply DS-1 channel terminations—is fatally flawed.

Existing data is more than adequate as the basis for a Commission conclusion that the triggers must be discarded and that flexibility granted—at least with respect to channel

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[29] *2005 Special Access NPRM*, 20 FCC Rcd 1997 ¶ 6 (citing AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (filed Oct. 15, 2002) at 2, 6-7, 11-13, 20, 25-32).

[30] *See* Letter from A. Richard Metzger, Jr., and Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC (filed Oct. 5, 2007), Attachment at 47-48, 54-64; Comments of Sprint Nextel Corporation (filed Aug. 8, 2007) at 16-17; Comments of Sprint Nextel Corporation (filed June 13, 2005) at 9-10; Comments of Time Warner Telecom Inc. and One Communications (filed Aug 8, 2007) at 18-2; Comments of Time Warner Telecom (filed June 13, 2005) at 4-6, 10; Comments of T-Mobile USA, Inc. (filed Aug. 8 2007) at 11-17; Comments of T-Mobile USA, Inc. (filed June 13, 2005) at 14-17; Reply Comments of T-Mobile USA, Inc. (filed July 25 2005) at 15-17.

[31] *See Majure Declaration* at 11 n.17.

[32] Comments of Sprint Nextel Corporation (filed Aug. 8, 2007) at 16-17 n.48.

terminations—must be rescinded. Yet if the FCC wishes to collect more data to confirm that this is the correct decision, it could seek two related sets of information from non-ILEC facilities-based competitors—the entities whose competitive offerings the triggers are supposed to predict. The Commission should collect information about collocation, specifically, the number of collocation arrangements competitors have established in ILEC central offices (physical or virtual) that are connected to transmission facilities the competitor owns or controls, by MSA or for a representative sample of MSAs. The Commission should also collect information about actual deployment of channel terminations to end-users, specifically the number of transmission facilities in each of the sample MSAs that the competitor owns or controls that connect an end-user facility to such a collocation arrangement, by service type (*e.g.*, DS-1s and equivalents, DS-3s and equivalents, etc.). In addition, the FCC should collect information about actual deployment of transport facilities that the collocator owns or controls and markets to customers, by service type.

By analyzing these data, the Commission will be able to determine the extent to which the presence of collocated facilities in an MSA correlates with the presence of competition for channel terminations and interoffice transport. If the data show that the number of collocated facilities is not correlated with the number of competitive channel terminations (for each service type), then the Commission will have confirmation that the pricing flexibility triggers are not an accurate proxy for the kind of investment that can constrain ILEC prices for those services. Similarly, if the data show that the number of collocated facilities is not correlated with the number of marketed interoffice transport facilities (for each service type), then the FCC will have confirmed that the current triggers are not an accurate proxy for the investments that can constrain ILEC prices for these service types as well.

IV. THE COMMISSION SHOULD ANALYZE PRICE CAP LECS' ABUSE OF MARKET DOMINANCE.

There is little doubt that price cap LECs dominate the market for most special access services and that there is little prospect of competition arising to change that fundamental fact. A well-designed and properly functioning regulatory system would nevertheless ensure that rates, profits, and terms were just and reasonable. That is, prices in an industry characterized by economies of scale and scope should decrease as demand increases; rates of return should be reasonable; and terms and conditions should not be overly onerous nor should they be anticompetitive.

The Commission can assess the effectiveness of its regulations by examining how price cap LECs have been able to use their dominant market position to maintain unreasonable prices, rates of return, and terms and conditions that hamper what little competition might otherwise be able to arise. In addition, information demonstrating that price cap LECs are exploiting their dominant market position will also serve as a powerful further confirmation of the fact that they have market power, since it is necessary first to have market power in order to exploit it.

A. ILECs Abuse Market Power By Maintaining Prices At Supra-competitive Levels.

1. Special Access Prices Have Not Decreased, Despite Declining Costs, Even In Areas Predicted To Be Competitive By The Pricing Flexibility Rules.

The Commission established the current pricing flexibility regime to "ensur[e] 'that our own regulations do not unduly interfere with the development and operation of these markets as competition develops.'"[33] Prices should fall in a competitive market in a declining-cost industry.

[33] *1999 Pricing Flexibility Order*, 14 FCC Rcd 14257 ¶ 67 (quoting Access Charge Reform, *First Report and Order*, 12 FCC Rcd 15982, 16094 (1997)).

Existing data demonstrates, however, that price cap LECs have instead used their market dominance to increase special access prices in areas where they have pricing flexibility. This is clear evidence both that ILECs enjoy market dominance in these areas, despite the areas' having met the Commission's "competitive triggers," and that price cap LECs are abusing this power.

Pricing flexibility has long presented an opportunity for ILECs to raise special access prices above competitive levels. In 2002, AT&T, then an interexchange carrier, demonstrated that the RBOCs were charging supra-normal rates and were using pricing flexibility to maintain or raise rates, not to lower rates in response to predicted competitive entry.[34] Even years later, the NRRI came to the same conclusion in its report, stating that "[o]verall, the evidence fails to support a conclusion that sellers are being restrained in Phase II areas by competition to offer lower prices." Instead, it suggests the contrary conclusion, that sellers are using market power in Phase II areas "to raise prices to their large wholesale customers."[35] NRRI found that prices to discount customers for channel terminations were higher in Phase II areas than in price cap areas.[36]

NRRI Table - Mean Discounted Rate[37]

	2006			2007		
	Phase I	**Phase II**	**Pct. Diff.**	**Phase I**	**Phase II**	**Pct. Diff.**
DS1	114.72	125.38	9%	116.83	125.82	8%
DS3	1,055.98	1,077.74	2%	881.83	1,007.71	14%

In its 2006 study of special access, the GAO also found that the average price flex rack rate was higher than the price cap rate, "regardless of whether the price was for channel terminations, interoffice mileage, DS-1 or DS-3 service, different term arrangements, or different

[34] *NRRI Report* at 18 n.74.

[35] *Id.* at 66.

[36] *Id.* at 65.

[37] *Id*.

density zones."[38] Additionally, a 2004 article by two FCC economists, Noel D. Uri and Paul R. Zimmerman, found that many rates had risen in areas with pricing flexibility.[39] They found:

- In states served by Southwestern Bell and Ameritech, rates increased by 15% under Phase II pricing flexibility for DS-1 and DS-3 services.[40]

- Pacific Bell special access rates for both DS-1 and DS-3 services increased for both month-to-month rates and optional payment plan rates with no reductions in any pricing flexibility rates over their conventional rate counterpart.[41]

- Qwest's DS-1 special access service rates increased by over 25 percent for both channel termination and channel mileage.[42]

The FCC economists concluded that the "fact that no rates have declined and that many have increased is further evidence that the price cap LECs are exercising market power and that the market for special access service is not competitive."[43]

Also in 2004, M. Joseph Stith, an analyst at AT&T, performed a systematic comparison of rates in Phase II price flexibility areas with UNE rates for the same basket of services.[44] Stith, like NRRI, GAO, and the FCC economists, concluded that "the Bells' tariffed pricing flexibility rates are equal to or higher than their tariffed price cap rates in virtually every instance."[45]

None of this is news to the Commission. Indeed, the Commission required AT&T and BellSouth to (temporarily) roll back price increases in Phase II price flex areas when it permitted

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[38] *GAO Report* at 28.

[39] *NRRI Report* at 24 (citing Uri and Zimmerman, *Market Power and the Deregulation of Special Access Service by the Federal Communications Commission*, 13 Information & Telecommunications Technology Law No. 2 at 129 (2004) ("*Uri and Zimmerman*")).

[40] *NRRI Report* at 24 (citing *Uri and Zimmerman* at 150).

[41] *NRRI Report* at 25 (citing *Uri and Zimmerman* at 168).

[42] *NRRI Report* at 25 (citing *Uri and Zimmerman* at 168).

[43] *NRRI Report* at 25 (citing *Uri and Zimmerman* at 168-69).

[44] Reply Comments of AT&T Corp., WC Docket No. 04-313 (filed Oct. 19, 2004), Declaration of M. Joseph Stith, Attachment 1 at 1-2 ("*Stith Declaration*").

[45] *Stith Declaration* at 5 ¶ 19.

those companies to merge.[46] The Commission's action was a tacit admission that the prediction that price flex areas would be characterized by competition sufficient to keep prices just and reasonable was fundamentally wrong.[47] Notably, while AT&T agreed to that temporary limitation on its prices, its tariffs indicate that as soon as that regulatory requirement is lifted its prices will increase again.[48]

2. Prices For Other Broadband Services Confirm That ILEC Special Access Prices Are Unreasonably High.

A comparison of special access prices to prices carriers charge for other broadband products reinforces the conclusion that special access prices are unreasonably high. Comparing the prices of UNE services with those of similar special access services reveals a remarkable price differential. For example, Dr. Stith demonstrated that month-to-month DS-1 and DS-3 rates under pricing flexibility are nearly three times the rates for similar UNEs. Dr. Stith's comparisons of Phase II pricing flexibility rates, for a three-year term, with month-to-month

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[46] *See AT&T/BellSouth Merger Order*, 22 FCC Rcd 5662, App. F, Special Access (2006), *amended on reconsideration*, 22 FCC Rcd 6285 (2007).

[47] Rather, as the Commission's requirement on AT&T recognizes, the one thing that has kept prices (somewhat) in check—aside from the price cap LEC's fear that even-more egregious overreaching than they already engage in might lead the Commission to finally act—is the minimal regulation that still exists. It was to illustrate that fact that the NoChokePoints Coalition originally suggested collecting data on price changes that were not required by regulation (including merger commitments). *See* Letter from Edward J. Black, President & CEO of Computer & Communications Industry Association, *et al*., to Marlene Dortch, Secretary, FCC (filed June 3, 2009). Before the Commission gives any credence to ILEC claims that prices have fallen, it must first ensure that the price changes it examines clearly distinguish between those related to regulatory requirements and those which were not.

[48] *See* BellSouth Telecommunications, Inc. Tariff FCC No. 1, 2d Revised Page 23-1; Southwestern Bell Telephone Company Tariff FCC No. 73, 9th Revised Page 39-8.1; Ameritech Operating Companies Tariff FCC No. 2, 3d Revised Page 694.1; Pacific Bell Telephone Company Tariff FCC No. 1, 3d Revised Page 31-8.1.

UNE rates find the "staggering" result that the three-year term rates range from 129% higher for Verizon to 171% higher for Ameritech.[49]

Similarly, Sprint compared price cap ("PC") and price flex ("PF") special access rates in a sample of five states in AT&T territories and four states in Verizon territories with the charges for comparable UNEs (two channel terminations and one ten-mile channel mileage circuit), as demonstrated in the chart, below.[50]

	UNE	**PC**	**% Diff.**	**PF**	**% Diff.**
DS1 Circuit	$205.49	$411.27	100%	$457.63	123%
DS3 Circuit	$2,128.52	$2,994.28	41%	$3,705.38	74%

Notably, the special access prices analyzed by Sprint in the above table are discounted rates offered only if the purchaser is willing to agree to a five-year term commitment. In contrast, the UNE prices included in the table are month-to-month rates determined through an administrative process in which the incumbent LEC is a key participant, designed to approximate the prices that a competitive market would produce.[51] These results, in light of the use of such a conservative comparison, demonstrate just how unreasonable special access rates are relative to

[49] *Stith Declaration* at 5 ¶ 17.

[50] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 18-19. Sprint's analysis is based on the price cap and price flex rates charged by AT&T in Wisconsin, Texas, Ohio, Michigan and California (Ameritech Tariff FCC No. 2, Section 21; Pacific Bell Tariff FCC No. 1, Section 31; and Southwestern Bell Tariff FCC No. 73, Section 39) and by Verizon in Pennsylvania, New York, Massachusetts and Maryland (Verizon Tariff FCC No.1, Sections 30 and 31, and Verizon Tariff FCC No. 11, Sections 30 and 31), to UNE rates. The rates in the table are simple averages across different zones. The Commission may wish to obtain more comprehensive updated data on the price difference between identical services offered as UNEs and special access, perhaps by updating the analysis performed by Dr. Stith discussed above in footnote 49 and the accompanying text. The data are certain to once again show "staggering"—though, after this many years, not surprising—differentials.

[51] Comments of Sprint Nextel Corporation, GN Docket 09-51 (filed June 8, 2009) at 21 n.48; Comments of Embarq (August 8, 2007) at 20 (forward looking costs, which are the basis of UNE rates, are more appropriate than ARMIS for measuring the costs of special access services).

other broadband services. Similarly, in 2005, T-Mobile found similar results when it compared the prices for DS-1 channel terminations to the prices for DS-1 UNE loops in Florida, Illinois, New York, Texas, and Washington.[52] In every instance, the DS-1 channel termination rate exceeded by a large margin the UNE rate for the comparable circuit. In Illinois, for example, SBC charged $102 for a DS-1 channel termination, but only $27.72 for a DS-1 UNE loop.[53]

A comparison of special access rates to other broadband products with similar capacity, such as DSL and cable broadband—or even with products with far higher capacity, such as FiOS or U-Verse—produces similarly exceptional price differentials. Sprint stated recently that it pays an average of approximately $390 per month for a DS-1 circuit (2 channel terminations and 10 channel miles, under a 5-year-term plan), even though ILECs offer DSL for a fraction of that rate, around $35 per month for 1.5 Mbps download throughput, up to $55 per month for 7.1 Mbps.[54] Even prices for the more robust FiOS and U-Verse services are remarkably lower than DS-1 special access prices. In its undiscounted plan, Verizon offers FiOS with up to 15 Mbps for $54.99 per month.[55] AT&T's U-Verse prices are in the same range: retail consumers pay $25 per month for up to 1.5 Mbps, and $55 for up to 12 Mbps.[56] Retail prices for speeds for FiOS

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[52] Comments of T-Mobile USA, Inc. (filed June 13, 2005), Attachment B: Declaration of Simon J. Wilkie, at 9-10 ("*Wilkie Declaration*"). *See also* Letter from Philip J. Marcus, Counsel to 360 Networks (USA), Inc., *et al.*, to Marlene Dortch, Secretary, FCC (filed Oct. 5, 2007) at 2.

[53] *Wilkie Declaration* at 9-10.

[54] Prices quoted are for DSL service taken by a consumer not already a subscriber for phone service. *See* AT&T pricing for DSL service, *available at* http://www.att.com/gen/general?pid=11575 ($35 per month for 1.5 Mbps, $40 per month for 3.0 Mbps, $45 for 6.0 Mbps); Verizon pricing for DSL service, *available at* http://www22.verizon.com/Residential/HighSpeedInternet/Plans/Plans.htm ($34.99 per month for 1.0 Mbps, $44.99 for 3.0 Mbps, $54.99 for 7.1 Mbps).

[55] *Available at* http://www22.verizon.com/Residential/FiOSInternet/Plans/Plans.htm.

[56] *Available at* http://www.att.com/u-verse/explore/internet-landing.jsp (AT&T will raise its prices by $5 for each service level on February 1, 2010).

and U-Verse that are substantially higher than DS-1 service are therefore only a fraction of the cost for a 1.544 Mbps DS-1, which is priced at $390, even under a five-year "discount" term plan.[57]

ILECs may suggest that DS-1 service is different from these other broadband offerings because DS-1 service is more reliable or offers guaranteed bandwidth. To be sure, the services are not identical, and these differences may justify some difference in price—but certainly not a ten-fold difference. NoChokePoints members know that the enormous difference in price between these services is not due to the technical differences between the services, but rather to the fact that these retail services are offered to consumers that have at least some other competitive options, while consumers of special access services typically do not.[58]

B. The FCC Should Analyze Excessive Price Cap LEC Rates of Return.

Exorbitant rates of return are an indication of both market power and the abuse of that market power. In order to determine rates of return and to confirm that prices are unreasonably high, the FCC needs information about the ILECs' underlying costs. ARMIS data on ILECs' actual costs of providing special access services establishes that rates of return are exceptionally high. ILECs argue, however, that ARMIS data is of limited usefulness. The Commission should therefore seek additional data from ILECs to improve available ARMIS data and fill in data for 2008, as follows:

- To enable the FCC to analyze financial performance and productivity for incumbent price cap LEC special access for periods not covered by ARMIS data already possessed by the FCC, the FCC should seek from price cap LECs:

[57] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 21.

[58] *See also* Comments of BT Americas Inc. (filed Aug. 8, 2007) at 16-17 and Attachment A (demonstrating that special access prices in the United States are materially higher than prices for similar services in the United Kingdom).

1. ARMIS 43-01 Table I data on cost and revenue, and Table II data on demand analysis for 2008.

2. ARMIS 43-02 Table I1 data on employee counts and compensation, and Table B1B data on capital additions, end of year, and beginning of year plant amounts for 2008.

3. ARMIS 43-08 Table III data on switched and special access lines for 2008.

- To enable the FCC to assess changes in the types of special access circuits purchased, the FCC should seek from price cap LECs the number of DS-1, DS-3, Ethernet and OCn channel terminations they sold from 1985 to 2008.

- Additionally, to enable the FCC to address ILEC complaints about ARMIS data, the FCC should seek from RBOCs:

  1. Any revisions to their previously filed ARMIS 43-01 and/or ARMIS 43-02 Table B1B revenue;

  2. Expense and investment data to correct for any alleged special access misallocations for all years that need correction; and

  3. Explanations justifying such corrections (particularly for corrections prior to 2001, the year the separations freeze was adopted).

- Furthermore, the FCC should also compare ILEC special access rates with the UNE rates established by states for pricing high-speed termination and transmission facilities at rates based on forward-looking costs. Special access rates in excess of the UNE rates would indicate a rate of return on effective investments that exceeds the competitive cost of capital.

- To ensure it has all necessary data, not only now but also in the future so that it is prepared to make adjustments to special access rules as changes in the marketplace require, the FCC should grant the pending ARMIS Application for Review of the Cost Allocation Forbearance Order[59] to ensure that it has the data needed for the special access proceeding and to otherwise improve oversight.

Armed with these data the FCC will be able to examine the reasonableness of price cap LEC rates of return. The Commission has a guidepost for determining the reasonableness of

[59] Ad Hoc Telecommunications Users Committee, Application for Review of Action Taken Pursuant to Delegated Authority, WC Docket No. 07-21 (filed Jan. 30, 2009).

these rates. It long ago established 11.25 percent as a reasonable rate of return.[60] The new data described above will confirm currently available data which shows that actual rates of return vastly exceed 11.25 percent. Even if the FCC determines that rates of return under price caps in excess of 11.25 percent are not necessarily unreasonable, price cap LEC rates of return in the eye-popping 100 percent range indicated by ARMIS data clearly are unreasonable by any measure.

For example, 2007 ARMIS data demonstrates that Verizon had a rate of return of 62 percent, AT&T had a rate of 138 percent and Qwest had a rate of 175 percent. Even NRRI, adjusting ARMIS data to reflect estimated cost information, found that AT&T, Qwest and Verizon had earnings "well above the 11.25% authorized return that the FCC last prescribed for price cap carriers."[61] In fact, NRRI estimated, AT&T's return on investment for special access was 30%, Qwest's, 38%, and Verizon's, 15%.[62] Such returns demonstrate "that all three large RBOCs have raised prices above average cost, defined in the traditional accounting sense." As NRRI concluded, "such high earnings [are] evidence that the three RBOCs continue to have market power and, for AT&T and Qwest, at least, have made substantial and sustained price

[60] *See* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507 ¶ 1 (1990) (establishing a rate of return of 11.25%). This rate of return was established by the FCC in the rate of return regulation context; although rates of return were applied to price caps when revenue sharing existed, those sharing requirements no longer apply. *See* Price Cap Performance Review for Local Exchange Carriers, *Fourth Report and Order*, 12 FCC Rcd 16642, 16645 ¶ 1 (1997) (eliminating sharing requirements from price cap rules).

[61] *NRRI Report* at 71. The NRRI adjusted plant investment to reflect special access sales growth since 2000; these results account for that adjustment.

[62] *Id.* at tbl.13.

increases that are based on the use of market power."[63]

C. The FCC Should Analyze Anticompetitive Special Access Terms And Conditions.

Imposing supra-competitive prices and securing excessive rates of return are not the only ways that dominant market actors can capitalize on their dominance. Dominant companies can also use their power to foreclose or limit potential competition. ILECs insist on anticompetitive terms and conditions in special access contracts to strangle competition in the crib in markets where it may be possible. Their ability to secure tying provisions, excessive early termination fees, and lock-in through minimum commitments and "move" penalties is both a clear symptom of market dominance and another example of the abuse of this dominance.

The result is that competitors are often unable to purchase services from the few alternatives to ILECs in the few places where they are available, even if they have lower rates, because doing so would trigger penalties that outweigh savings from using competitors. Some purchasers even choose to lease unused circuits ("DS-1s to nowhere"), or to buy circuits they do not need, merely to avoid triggering a contract penalty. Such extreme and inefficient behavior would not be necessary in a competitive market. Indeed, by foreclosing the ability of purchasers to shift some of their demand to competitors, these terms and conditions limit the ability of any competitors to achieve the scale they would need to become competitors who could truly constrain special access pricing by the price cap LECs. The Commission should therefore request additional information on these terms and conditions and limit their use where they are unreasonable.

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[63] *Id*. *See also* Joint CLECS Comments in Response to NBP Public Notice #11, GN Docket No. 09-49 (filed Nov. 4, 2009) at 31 (comments filed on behalf of PAETEC Communications, Inc., TelePacific Communications, New Edge Network, Inc., and TDS Metrocom LLC).

1. Tying Arrangements.

An anticompetitive tying arrangement makes the ability to purchase a product in a non-competitive area contingent on the purchase of that product in an area where a competitive provider may be available. Such anticompetitive behavior is only effective where a company has market power. Several ILECs include tying arrangements in their special access offerings.[64] For example, tw telecom has noted that it is forced by ILECs' market power to accept provisions "tying access to those circuits that are only available from the monopolist (the tying product) to the portion of the CLEC's demand that could be fulfilled by competitive providers (the tied product)."[65]

2. Excessive Early Termination Fees.

Early termination fees can be reasonable or unreasonable, depending on their application. ILECs exploit their market power to exact extreme and punitive early termination fees in special access tariffs. The threat of unduly large termination penalties limits competitors' incentive to invest in competitive facilities because it limits special access customers' ability to shift traffic away from an incumbent's network.

An example of an unreasonable special access early termination provision is found in AT&T tariffs that calculate early termination liability by multiplying the number of committed circuits by the *undiscounted* month-to-month rate by the number of months remaining in the term plan. This produces an outrageous take-or-pay-*more* system that has no relation to costs.[66]

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[64] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 27.

[65] Comments of Time Warner Telecom and One Communications (filed Aug. 8, 2007) at 37.

[66] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 32 (citing Southwestern Bell Telephone Company Tariff FCC No. 73, Section 7.2.22; Pacific Bell

AT&T tariffs have other severe termination penalties as well. For example, for one five-year-term plan, if terminated customers try to shift to a competitor at the end of the third year, termination penalties are 50 percent of the remaining 2 years of recurring charges, or *approximately 100 percent of annual billings*. To provide comparable rates, a competitor would have to provide a 50 percent discount over the next 2 years, just to match the incumbent's offer, and would need to provide a higher discount to provide a lower rate.[67]

3. Lock-In Through Minimum Commitment Provisions And "Move" Penalties.

Purchasers of special access are also often locked into purchasing from incumbents by minimum commitment provisions and "move" provisions. Both types of terms use market dominance to undermine competition by punishing purchasers when they seek alternative providers.

As examples of commitment provisions, the Southwestern Bell, Pacific Bell and Nevada Bell OS-I term plans require purchasers to commit to buying 100 percent of their channel terminations from the incumbent in order to buy circuits. Ameritech similarly requires purchasers to commit to buying 90 percent of their in-service lines from the company to participate in some plans.[68] Such minimum commitments prevent competitive entry: a potential competitor must offer extraordinarily low prices, below what is economically feasible in many cases, to overcome the substantial penalties buyers face if they do not maintain their minimum

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Telephone Company Tariff FCC No. 1, Section 7.4.18; and Nevada Bell Telephone Company Tariff FCC No. 1, Section 7.11.5.2).

[67] *GAO Report* at 31.

[68] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 28 (citing SBC FCC Tariff No. 73, Section 7.2.22; Pacific Bell FCC Tariff No. 1, Section 7.4.18; Nevada Bell FCC Tariff No. 1, Section 7.11.5.2; Ameritech FCC Tariff No. 2, Section 7.4.13).

volume commitments. This problem is exacerbated by the fact that these minimum commitments are often based on the customer's total prior payments to the ILEC over the entire geographic area covered by the plan at issue. So the competitor must offer a price below not just the average price paid to the ILEC, but its price also must account for often huge penalties not just where the competitor hopes to win business, but across the geographic area covered by the entire ILEC plan.

The ILECs also charge exorbitant fees to perform "moves" that are not moves at all. For example AT&T plans include charges as high as $1,125 *per circuit* for a circuit migration, in addition to hourly overtime labor charges.[69] ILECs assess these charges even if the move involves nothing more than a few keystrokes and a re-route of the circuit from one port in a central office to another port a few feet away in the very same office: if, for example, a purchaser wishes to switch the circuit from the incumbent LEC to a competitive LEC collocated in the incumbent LEC's central office, with no change to the customer termination point.[70] Move fees enable ILECs to demand higher prices without fear of losing business to a competitor—even a competitor that is collocated in the same facility.

4. The FCC Should Find These Practices Unreasonable.

Special access purchasers only acquiesce to these anticompetitive terms and conditions because they have no alternative. This is clear evidence of a broken market. It is critical to understand that many of the most anticompetitive terms do not appear to be designed to lower costs for the ILECs. For example, a true volume commitment discount would allow a purchaser to agree to a lower price in exchange for a commitment to buy enough circuits that the seller

[69] *See* Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009), Attachment 2 (citing BellSouth Tariff FCC No.1, Section 7.4.5(A) and (B) and Section 7.5.9).

[70] Comments of Sprint Nextel Corporation, GN Docket No. 09-51 (filed June 8, 2009) at 33-34.

could provide the service at a lower cost. But these terms are typically tied to the customer's pre-existing volume rather than a particular volume level. Thus, they are not really volume commitments at all—and there is no evidence that they have any relation to the ILEC's cost. The truth is that ILECs insist on these terms to foreclose competition.

To support its analysis of how ILECs abuse market power through anticompetitive terms and conditions, the Commission should seek the following information from price cap LECs:

- To analyze whether tying arrangements reveal the existence and abuse of market power, price cap ILECs' cost justification for tying the ability to purchase special access services of one type, or in one geographic area, to the purchase of special access services of another type, or in another geographic area.

- To analyze whether minimum commitment provisions and "move" penalties reveal the existence and abuse of market power, price cap ILECs' (1) percent of revenue (separately for DS1/DS3/above DS3), by geographic area that is subject to minimum commitment agreements; (2) number of special access circuits, by geographic area, that are subject to minimum commitment agreements; (3) number of special access circuits, by geographic area, that are not subject to minimum commitment agreements; and (4) for "move" provisions, (a) identification of any "move" provisions, (b) which plan such provisions apply to, (c) descriptions of these provisions and their associated penalties; and (d) cost justifications for each such provision—all by year for 2002 through 2008. The FCC should also seek a description of each ILEC's minimum commitment agreements (separately for DS1/DS3/above DS3), and, for each such plan, (1) the commitment levels required; (2) the covered/available geographic areas; (3) associated commitment requirements; (4) the associated true-up interval time frames; (5) the penalties for failing to meet commitment levels and/or terminating early; and (6) associated renewal requirements.

- To analyze whether early termination fees reveal the existence and abuse of market power, (1) the number of special access circuits (separately for DS1/DS3/above DS3) that price cap LECs sell that are subject to an early termination penalty, and the number of circuits not subject to such a penalty; and (2) for 2008 the total amount of early termination penalties and forgone discounts (separately for DS1/DS3/above DS3) that would be due to the ILEC if all special access service subject to volume commitment agreements were transferred by buyers to alternative providers.

- To analyze whether extended term commitments reveal the existence and abuse of market power, the number of contracts, circuits, and annual revenue from term commitment contracts and the number of access circuits that each price cap LEC

> sells that are: (1) purchased without any term commitment; (2) purchased under contracts with a term commitment of one year or less; (3) purchased under contracts with a term commitment of more than one year but no more than 3 years; (4) purchased under contracts with a term commitment of more than 3 years but no more than 5 years; and, (5) purchased under contracts with a term commitment of more than 5 years—separately for DS1/DS3/above DS3.

This information will provide the Commission with additional evidence of the existence and abuse of market power. In addition, it will allow the FCC to take remedial action when it finds that a type of term or condition is unjust or unreasonable. Unreasonable terms and conditions include those that: (1) condition discounts on the volume of services aggregated across products and geographic areas; (2) condition discounts on any requirement that a customer reduce or discontinue purchases from a competitor; and (3) impose penalties for failure to achieve a committed volume of purchases that exceed a reasonable multiple of the rack rate for the volume shortfall.

Where the FCC finds unreasonable or anticompetitive terms and conditions, it should take remedial action. When the FCC makes a finding that a term or condition is unjust or unreasonable it should require the seller to remove the condition after one year (*i.e.* ILECs can continue to enforce existing term/condition penalties if triggered within the transition year). If an ILEC wishes to remove discounts from a contract which coincide with the unreasonable term or condition, the FCC should require the ILEC to petition the FCC for permission to do so within the year, and to demonstrate that the removal of the discount (*i.e.*, the effective rate increase) is in the public interest and the effective rate increase is cost-justified (*e.g.*, does not result in effective rates that exceed the ILEC's functionally equivalent UNE rates by more than a reasonable percentage). Furthermore, the FCC should require that a subscriber may terminate a term or volume agreement without penalty where the FCC makes a finding that a particular term or condition hinders effective competition.

V. THE COMMISSION SHOULD GATHER DATA TO SUPPORT LONG-TERM REMEDIAL ACTION.

The Commission created the current system of price cap regulation in an attempt to mitigate the anticompetitive effects of price cap LEC market dominance. Unfortunately, the Commission's current application of its special access regulations fails to accomplish this goal. Members of the NoChokePoints Coalition believe that the two-part analytical framework described above is the best way for the Commission to analyze the special access market. But Coalition members are confident that any reasonable analytical framework will come to the only possible conclusion—the market for many special access products in many geographic markets in the country is not competitive and will not become competitive in the foreseeable future.

The Commission has an obligation to ensure that prices and terms for special access services are "just and reasonable."[71] Doing so promptly is critical. AT&T filed its petition in 2002, and, after the D.C. Circuit heard argument on a petition for mandamus to require the Commission to act, the Commission finally issued its Notice of Proposed Rulemaking in 2005.[72] That NPRM noted that the *CALLS Order*, issued in 2000, had established regulations designed to last only through June 30, 2005.[73] The Commission suggested in 2005 that while it might not replace *CALLS* with a comprehensive new regulatory regime before July 1, 2005, the Commission "anticipate[d] adopting an order prior to July 1, 2005 that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the Commission considers the record in this proceeding."[74]

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[71] 47 U.S.C. § 201(b).

[72] *See 2005 Special Access NPRM*, 20 FCC Rcd 1994.

[73] *Id*. at 2000 ¶ 15.

[74] *Id*. at 2036 ¶ 131.

The Commission, of course, never issued any such "interim plan." Every day that passes makes the current regulatory regime even more out of date, and causes special access purchasers to transfer monopoly rents to the price cap LECs rather than investing in deployment and job creation. Data already in the record demonstrates that the current regulatory regime is indefensible. Rates of return that the price cap LECs are earning are far above what is "just and reasonable."[75] Pricing flexibility has not reduced prices to reasonable levels (and has, in fact, led to increases).[76] The current pricing flexibility triggers do not actually serve to identify areas where competition exists or will exist.[77] Outside of urban cores, there is little competition—and even within those urban cores there is competition only for the highest-capacity services, not for all special access services.[78]

Therefore, as the Commission considers the particulars of the analytical framework it will use to assess its regulations, it should also take this opportunity to gather all the information necessary to reform those regulations. That is, the Commission should not first decide that it needs additional information to determine *whether* the market is broken and only later, after confirming the obvious fact that it is, gather data on what reforms are necessary. Rather, the Commission should act *now* to gather data necessary to identify how it should modify its regulations to fulfill its statutory mandate. If the Commission decides, as it should, that interim

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[75] *See, e.g.*, *NRRI Report* at 71 (estimating adjustments to ARMIS reports to account for price cap LEC criticisms of those data and concluding that rates of return far exceed the 11.25% rate of return last authorized by the Commission).

[76] *See, e.g.*, *GAO Report* at 27-29; Comments of the Office of Advocacy, U.S. Small Business Administration (filed Aug. 8, 2007) at 7.

[77] *See supra* part III.D.

[78] *See, e.g.*, Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene Dortch, Secretary, FCC (filed July 9, 2009) at 15.

reform is appropriate while the Commission considers the precise contours of comprehensive reform, it can nevertheless collect all necessary data now.

The Commission should therefore collect data to explore how to adjust price caps for areas that are governed by price caps (including areas that the Commission concludes are no longer appropriate for pricing flexibility). In particular, the Commission should collect data from the price cap LECs with 2009 units and revenues for all special access services (*i.e.*, all services and areas currently subject to price caps as well as those not subject to price caps), which could serve as the baseline for modeling the effect of various Price Cap Index and Service Band Index adjustment scenarios.[79] In addition, the Commission should seek data on UNE rates for services that are the equivalent of special access services that are not provided as UNEs (*e.g.*, Ethernet services). UNE rates are, of course, based on forward-looking cost estimates, and the Commission might consider requiring special access rates to be based on UNE prices.

In addition, the Commission should collect any data necessary to reform the pricing triggers. Members of the NoChokePoints Coalition believe that the triggers can be reformed based on a careful analysis of the data obtained to analyze market dominance for the various products, since it is the level of competition or dominance that the triggers ought to measure. Yet if the Commission believes additional data would be appropriate, or if it desires additional guidance from commenters, it should request that information as soon as possible, and ideally concurrently with any other information request the Commission may issue.

[79] These data would be similar to the data provided by the price cap LECs in the Tariff Review Plans required by the FCC in the annual access tariff filings.

VI. THE COMMISSION SHOULD PROVIDE FOR APPROPRIATE CONFIDENTIALITY.

Some of the data the Commission may wish to seek in this inquiry is highly confidential. Ensuring adequate confidentiality, appropriate to the nature of the information the Commission seeks in each instance, will maximize the scope and quality of the data that will be submitted in response to any request for data.

Much of the analysis the Commission will conduct, including its analysis of the extent of competition, will rely on aggregated data. For example, if the Commission seeks information about the precise location of competitive facilities down to the building level, the Commission's rules will nevertheless be based on assessments about the state of competition in buildings where only the ILEC provide service, as compared to buildings where the ILEC provides service in competition with some number of competitors. To take another example, individual companies' build/buy decision models are highly confidential (and each company's model is of limited value to the Commission by itself), but an aggregation of information about competitive providers' build/buy models both poses somewhat less competitive concern and is also more valuable to the Commission.

Because the Commission will rely only on this aggregated data, and because actual building and company-specific information about competitive networks is highly sensitive, the Commission should state explicitly in any request for such sensitive data that it will ensure confidentiality by making it available only to Commission staff and Commission-contracted consultants. This staff would then aggregate the data into a report that permits assessments of competition in relevant markets but does not include, or enable the reader to infer, company-specific data about competitive providers. This report, which would be made available to the

public for review and comment, would provide a basis (in addition to information already in the record) on which the Commission would act.

This proposal for the handling of sensitive information is similar to the proposal advanced by Sprint in its June 22, 2009 *ex parte* letter.[80] As Sprint explained, aggregating data, generating a report based on that aggregated data, making that report publicly available, and then relying on the report in promulgating rules is consistent with the Administrative Procedure Act's requirement that parties be given "meaningful notice and an opportunity to comment" as a part of agency rulemaking.[81]

The Commission has already established a protective order in this docket,[82] but the system proposed here has important advantages over the protections already available. First, the current protective order permits attorneys representing competitors to view all submissions. While the Commission may feel that the protective order adequately protects legitimate interests, the Commission is seeking information from companies that are not required to provide any information. These companies will be more likely to voluntarily provide highly sensitive data if they are assured that only the Commission and its consultants will be able to view that data. Second, it will allow *all* members of the public to review and comment on the data that the Commission will rely on, including those who are barred from reviewing confidential

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[80] *See* Letter from Christopher J. Wright, counsel to Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC (filed June 22, 2009). *Cf*. Letter from David L. Lawson, counsel to AT&T, Inc., to Marlene Dortch, Secretary, FCC (filed July 10, 2009) (criticizing Sprint's proposal); Letter from Christopher J. Wright, counsel to Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC (filed July 31, 2009) (responding to AT&T's criticism).

[81] *See* Letter from Christopher J. Wright, counsel to Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC (filed June 22, 2009) at 3-4; Letter from Christopher J. Wright, counsel to Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC (filed July 31, 2009) at 1-2 (noting that AT&T had not disputed these points).

[82] *See* Special Access Rates for Price Cap Local Exchange Carriers, *Order*, WC Docket No. 05-25, DA 05-1635 (rel. June 8, 2005).

submissions under the terms of the protective order. By focusing attention on the aggregated data that the Commission will rely on, and making that information available publicly, the Commission will facilitate a thorough review of that information.

VII. CONCLUSION.

The NoChokePoints Coalition thanks the Commission for its focus on the broken special access market. We are confident that a careful review, consistent with the framework described in these comments, will enable the FCC not only to understand the pertinent aspects of the special access problem—particularly ILEC market dominance, and prices, rates of return and terms that reveal an abuse of that dominance—but also enable the Commission to address that problem in a timely manner. We stand ready to assist in any way.

Sincerely,

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