

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter 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
	)	

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**COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.**

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## INTRODUCTION AND EXECUTIVE SUMMARY

In its November 5, 2009 Public Notice, the Commission asks whether its existing pricing flexibility rules are well-calibrated to grant regulatory relief where, and only where, markets are subject to competition; whether, in other markets, its “price cap rules ensure just and reasonable special access rates”; and what significance, if any, the Commission should attach to allegations that its current rules “have resulted in . . . significant overearning” by incumbents.<sup>1</sup> Those questions are properly answered through primary reliance on actual market data:

- As the Commission found in 1995, “competition can be expected to carry out the purposes of the Communications Act more assuredly than regulation” could, and thus price regulation is appropriate only “where and to the extent that competition remain[s] absent in the marketplace.”<sup>2</sup>
- In determining “where” and “the extent” to which markets are subject to competition, the Commission should look *directly* at actual competitive data from a statistically valid cross-section of Phase I and Phase II markets. It should not rely *indirectly* on speculative inferences from methodologically dubious contentions about service-specific ILEC rates of return. Although competitive special access providers were once reluctant to produce the competitive data needed for a genuine market analysis, there is now an emerging industry consensus that the Commission must collect such data to resolve the issues it poses here.
- In determining what constitutes a “just and reasonable” rate, the Commission should likewise not rely *indirectly* on methodologically flawed rate-of-return allegations. Instead, it should look *directly* at what rates ILECs are charging in the same non-price-regulated (*i.e.*, Phase II) markets that the Commission concludes are competitive, because those rates are just and reasonable by definition. And it should then determine whether ILECs are charging comparable rates in non-Phase II areas, where per-unit costs are generally comparable or (particularly in price cap markets) even higher. If so, the rates in those non-Phase II areas are certainly no higher than just and reasonable levels—and may indeed be lower in some markets as a result of rate regulation.

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<sup>1</sup> Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, DA 09-2388, at 2 (Nov. 5, 2009) (“Public Notice”).

<sup>2</sup> First Report & Order, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, 8989 ¶ 64 (1995) (“*LEC Price Cap Review Order*”).

In these comments, Qwest proposes an efficient, administrable mechanism for conducting these indispensable market-based inquiries into whether any changes are needed to the existing special access rules. In their attached declaration, Dr. Timothy Tardiff and Professor Dennis Weisman develop the economic framework for that analysis, and they separately examine the historical trajectory of special access rates and rebut the allegations of “significant overearning” cited in the Public Notice.<sup>3</sup> As Dr. Tardiff and Professor Weisman explain, special access rates, and Qwest’s in particular, have fallen significantly in real terms across all classes of service since 2002; any economically sound analysis of Qwest’s company-wide rate of return would confirm that it is far lower than the advocates of re-regulation assert on the basis of accounting returns; and the forced price reductions those advocates seek could reduce Qwest’s overall rate of return to confiscatory levels.<sup>4</sup>

Some historical background is essential to place the present debate in context. The existing special access regime reflects twenty years of bipartisan consensus that the Commission should rely increasingly on market forces to protect the interests of consumers, and not on traditional price regulation—particularly price regulation based on reported ILEC rates of return. In 1990, the Commission reaffirmed its “policy judgment that incentive-based regulation is superior to rate of return for the regulation of certain dominant carriers, including local exchange carriers.”<sup>5</sup> In 1995, the Commission rejected further reliance on rate-of-return regulation and concluded that incentive-based regulation should “act as a transitional system as LEC regulated

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<sup>3</sup> Public Notice at 2; *see* Declaration of Timothy Tardiff and Dennis Weisman, attached as Exhibit 1 (“Tardiff-Weisman Decl.”).

<sup>4</sup> *See* Tardiff-Weisman Decl. at ¶¶ 15-37.

<sup>5</sup> Second Report & Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6789 ¶ 21 (1990) (“*LEC Price Cap Order*”).

services,” including special access, become “subject to greater competition.”<sup>6</sup> And in 1999, under the leadership of Chairman Kennard, the Commission took the next logical step by adopting the *Pricing Flexibility Order*, which frees ILECs from price regulation as competition develops and thus allows competition to “replace[] regulation as the primary means of setting prices.”<sup>7</sup>

The proponents of re-regulation claim, in essence, that this decision was a mistake and that the special access market is less competitive today than the Commission already concluded it had become more than a decade ago, in the first years after passage of the Telecommunications Act of 1996. The burden is on them to prove their claim that competition has receded under the pricing flexibility regime, and they have not begun to meet that burden. To the contrary, as Qwest and others have explained in previous comment rounds, that claim is empirically untenable. But even less plausible are the policy proposals suggested by the advocates of re-regulation.

In a nutshell, they propose not only to roll back the 1999 *Pricing Flexibility Order* by replacing market forces with price regulation, but also to roll back the 1990 *LEC Price Cap Order* and reimpose rate-of-return regulation by another name. Specifically, they allege that ILECs are earning “too high” a rate of return on their special access services and, on that basis, urge the Commission to force down the prices for those services to produce a more “reasonable” rate of return. As discussed below and in Dr. Tardiff’s and Professor Weisman’s declaration, the allegation that ILECs are earning “too high” a rate of return on these services rests on the false premise that it is even *possible* to rely on historical accounting data to calculate a meaningful rate

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<sup>6</sup> *LEC Price Cap Review Order*, 10 FCC Rcd at 8989 ¶ 64.

<sup>7</sup> Fifth Report & Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd 14221, 14224 ¶ 2 (1999) (“*Pricing Flexibility Order*”).

of return for individual services provided over legacy joint-use facilities. That premise is particularly flawed where, as here, the facilities in question are mostly depreciated and the carriers in question have made radically varying levels of new capital investment from year to year and place to place.

Even if it were possible to identify meaningful service-specific rates of return, it would still be methodologically unsound to *base regulatory policy* on those rates of return. The very point of incentive-based price cap regulation is to give regulated companies incentives to cut costs and operate efficiently by offering them the potential for greater profits if they do so.<sup>8</sup> Forcing rates down to produce a more “reasonable” rate of return is the essence of rate-of-return regulation. If the Commission were to indicate that it will periodically recalibrate special access prices in light of presumed service-specific rates of return, it would wipe out 20 years of regulatory progress and return this industry to the pre-1990 era of rate-of-return regulation. And such regulatory steps would have that effect whether the Commission acknowledges that it is relying on rates of return *directly* as a basis for setting rates, as it did under rate-of-return regulation itself, or *indirectly*, as the re-regulation advocates propose here: as a proxy for competitive conditions and as a basis for reimposing price caps in pricing flexibility areas and “reinitializing” those price caps to produce a more “reasonable” rate of return.

All this said, the Commission does have a responsibility to revisit its special access regime periodically to ensure that it accurately reflects the extent of competition. The question is how to measure the extent of competition in particular markets. Fortunately, the Commission need not rely on inherently indeterminate rate-of-return analysis to make those competitive assessments. Instead, it can and should obtain the data needed to analyze a statistically valid

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<sup>8</sup> See, e.g., *LEC Price Cap Order*, 5 FCC Rcd at 6787 ¶ 1.

sample of markets *directly* to determine how competitive they are—data that will test, among other things, the threshold accuracy of the pricing flexibility triggers. In addition, the Commission can use the ILEC special access rates in a sample of non-price-regulated (Phase II) markets that it confirms are competitive, and then compare those presumptively reasonable prices to the prices ILECs charge for the same services in Phase I and price cap markets. In short, competitive market data can give the Commission a direct basis for assessing the reasonableness of ILEC rates in price flex and price cap markets alike.

These comments propose a basic framework for conducting a data-driven analysis to resolve the key issues posed in the Public Notice. As a first step, the Commission should select a statistically valid sample of Phase I and Phase II markets from which to collect the information necessary to conduct a market-power analysis—similar to the information and analysis the Commission has used in a range of other proceedings, including merger and forbearance proceedings. The sample should be stratified to ensure, for example, that it includes markets of varying sizes from different regions with different ILECs. For each of the markets in the sample, the Commission should then collect data from relevant stakeholders that will enable it to determine whether the sample markets are in fact competitive. The stakeholders from which such information is collected should include ILECs, all competitive providers of special access services and wholesale fiber capacity, and the major special access customers (including wireless carriers) that have participated in this proceeding. And the Commission should collect data about any and all alternatives to ILEC special access services, including not just literal substitutes for the TDM-based DS<sub>n</sub>-level ILEC services at issue here (including channelized fiber facilities), but all other services as well, since in many contexts those other services compete with these ILEC services and thus constrain their prices.

The ensuing competitive analysis of the sample markets will enable the Commission to make several key assessments. First, it will help resolve the debate about whether the existing collocation triggers are effective indicators of competition. For example, if all or virtually all of the sampled Phase II markets are competitive, the analysis would indicate that the Commission's existing triggers do not provide substantial numbers of "false positives." In that event, the Commission could conclude that *non*-sampled Phase II markets are likewise competitive and that the ILEC's rates in *all* Phase II markets are therefore presumptively just and reasonable. Further, if this data-driven analysis reveals that at least some *Phase I* markets are more competitive than the Commission's collocation triggers would suggest, that would both provide a basis to reclassify those markets as Phase II and indicate that the Commission's current triggers are underinclusive because, for example, they do not account for intermodal competition from cable, microwave, and other providers of alternative special access services, as Qwest and others have long observed. The data would also provide a roadmap for adjusting the triggers to reflect the advances of facilities-based competition since their adoption.

Second, the Commission should collect and use ILEC rates in the sampled Phase II markets that it confirms are competitive as benchmarks for assessing the reasonableness of rates in *non-Phase II* markets as well (*i.e.*, price cap and Phase I markets). The rates an ILEC charges in markets that are both free from price regulation (*i.e.*, Phase II markets) and found to be competitive are just and reasonable by definition. And if a rate in a non-Phase II market is lower than or comparable to the benchmark rate for the same service in a Phase II market, then the rate in the non-Phase II market should be deemed reasonable as well from the perspective of any special access customer, since it is reasonable to assume that per-unit costs of non-Phase II markets, particularly price cap markets, are at least comparable to and often *higher* than per-unit

costs in Phase II markets. Of course, if a Phase II benchmark rate is lower than the corresponding rate in a price cap or Phase I market, further investigation may be warranted to determine the reason for the discrepancy. The Phase II benchmark rates can likewise serve as a check on the Commission's price cap methodology. If rates in price cap markets are comparable to or lower than those in markets the Commission finds to be competitive, that will indicate, at a minimum, that further reduction of price cap rates (*e.g.*, through "reinitialization" or application of a "productivity factor") is unwarranted. Indeed, such a finding could further suggest that regulation is artificially *depressing* rates in Phase I and price cap markets.

Of course, this proposed analysis will require time and effort—from the Commission, to be sure, and also from the relevant stakeholders, including ILECs, competitive providers, and major special access customers, such as the wireless carriers that purchase backhaul services. Nonetheless, as discussed below, most of the major participants in the special access debate—including many of the largest competitive special access providers and customers—have now reached general agreement that this data-collection initiative is a necessary step in the resolution of the main questions presented here. And the Commission can ensure the administrability of this data-gathering project by drawing appropriate inferences from statistically valid market samples. At the end of the day, this data-driven analysis is the only responsible means of resolving the parties' multi-billion-dollar dispute about the future of special access regulation.

## **BACKGROUND**

In its 2007 comments and reply comments, Qwest discussed the competitive landscape of the special access market in considerable detail. Rather than repeat that discussion here, we respectfully refer the Commission to those prior submissions. In the pages that follow, we briefly address two respects in which market developments since 2007 strengthen the case for continuing the deregulatory course the Commission set in the 1990s. *First*, claims that additional

regulation is needed to constrain ILEC prices are increasingly difficult to reconcile with (i) falling prices amid rapidly escalating demand, and (ii) the ever-more bullish claims the ILECs' special access rivals have made to their investors and would-be customers. *Second*, it would be particularly counterproductive to force down prices for TDM-based DS<sub>n</sub>-level services—the focus of this proceeding—now that providers have begun building new facilities to meet the explosive demand for OC<sub>n</sub>-level circuits to handle the new generation of high-bandwidth Internet access services, including backhaul needs for 3G and 4G wireless broadband services. No one can seriously suggest that the Commission should subject highly competitive OC<sub>n</sub>-level circuits to price regulation.<sup>9</sup> And imposing new price cuts on DS<sub>n</sub>-level services would artificially prolong the industry's residual reliance on those services and thus undermine a central goal of this Commission: creating incentives for the rapid deployment of high-capacity next-generation facilities.

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<sup>9</sup> With the D.C. Circuit's recent approval, the Commission has differentiated the traditional special access services that are the focus of the November 5 Public Notice (*i.e.*, TDM-based DS<sub>n</sub>-level services) from both (1) packet-switched enterprise broadband services such as Ethernet and ATM and (2) high-capacity OC<sub>n</sub>-level services, and it has eliminated dominant-carrier regulation of services in these latter two categories on the grounds that they are highly competitive and technologically dynamic. *See generally* Mem. Op. & Order, *Petition of AT&T for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705 (2007) (“*Enterprise Broadband Forbearance Order*”), *pet. for review denied*, *Ad Hoc Telecomm's Users' Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *see also* Mem. Op. & Order, *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services*, 23 F.C.C.R. 12260 (2008), *appeal dismissed*, *Ad Hoc Telecomm's Users' Comm. v. FCC*, No. 08-1288 (D.C. Cir. Aug. 7, 2009). In the Public Notice, the Commission does not draw these determinations into question, nor should it: they are correct.

**A. Developments Since 2007 Make It Even More Difficult Than Before To Credit Allegations That Re-Regulation Is Needed To Constrain Special Access Prices.**

**1. Special Access Prices Continue to Fall Despite Surging Demand.**

As Qwest and others have previously explained, the special access prices that customers actually pay ILECs have generally fallen across the board, year after year, for all classes of service since the current pricing flexibility regime was adopted in 1999.<sup>10</sup> As USTelecom reports, the best evidence of those prices—ILEC average revenues per unit (“ARPU”)—

show[s] a continued decline in DS-1 and DS-3 special access rates in the most recent periods for which data are available. In the case of one major ILEC, for example, average revenue per unit for DS-1 services decreased by 23 percent in real, inflation-adjusted terms between 2005 and 2008, while ARPU for DS-3 services decreased by 19 percent in real terms during that same period.<sup>11</sup>

Indeed, although advocates and opponents of re-regulation disagree about much else, virtually no one seriously disputes that special access prices are falling. Even a study much touted by pro-regulation advocates (for the pro-regulatory slant of its policy recommendations) acknowledges that, between 2006 and 2007, prices for the three Bell companies fell by 12 percent and 27 percent for DS-1 and DS-3 channel terminations, respectively; by 9 percent and 10 percent for DS-1 and DS-3 fixed transport charges, respectively; and by 13 percent and 18 percent for DS-1 and DS-3 variable transport charges, respectively.<sup>12</sup> While these declines reflect the substantial price concessions ILECs make to many customers, even ILEC “rack

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<sup>10</sup> See Reply Comments of Qwest Communications International Inc., WC Docket No. 05-25, RM-10593, at 3-6 (filed Aug. 15, 2007) (“*Qwest 2007 Reply Comments*”); Supplemental Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 21-24 (filed Aug. 8, 2007) (“*AT&T 2007 Comments*”); Patrick Brogan & Evan Leo, USTelecom, *High-Capacity Services: Abundant, Affordable, and Evolving* at 43 (July 2009), [http://www.ustelecom.org/uploadedFiles/News/News\\_Items/High.Capacity.Services.pdf](http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf) (“*USTelecom Report*”).

<sup>11</sup> *USTelecom Report* at 43.

<sup>12</sup> Peter Bluhm & Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets, Revised Edition*, 09-02, at 59-60 (Jan. 21, 2009) (“*NRRI Report*”), [http://nrri.org/pubs/telecommunications/NRRI\\_spcl\\_access\\_mkts\\_jan09-02.pdf](http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf).

rates”—the rates any customer can pay even if it buys only one circuit for one month—have generally declined in recent years.<sup>13</sup> Qwest’s own experience bears out these trends, as Dr. Tardiff and Professor Weisman demonstrate in their attached declaration.<sup>14</sup>

As re-regulation advocates point out, these price declines are not, of themselves, *dispositive* evidence of competition: theoretically, prices might have declined even faster if the market were yet more competitive. But falling prices are surely *prima facie* evidence of competition—particularly where, as here, they appear amid other marketplace developments that should tend to produce *higher* prices. Specifically, as discussed below, *demand* for special access services has recently skyrocketed with the explosive popularity of 3G wireless broadband and other high-bandwidth data services. And all else held equal, increases in demand for a service should normally *raise* prices for that service. Here, however, substantial increases in demand for special access services have coincided with *falling* prices. That is strong evidence that competitive pressures and efficient supply responses are performing a key role they perform in all well-functioning markets: keeping prices low. Dr. Tardiff and Professor Weisman note: “From an economic perspective, the combination of expanding volumes and decreasing prices typically indicates that consumers are benefiting from market competition[.]”<sup>15</sup>

## **2. Competitive Providers of Special Access Services Are Appropriately More Bullish Than Ever About Their Competitive Prospects.**

Some of the key advocates of increased regulation are competitive providers of special access services. Much like the end-user customers that seek government-mandated price cuts of

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<sup>13</sup> See *USTelecom Report* at 44. As Qwest has previously explained, it makes abundant sense that ILECs would charge more to customers unwilling to make any term or volume commitments, given the high nonrecurring costs every carrier incurs when deploying service to a given customer. See *Qwest 2007 Reply Comments* at 16-19.

<sup>14</sup> Tardiff-Weisman Decl. at ¶¶ 20-21.

<sup>15</sup> Tardiff-Weisman Decl. at ¶ 16.

their own, these competitive special access providers are asking the Commission to give them, in the aggregate, a multi-billion-dollar price break on the ILEC services that they use as components of the finished services they then resell to their own end users. These competitors and their regulatory allies try to justify these price breaks on the theory that ILECs have nearly ubiquitous market power and are the sole suppliers of special access facilities to the overwhelming majority of customer locations. But these “market power” arguments lack any empirical foundation, and commonly touted market-*share* figures are grossly misleading, both in their own right and as purported proxies for market *power*.<sup>16</sup> Among other flaws, the market-share figures invoked by advocates of re-regulation are based on incomplete and highly distorted data, and in addition they often reflect only a crude percentage of all buildings served. As a result, they count each dry-cleaner or gas station as the equivalent of a multi-tenant office building,<sup>17</sup> even though such small businesses normally do not purchase special access services and, in any event, should not be treated as equivalent to multi-tenant office buildings for market-share purposes even when they do.<sup>18</sup> Just as important, such figures altogether ignore the pricing

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<sup>16</sup> See, e.g., Letter from Gary L. Phillips, AT&T, to Marlene Dortch, FCC, WC Docket No. 05-25, at 14 (Feb. 21, 2008) (“*AT&T Feb. 2008 Ex Parte*”); see also Comments of Qwest Communications International Inc., WC Docket No. 05-25, RM-10593, at 13-16 (filed Aug. 8, 2007) (“*Qwest 2007 Comments*”); see generally pp. 34-36, *infra* (discussing why market share cannot serve as a proxy for market power).

<sup>17</sup> E.g., Economics and Technology, Inc., *Competition In Access Markets: Reality Or Illusion, A Proposal for Regulating Uncertain Markets*, at 16-17 (Aug. 2004) (attached to Comments of the Ad Hoc Telecommunications Users Committee, filed in WC Docket No. 05-25, June 13, 2005).

<sup>18</sup> See Tardiff-Weisman Decl. at ¶ 50 (discussing need for economically rigorous weighting of demand within competition analysis); see generally *AT&T Feb. 2008 Ex Parte* at 14-17 (point-by-point rebuttal of “market share” assertions by advocates of re-regulation).

pressures imposed by *potential* competition—*e.g.*, by providers that could cost-efficiently extend their nearby facilities to provide service if and when an ILEC’s prices rise.<sup>19</sup>

Here, rather than reprise these points, we focus on the widening chasm between (1) what the CLEC lobby tells *this Commission* when it is seeking wholesale price breaks and (2) what some competitive providers of special access services are telling *investors and potential customers* about their ability to compete in the market. These latter statements strongly support the view of independent analysts “that metro fiber players . . . will drive increased competition in the [business private line] market through 2014” and that “[t]he wholesale local private line market will experience increased competition from cable and metro fiber players as demand for connectivity increases.”<sup>20</sup>

For example, some companies that base their regulatory advocacy on a claim that they cannot compete are simultaneously telling investors that their proximity to concentrated demand makes them ideally suited to expansion in the special access market, which they see as a huge growth area for their businesses. Particularly bullish is national Ethernet powerhouse tw telecom (“TWTC”), which told its investors last December that approximately one million “target” businesses with substantial special access demand lie within a mile of TWTC’s fiber network—and that TWTC would aggressively “leverage” this “large opportunity near our network.”<sup>21</sup>

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<sup>19</sup> See *Qwest 2007 Comments* at 13-16 (filed Aug. 8, 2007).

<sup>20</sup> ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share: 2009-2014*, at 82 (2009) (“*ATLANTIC-ACM Report*”); see also *id.* at 79 (“metro fiber players and cable providers will drive increased competition in the [business private line] market through 2014”). Overall, the report predicts that the market will substantially grow for all providers, fueled particularly by burgeoning demand for wireless backhaul. *Id.* at 81.

<sup>21</sup> See TWTC, *Investor Presentation* at 9-10 (Dec. 2009) (capitalization altered), [http://www.twtelecom.com/files/dec\\_09\\_Investor.pdf](http://www.twtelecom.com/files/dec_09_Investor.pdf). TWTC is also notorious for telling the Commission that it could not provide Ethernet services over traditional special access services while telling investors and customers the opposite: that it could in fact “cost-effectively deliver . . . Ethernet to customers anywhere,” even to places where it “may be uneconomical” to directly

Indeed, TWTC already boasts “the third highest market share of retail Ethernet ports in service”—ranking well ahead of Qwest itself.<sup>22</sup> Similarly, Level 3 has told investors that “[o]ver 100,000 enterprise buildings [are] within 500 ft of [its] US network”—and are thus potential Level 3 customers.<sup>23</sup> PAETEC, which provides service to business-class customers in more than 83% of the nation’s top 100 metropolitan areas, bills itself as the “premier alternative to the ILECs, based on our nationwide footprint, breadth of products, and quality of service.”<sup>24</sup> And XO Communications boasts that it “serves 50 percent of the Fortune 500” and “has seen increased opportunities in the enterprise market as customers seek alternatives to today’s incumbent telecom companies in the wake of industry consolidation.”<sup>25</sup> These companies were being truthful with their investors: USTelecom reports systematic expansion of CLEC fiber facilities nationwide since 2008.<sup>26</sup>

Apart from these traditional wireline CLECs, intermodal competitors are likewise coming into their own as top-tier providers of special access services and touting their competitive prospects to investors. For example, cable companies have built out fiber facilities into business

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connect a customer location to TWTC’s own fiber network. *Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18721 ¶ 26 (quoting TWTC, Press Release, *Time Warner Telecom and Overture Networks Provide Ethernet Anywhere*, June 6, 2006). The Commission properly called TWTC on this self-contradiction in its *Enterprise Broadband Forbearance Order*. *Id.*

<sup>22</sup> TWTC, Press Release, *ENETsolutions Selects tw telecom to Power New State-of-the-Art ‘Solution Center’*, Oct. 13, 2009, <http://www.twtelecom.com/Documents/Announcements/News/2009/ENETsolutionsFINAL.pdf>.

<sup>23</sup> Level 3 Communications, *Investor Presentation*, at 7 (del. May 7, 2009), [http://files.shareholder.com/downloads/LVLT/410073203x0x296047/425b109c-bb88-4e29-82be-95e94218b23c/Investor%20Presentation\\_Mid%20May%202009.pdf](http://files.shareholder.com/downloads/LVLT/410073203x0x296047/425b109c-bb88-4e29-82be-95e94218b23c/Investor%20Presentation_Mid%20May%202009.pdf).

<sup>24</sup> PAETEC, About Us, <http://www.paetec.com/about-us>.

<sup>25</sup> XO Communications, Press Release, *XO Communications Expands Focus on Enterprise Market* (Oct. 8, 2007), <http://www.xo.com/about/news/Pages/361.aspx>.

<sup>26</sup> *USTelecom Report* at 28 (“[C]arriers are adding lit buildings to their existing metropolitan networks while in other cases they are deploying networks in new areas.”).

districts, reached a reported \$3 billion in annual business revenues, achieved an annual growth rate of 15-20% per annum, and provide service—including high-capacity offerings—to nearly a million business customers.<sup>27</sup> Moreover, the cable industry’s enormous investments in network expansion and DOCSIS 3.0 technology, which supports transmission rates as high as 100 megabits per second, have put an end, once and for all, to any debate about whether cable companies are viable competitors for enterprise-grade special access services.<sup>28</sup> As Cox, one of Qwest’s leading rivals, recently boasted: “Backed by our own fiber-based metropolitan networks and nationwide fiber-optic IP backbone, Cox Optical Internet gives your business dedicated access to our network with flexible tiered bandwidth options scalable to OC-12 or higher.”<sup>29</sup> Indeed, Cox estimates it controls as much as 25% of the small and medium business market in its footprint, and Comcast is aiming to attain a similar share.<sup>30</sup>

Fixed wireless providers are likewise fulfilling their promise as intermodal rivals to conventional special access providers, particularly in the provision of backhaul services for wireless broadband services.<sup>31</sup> For example, Clearwire, which predicts that its next-generation

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<sup>27</sup> *Id.* at iv, 9-11. See also Time Warner Cable Business Class, Dedicated Internet Access, [http://www.twcbc.com/MediaLibrary/1/1/Content%20Management/Products%20and%20Services/Data/pdf/dia\\_brochure.pdf](http://www.twcbc.com/MediaLibrary/1/1/Content%20Management/Products%20and%20Services/Data/pdf/dia_brochure.pdf) (claiming enterprise “connectivity speeds ranging from 1 Mbps to 10 Gbps”).

<sup>28</sup> *USTelecom Report* at iv.

<sup>29</sup> Cox Business, Cox Optical Internet, <http://www.coxbusiness.com/products/data/opticalinternet.html>.

<sup>30</sup> *USTelecom Report* at 15 (citing C. Moffett *et al.*, *U.S. Telecom: Enterprise Services . . . Time for a Star Turn?*, Bernstein Research, at 18 (Mar. 25, 2008)); Comcast Corporation Presentation, UBS Global Media and Communications Conference, at 13 (del. Dec. 8, 2008), [http://files.shareholder.com/downloads/CMCSA/820537788x0x299910/228789aa-1051-4e9e-a4e0-01953d0710a9/UBS2008Slides\\_FINAL.pdf](http://files.shareholder.com/downloads/CMCSA/820537788x0x299910/228789aa-1051-4e9e-a4e0-01953d0710a9/UBS2008Slides_FINAL.pdf).

<sup>31</sup> *USTelecom Report* at 35-37. Microwave backhaul requires merely a small device mounted on a building; it can be provisioned within 48 hours; and it can provide uplink speeds at DS-3 levels or higher. See AT&T Supplemental Comments at 15-16.

WiMAX service will reach 120 million people by the end of 2010,<sup>32</sup> will rely mostly on fixed wireless facilities for backhaul.<sup>33</sup> Likewise, FiberTower—the leading independent provider of third-party wireless backhaul services—serves the top 77 metro areas plus many suburban and rural markets, and has spectrum covering virtually the entire country.<sup>34</sup> As one FiberTower executive explained, the company’s fixed-wireless model gives it strong advantages over traditional wireline special-access services: “You can literally cover over a hundred miles” with fixed-wireless transmission facilities “and you’re talking less than \$100,000 in equipment rather than millions to put in fiber.”<sup>35</sup>

This is not empty talk: even apart from Clearwire, leading *customers* of fixed wireless backhaul services increasingly laud the benefits of that technology as a supplement to (or substitute for) traditional wireline special access services. U.S. Cellular Corp., one of the half-dozen largest wireless providers in the United States, has told the Commission that it “makes very extensive use of 6 and 10 GHz common carrier microwave facilities to link its base stations with each other and with USCC’s switches. At present, USCC has approximately 2,350 licensed

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<sup>32</sup> Stephen Lawson, *Clearwire Aims to Reach 120 Million in 2010*, PC World, Mar. 5, 2009, [http://www.pcworld.com/businesscenter/article/160800/clearwire\\_aims\\_to\\_reach\\_120m\\_people\\_in\\_2010.html](http://www.pcworld.com/businesscenter/article/160800/clearwire_aims_to_reach_120m_people_in_2010.html); Clearwire, Press Release, *Clearwire Reports First Quarter 2009 Results*, May 13, 2009, <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=irol-newsArticle&ID=1288116&highlight>.

<sup>33</sup> See Lawson, *Clearwire Aims to Reach 120 Million*, *supra* (“The company also said it has a cost advantage from using wireless microwave for backhaul links from cell towers to the Internet. While traditional carriers spend billions of dollars a year on wired backhaul, the microwave links have almost no ongoing cost, executives said.”).

<sup>34</sup> FiberTower, Spectrum Assets, <http://www.fibertower.com/corp/company-spectrum-assets.shtml>.

<sup>35</sup> *Pressure Grows on FCC to Release Wireless Backhaul Notice*, Comm. Daily, Apr. 7, 2009. See also Lemko Corp., Press Release, *Lemko Delivers Cellular’s Lowest Total Cost of Ownership*, Mar. 31, 2009, [http://www.lemko.com/index.php?option=com\\_content&view=article&id=71](http://www.lemko.com/index.php?option=com_content&view=article&id=71) (claiming that its fixed wireless service providers customers “more than a 65% reduction in their switching, backhaul and inter-connect expenses”).

common microwave facilities.”<sup>36</sup> A top wireless industry executive recently told the Commission that, particularly in less urban areas, “there are good microwave solutions” for wireless backhaul, “and some carriers are totally deploying their back haul solutions on a microwave basis.”<sup>37</sup> Another top wireless executive agreed that “high-capacity microwave” presents an “organic opportunity” for wireless providers seeking backhaul solutions, along with two other categories of “nontraditional backhaul partners”: “alternate access companies that are building businesses and networks around shared tenant or multi-carrier backhaul”; and “the cable industry,” with whom wireless carriers have been “mak[ing] significant progress in partnering” over “the last year or so.”<sup>38</sup> And the CEO of wireless broadband provider Stelera has told the Commission that “[w]e don’t have a problem with back haul because we’re using 300 MIP microwave off of those cell sites, so I’ve got plenty of back haul capacity to go back. So there’s no issue there.”<sup>39</sup>

In fact, the availability of copper backhaul facilities at regulated prices has likely slowed the development of fixed wireless backhaul in the U.S. One analyst, in comparing European and American backhaul markets, summed it up: “Wireless implementations of metro backhaul have long dominated in Europe. In North America, however, more TDM copper backhaul has been historically employed primarily as a result of low cost ILEC T1 TDM circuits available through

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<sup>36</sup> Comments of United States Cellular Corporation, WT Docket No. 09-166, at 1 (filed July 27, 2009).

<sup>37</sup> National Broadband Plan Workshop, Deployment Wireless – General, Tr. at 46 (Aug. 12, 2009) (“*Wireless Workshop Transcript*”) (T-Mobile USA Senior Vice President Engineering Neville Ray); *see also id.* at 45-46 (“[C]ompetitive forces work in metro areas where there’s lots of fiber, be that from the utility company, from the cable company, from the existing, you know, telco provider. So, I think market forces are starting to work there.”).

<sup>38</sup> Om Malik, *The GigaOM Interview: Cole Brodman, CTO, T-Mobile USA*, GigaOM, May. 12, 2009, <http://gigaom.com/2009/05/12/the-gigaom-interview-cole-brodman-cto-t-mobile-usa/>.

<sup>39</sup> *Wireless Workshop Transcript* at 42-43 (Stelera Wireless founder and CEO Ed Evans).

US . . . regulations.”<sup>40</sup> Sprint’s Chief Technology Officer has similarly suggested that fixed-wireless technologies would be every bit as ubiquitous in the United States as they are in the rest of the world, except that “relatively abundant *and inexpensive* T-1 lines have stifled [fixed wireless] technology here.”<sup>41</sup> And Ericsson concurs that, “[i]n the U.S.[,] the ability to lease T1s has retarded microwave; it’s always been less expensive to lease T1s.”<sup>42</sup>

Finally, ILECs face substantial competition from *wholesale fiber providers* such as American Fiber Systems and Zayo Bandwidth.<sup>43</sup> Although such companies are not necessarily certified as CLECs, they play a central role in the provision of telecommunications solutions to both carriers and enterprise customers, and they provide further price-disciplining competition in the special access market.

**B. As Demand for Special Access Shifts Strongly Towards Fiber-Based Services, Increased Regulation of Legacy DSn-Level Services Would Imperil The Commission’s Broadband Objectives.**

The cited acknowledgment by Sprint’s CTO that low prices for conventional wireline services are “stifl[ing]” the deployment of intermodal alternatives should have particular resonance for policymakers as they contemplate how to encourage the build-out of facilities

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<sup>40</sup> Erik Boch, *Backhaul for WiMAX & LTE: High-bandwidth Ethernet Radio Systems*, 51 *Microwave Journal* 22 (Nov. Supp. 2008), [http://www.mwjjournal.com/search/article.asp?HH\\_ID=AR\\_6743](http://www.mwjjournal.com/search/article.asp?HH_ID=AR_6743).

<sup>41</sup> Stephen Lawson, *Sprint Picks Wireless Backhaul for WiMAX*, *Industry Standard*, July 9, 2008, <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (emphasis added; citing Sprint CTO Barry West).

<sup>42</sup> Anne Morris, *Microwave To Retain Key Role in Wireless Backhaul, As Fibre Waits in Wings*, *Total Telecom*, Sep. 2, 2009, <http://www.totaltele.com/view.aspx?ID=448534> (quoting Don McCullough, Ericsson).

<sup>43</sup> See American Fiber Systems, *Enterprise Solutions*, <http://www.americanfibersystems.com/enterprise-solutions.php> (advertising “[e]nd-to-end fiber optic directly connecting your business locations with AFS-owned and operated fiber,” as well as connection speeds “[f]rom DS-3 to OC-192”); American Fiber Systems, *TDM Transport and SONET Ring Services*, <http://www.americanfibersystems.com/tdm-transport-and-sonet-ring-services.php>; Zayo Bandwidth, <http://www.zayo.com/bandwidth>.

needed to handle tomorrow's broadband infrastructure. In particular, new price constraints on traditional DSn-level services—the focus of this proceeding—would be not only needless, but inimical to the Commission's own broadband initiatives because it would create perverse incentives to delay the next-generation of high-bandwidth transmission facilities needed to handle escalating backhaul needs.

A key driver of competitive growth in the special access market is demand for wholesale backhaul for broadband providers, including wireless carriers. Wireless data usage is exploding, and will only continue to grow with the deployment of 3G and 4G services offering such heavy-bandwidth applications as real-time gaming and streaming video.<sup>44</sup> Within several years, wireless broadband services will rival today's state-of-the-art *wired* broadband services in bandwidth, reaching speeds of 5-10 Mbps.<sup>45</sup> According to the Yankee Group, the resulting capacity needs for 3G and 4G wireless backhaul will increase by a factor of 28 between 2008 and 2012.<sup>46</sup> Another analyst report added: "All wireless carriers in the United States are continuing to ramp up their networks with technologies that allow much greater capacity and the use of much more capacity per user," and thus "base stations with more than 24 Mbps of

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<sup>44</sup> See, e.g., *Surfing hertz*, Fin. Times, Dec. 1, 2009, <http://uk.finance.yahoo.com/news/surfinghertz-ftimes-96b9286f2ccc.html> ("Nokia Siemens Networks estimated recently that global wireless data traffic is doubling annually and that it will reach 2,000 petabytes by 2011.") For example, AT&T reports that its "wireless network has experienced a 6,732% increase in data usage over the last 13 quarters." Comments of AT&T Inc., WC Docket Nos. 09-191 and 07-52, at 148 (filed Jan. 14, 2009).

<sup>45</sup> Robert C. Atkinson & Ivy E. Schultz, *Broadband in America, Where It Is and Where It Is Going*, at 23, Figure 8 (Columbia Institute for Tele-Information, Nov. 11, 2009), [http://www.broadband.gov/docs/Broadband\\_in\\_America.pdf](http://www.broadband.gov/docs/Broadband_in_America.pdf).

<sup>46</sup> See Jennifer Pigg, Yankee Group, *Mobile Backhaul: Will the Levees Hold?*, at 3 (June 2009) ("Yankee Group forecasts that mobile traffic will have a CAGR of 130 percent from 2008 through 2012—that is, 1 MB of traffic in 2008 will equal 28 MB of traffic in 2012.").

backhaul capacity will grow by more than a factor of 20 from 2009 to 2015.”<sup>47</sup> To meet this demand, providers will need to invest billions of dollars in new backhaul facilities and will require commensurate returns on that investment.<sup>48</sup> U.S. backhaul revenues are currently in the range of \$3 billion annually, but could reach \$8 to 10 billion in the next two to four years, according to analysts.<sup>49</sup>

There is increasing consensus that copper-based, DSn-level special access services will be incapable of supporting backhaul requirements for this explosion of data traffic. The Yankee Group explains: “Within the next five years, service providers will have to: transition from TDM to packet based backhaul [and t]ransition to fiber backhaul and microwave.”<sup>50</sup> And major wireless broadband providers fully concur, telling the Commission that in the “3G footprint today, we are certainly moving to, you know, a fiber backhaul solution environment.”<sup>51</sup> Yet

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<sup>47</sup> Narayan Bhat, *Report Shows Mobile Wireless Networks in U.S. Will Increase Backhaul Capacity*, Oct. 16, 2009, <http://dark-fiber.tmcnet.com/topics/wireless-backhaul/articles/66845-report-shows-mobile-wireless-networks-us-will-increase.htm>; see also Malik, *The GigaOM Interview: Cole Brodman, CTO, T-Mobile USA*, *supra* (“We probably average between 3 and 4 T-1s per cell site today for our general 2G-3G business . . . We’re at 6 Mbps per second per site. Tomorrow I think the first steps are going to be something more like 20-25 Mbps, quickly followed by 50 Mbps, and eventually getting to 100 Mbps+.”).

<sup>48</sup> See, e.g., National Broadband Plan Workshop, Deployment Wired – General, Tr. at 35 (Aug. 12, 2009) (“*Wireline Workshop Transcript*”) (Dallas Clement, Cox) (“Relative to wireless back haul from cell sites . . . in our commercial business it’s a growth area. We’re getting calls in our franchises from wireless providers who are preparing for their 4G networks and they’re looking for lower cost alternatives for back haul. And because we’re there and we can do sort of spurs off of our network, we feel as though it’s a big growth area and we’re deploying capital to that area to be able to satisfy that demand.”).

<sup>49</sup> *USTelecom Report* at 34 (citing F. Louthan *et al.*, Raymond James & Associates, *Examining the Convergence of the Telecom and Cable Sectors*, at 16 (Aug. 18, 2008)).

<sup>50</sup> Yankee Group 4G Network Backhaul Summit, Presentation of Jennifer Pigg, at 7 (“*Yankee Group 4G Summit*”) (Sept. 15, 2009); see generally *Ex Parte* Letter from Robert Quinn, AT&T, to Marlene Dortch, WC Docket No. 05-25, at 2-3 (Nov. 4, 2009) (“*AT&T Nov. 2009 Ex Parte*”) (collecting analyst and industry commentary on this issue).

<sup>51</sup> *Wireless Workshop Transcript* at 45 (T-Mobile USA Senior Vice President Engineering, Neville Ray). See also *Wireline Workshop Transcript* at 25-26 (Craig Moffett noted as

providers are just now deploying the new fiber and microwave facilities needed to meet this challenge. According to one calculation, between 80% and 90% of wireless cell sites are still served by copper, TDM-based T1 lines.<sup>52</sup>

Against this backdrop, the very *worst* policy choice the Commission could make would be a forced reduction in the rates for DS<sub>n</sub>-level services in the absence of compelling evidence that those rates are supracompetitive. By artificially reducing prices for those legacy services, special access re-regulation would merely prolong the dependence of customers on those services in the short to intermediate term and suppress their demand for new, non-price-regulated services. And that in turn would delay the deployment of next-generation alternatives to those legacy services—thereby exacerbating the perverse market dynamic that Sprint’s CTO invoked to explain why wireless backhaul is so much more prevalent in the rest of the world than in the United States.<sup>53</sup> In short, new price constraints on traditional DS<sub>n</sub>-level services would threaten the Commission’s overarching objective (and statutory mandate) to promote the facilities deployment needed to bring America’s broadband services fully into the 21st century.<sup>54</sup>

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“obvious[.]” that demand for broadband backhaul would require “providing more than T1s in and out of the towers. . . . It’s a foregone conclusion you’re going to have to bring fiber”); *id.* at 45 (David Amentrout of FiberNet: “T1s are out . . . [I]t’s either going to be fiber or its going to be microwave.”); *Yankee Group 4G Summit*, Presentation of Dan Graf, Leap Wireless, at 4 (“4G will require bandwidth that current TDM networks cannot provide economically.”)

<sup>52</sup> See *AT&T Nov. 2009 Ex Parte* at 3 (summarizing data).

<sup>53</sup> Lawson, *Sprint Picks Wireless Backhaul*, *supra*.

<sup>54</sup> See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, div. B, tit. VI, § 6001 (Feb. 17, 2009) (“Recovery Act”).

## ARGUMENT

### I. OVERVIEW OF PROPOSED FRAMEWORK FOR ASSESSING WHETHER SPECIAL ACCESS RATES ARE JUST AND REASONABLE.

The debate about special access rates has dragged on for years, and it can be responsibly resolved in only one way: by conducting a market-power analysis to determine (1) whether the competitive triggers are accurate proxies for competition and (2) whether ILEC rates, particularly in Phase II pricing flexibility markets, are the product of ILEC market power or, instead, of competitive market forces. To the extent this analysis demonstrates that special access is generally competitive in a non-price-regulated (*i.e.*, Phase II) market, that should be the end of the inquiry because the prices charged in such a market are “just and reasonable” *by definition*.

“[T]he single most widely accepted rule for the governance of the regulated industries is regulate them in such a way as to produce the same results as would be produced by effective competition, if it were feasible.”<sup>55</sup> As a result, “carriers that lack market power [cannot] successfully charge rates, or impose terms and conditions . . . that violate Section 201 or 202 of the Communications Act, because any attempt to do so would cause their customers to switch to different carriers,” and therefore “competition is sufficient to ensure that [prices] are just and reasonable.”<sup>56</sup> Moreover, as discussed below, rates in non-price-regulated markets (*i.e.*, Phase II

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<sup>55</sup> 1 Alfred Kahn, *The Economics of Regulation* 17 (1970); accord James C. Bonbright, *Principles of Public Utility Rates* 107 (Columbia Univ. Press 1961) (“Regulation . . . is indeed a substitute for competition; and it is even a partly imitative substitute.”); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1236 (D.C. Cir. 1980) (Wilkey, J., dissenting) (regulation “is essentially a replacement or surrogate for the effects of free competition”).

<sup>56</sup> Second Report & Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, 20743, 20753 ¶¶ 21, 42 (1996); see also First Report & Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094, ¶ 263 (1997) (“Competitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to

markets) that the Commission confirms are competitive can further serve as benchmarks to assess whether rates in *non-Phase II markets* are at levels comparable to or lower than those in competitive markets. If they are, the analysis will put to rest any argument that rates in those non-Phase II markets are somehow higher than “just and reasonable” levels, given that per-unit costs in non-Phase II markets are typically at least comparable to those in Phase II markets and are often higher, particularly in price cap markets. Indeed, if rates in non-Phase II markets are comparable to or lower than those in sample Phase II markets that the Commission finds to be competitive, that may support a conclusion that price regulation has artificially constrained prices in the non-Phase II markets.

As discussed below, there is now an emerging consensus that this Commission cannot reasonably resolve the issues presented in this proceeding unless it conducts a data-driven analysis of actual competitive conditions in specific markets. Until recently, however, advocates of special access re-regulation had objected to such an analysis because it would require competitive providers to produce data about their own deployments and commercial track record. But their proposed alternatives to a data-driven market analysis make no sense. In particular, it is baseless to assess the reasonableness of ILEC special access *rates* on the basis of speculation about whether ILEC *net revenues* are too high. First, as discussed in Section IV below and in the declaration of Dr. Tardiff and Professor Weisman, it is nearly impossible to calculate a meaningful special-access-specific rate of return based on historical cost data. And

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consumers in the most efficient manner possible and at prices that reflect the cost of production. Accordingly, where competition develops, it should be relied upon as much as possible to protect consumers and the public interest.”) (“*Access Charge Reform Order*”), *aff’d Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); Third Report & Order & Second Order on Reconsideration, *Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Red 20227, 20272 ¶ 104 (1996) (“[S]trong competitive forces . . . ensure that . . . rates are just and reasonable.”)

even if such a calculation were possible, high net revenues do not, by themselves, signify market power, as courts, economists, and the Commission have all observed. Instead, they may simply reflect economies of scale, “good management, superior efficiency, or differences in accounting, none of which is inconsistent with an efficient market.”<sup>57</sup> As the Commission’s current Chief Economist explained nearly twenty years ago, sound competition policy “does not rely heavily on profitability measures in making inferences about market power,” both because “high profits or margins might reflect efficiencies, such as low costs or superior product design, rather than market power,” and because “the way accountants spread costs over time and adjust asset values for depreciation frequently causes accounting measures of profit to bear little relation to those underlying economic concepts that might in principle be related to market power.”<sup>58</sup> The Commission itself has thus rejected “central reliance on accounting rate of return data to draw conclusions about market power” and the reasonableness of rate levels.<sup>59</sup>

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<sup>57</sup> *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1252 (11th Cir. 2002) (citing *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 981 (N.D. Cal. 1979)); *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (“[N]ot only do measured rates of return reflect accounting conventions more than they do real profits (or losses), as an economist would understand these terms, . . . but there is not even a good economic theory that associates monopoly power with a high rate of return.”); see also *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 981 (N.D. Cal. 1979), *aff’d*, 698 F.2d 1377 (9th Cir. 1983) (“[T]he inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one. Good management, superior efficiency and differences in accounting provide explanations that are just as plausible, and none of those explanations is inconsistent with an effectively competitive market.”).

<sup>58</sup> Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 *Antitrust L.J.* 3, 5 (1992).

<sup>59</sup> Order & Notice of Proposed Rulemaking, *Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, 20 FCC Rcd 1994, 2035 ¶ 129 (2005); see also *id.* (“High or increasing rates of return calculated using regulatory cost assignments for special access services do not in themselves indicate the exercise of monopoly power.”); *Access Charge Reform Order*, 12 FCC Rcd at 16108 ¶ 293 (1997) (dismiss[ing] argument that parties can show that “rates have been excessive merely because earning[s] . . . have exceeded 11.25 percent, and, in some cases, by substantial amounts”); *Sprint Commc’ns Co. v. MGC Commc’ns, Inc.*, 15 FCC Rcd 14027, 14029 ¶ 6 (2000) (pointing to high

For at least two reasons, it would be equally irrational to conclude that ILEC rates are “supracompetitive” simply because they are sometimes higher than some competitors’ rates for superficially similar services. First, there is no meaningful way to compare ILEC and CLEC rates without adjusting for a variety of significant *cost differences*. To the extent CLECs provide DSn-level services, they typically sell them on a channelized basis to select customers over shared fiber facilities they have deployed on routes with robust demand (*e.g.*, to multiple customers in a single large office building). Far more than ILECs, therefore, CLECs enjoy scale economies in their provision of these services, and their pricing reflects that fact. In contrast, ILEC pricing for the same services may be higher on average because, unlike CLECs, ILECs must maintain ubiquitous networks and provide stand-alone DSn-level pipes to a variety of higher-cost customers that CLECs do not wish to serve, including those in less densely populated locations where scale economies are low or nonexistent. Second, price differences may also reflect *differences in service quality*, including differences in the type of performance guarantees or customer support the ILEC offers that its competitors do not. “Competitive markets are characterized by both price and quality competition, and a firm’s comparatively high price may simply reflect a superior product.”<sup>60</sup>

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rates of return does not “meet [the] burden” of proof necessary to show that a rate is “unjust and unreasonable”).

<sup>60</sup> *Harrison Aire, Inc. v. Aerostar Int’l, Inc.*, 423 F.3d 374, 381 (3d. Cir. 2005); *see also Blue Cross & Blue Shield*, 65 F.3d at 1412 (“Generally you must pay more for higher quality.”). It is similarly meaningless to allege, as the advocates of re-regulation often do, that providers are charging “supracompetitive” prices in a market characterized by actual or potential competition: When entry to a market is possible, “a predator charging supracompetitive prices will quickly lose market share (as well as any chance of reaping monopoly profits) as new rivals enter the market and undercut its high price.” *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995); *see also* 2A Phillip E. Areeda *et al.*, *Antitrust Law* ¶ 501 (2d ed. 2002) (“Thus, the substantial market power that concerns antitrust law arises when the defendant (1) can profitably set prices well above its costs and (2) enjoys some protection against a rival’s entry or expansion that would erode such supracompetitive prices and profits.”). Indeed, “there is probably no

In short, the only rational way for the Commission to resolve the long-running dispute about the appropriateness of special access rates is to conduct a market-power analysis: *i.e.*, an analysis of the extent to which both actual and potential competition constrains prices in the market.<sup>61</sup> The Commission has considerable experience with market-power analyses from its merger reviews, nondominance inquiries, and forbearance proceedings. To be sure, when the Commission last considered this question, it concluded that market-specific “analyses require considerable time and expense, and they generate considerable controversy,”<sup>62</sup> and it thus adopted the collocation proxies as an approximate measure of market power in the specific markets in which ILECs seek pricing flexibility. Qwest agrees that market power analyses would be too cumbersome to use in every market-specific pricing-flexibility proceeding. But a market-power analysis of a representative selection of markets *would* be administratively feasible as a basis for determining whether, as a general matter, the Commission’s current rules are producing “just and reasonable” rates.

In particular, the Commission can and should conduct such an analysis by identifying a fair cross-section of markets subject to Phase I and Phase II pricing flexibility and gathering the data needed to determine the competitive conditions in each of those markets, looking at both actual and potential competition, as discussed below. That approach would enable the Commission to accomplish two primary goals simultaneously. *First*, by gathering direct competition-related data in each of the sample markets, the Commission could draw statistically

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better way . . . to guarantee” entry by a competitor than by “greedily extracting the highest price” possible. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979).

<sup>61</sup> As discussed below, “market power” analysis is of course very different from a “market share” survey: a firm can have a very high market share yet lack market power depending on the degree of *potential* competitive entry to check any price increases. *See* p. 36-37, *infra*.

<sup>62</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14272 ¶ 90.

valid inferences about whether the existing collocation triggers are fair proxies for facilities-based competition. *Second*, the Commission could use the ILEC prices it collects in the sampled Phase II markets that it confirms are competitive—rates that are just and reasonable by definition—as benchmarks to determine whether ILECs’ prices in *non*-Phase II markets are likewise just and reasonable. Only Phase II rates (in markets the Commission finds competitive) can perform this function, because existing price regulation may artificially suppress rates in Phase I markets.

Before we address how that analysis would operate in practice, we first address a key threshold issue: how the Commission would define the geographic markets in which the Commission would assess competitive alternatives to ILEC special access services. In 1999, in the *Pricing Flexibility Order*, the Commission chose an MSA-based market definition on the ground that “MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.”<sup>63</sup> The D.C. Circuit affirmed that conclusion, noting with approval that the FCC had defined “the geographic area it should use . . . narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable.”<sup>64</sup>

In Qwest’s view, the Commission should retain—at least in the near-to-intermediate term—that MSA-based geographic market definition. The most obvious reason is pragmatic. For the past eleven years, this Commission has applied different levels of regulation to the special access market on an MSA-by-MSA basis. A key goal in this phase of the proceeding is to determine whether the Commission’s MSA-based collocation-trigger rules have been effective

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<sup>63</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14260 ¶ 72.

<sup>64</sup> *WorldCom Inc. v. FCC*, 238 F.3d 449, 461 (2001) (quoting *Pricing Flexibility Order*, 14 FCC Rcd at 14259 ¶ 71).

proxies for competition. It thus makes the most sense to apply a rigorous market-power analysis to the same geographic markets that are the focus of the proxy rules. In contrast, any abrupt abolition of an MSA-based inquiry to one based on wire centers or some other geographic unit would produce results of dubious value to assessing “whether the Commission’s pricing flexibility rules have worked as intended.”<sup>65</sup>

In any event, even if the Commission were approaching this issue on a blank slate, an MSA-based approach would be as appropriate today as it was in 1999, when the Commission viewed it as the best way to harmonize economic rigor with regulatory administrability. It is certainly far preferable to the hyper-granular alternatives proposed by some advocates of re-regulation. Under those alternatives, *each individual route* to a particular building would qualify as a separate market on the theory that a customer seeking special access service on that particular route could not use any substitute services. But the Commission has already properly rejected that analysis as a matter of administrability. To simplify its analysis, “the Commission has traditionally aggregated or grouped customers facing similar competitive choices[.]”<sup>66</sup>

By this standard, the MSA remains the appropriate geographic market for assessing special access competition. First, with occasional exceptions, the pricing options available to ILEC customers on all point-to-point routes throughout an individual MSA are essentially uniform,<sup>67</sup> and the pricing ILECs offer for their special access services do not vary from route to

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<sup>65</sup> Public Notice at 1.

<sup>66</sup> Mem. Op. & Order, *AT&T Inc. and BellSouth Corp., Application for Transfer of Control*, 22 FCC Rcd 5662, 5678, ¶ 31 (2007) (“*AT&T/BellSouth Merger Order*”); see also Tardiff-Weisman Decl. at ¶ 45 n.48 (discussing academic criticism of highly granular alternatives).

<sup>67</sup> Qwest also *markets* its services on an MSA-wide basis, as other ILECs no doubt do; thus, if there is a competitor in an MSA, Qwest’s offers throughout the MSA will take that into account.

route or among wire centers in an MSA.<sup>68</sup> Other ILECs have likewise confirmed that their Phase II prices are set on an MSA-wide basis, so that “rates for customers in any area where there are fewer competitors are determined with reference to competition in areas where special access demand is highly concentrated.”<sup>69</sup> As a result, competitors (and customers) typically face the same price competition from the ILEC throughout any given MSA. In other words, when there is competition in one part of an MSA, customers across the MSA benefit from reduced pricing and better terms.

Second, competing providers typically deploy their fiber rings or other facilities over broad geographic areas in order to address demand across that entire area. All areas *addressable* by such a deployment should be deemed to fall within the same geographic market, because competitive providers in that area would have the *ability* to offer a substitute service whenever sufficient demand arises, whether or not they offer such service today.<sup>70</sup> In other words, if a competitor is already active within an MSA, it may well be prepared to offer services throughout much of the MSA, particularly since many special access customers seek service at

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<sup>68</sup> Indeed, Qwest’s FCC Tariff No. 1 sets a single pricing structure throughout Qwest’s entire Service Territory. Qwest also offers its discount plan on a regional basis, which not only offers the same discount options region-wide, but also allows carriers to meet their commitments with facilities located anywhere in Qwest’s territory. And Qwest’s individual pricing contracts in price-flex MSAs also tend to be MSA-wide.

<sup>69</sup> Supplemental Reply Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 44 (filed Aug. 15, 2007).

<sup>70</sup> See *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5684 ¶¶ 41-44 (noting that the DOJ set “demand/distance” screens to identify buildings where competitive LEC entry was likely; only buildings that failed this screen were considered relevant to DOJ’s review.)

“geographically dispersed locations” that are often scattered throughout a region or even nationwide.<sup>71</sup>

Competitors have argued that their “build-buy” analyses often do not support extension of laterals to new, unserved buildings, but the question is not whether *every single customer* in the MSA has a variety of competitive options, but whether a significant number of customers and areas within the MSA have such options. If they do, then—as discussed above—pricing throughout that area will be disciplined and it will be reasonable to treat the area as one market. Indeed, when the Commission adopted the MSA-wide trigger, it fully recognized that its test would not guarantee “a competitive alternative for each and every end user.”<sup>72</sup> It found that an MSA-wide test was nevertheless the right level of analysis and that treating each wire center (much less each route) as a geographic market in its own right would be inadministrable, because that approach “would create thousands of individual markets and impose substantial administrative burdens on both the industry and this agency.”<sup>73</sup> As the Commission explained, although a narrower market definition “might produce a more finely-tuned picture of competitive conditions, the record does not suggest that this level of detail justifies the increased expenses and administrative burdens associated with these proposals.”<sup>74</sup> More than a decade later, the rationale for that policy choice remains as valid as ever.

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<sup>71</sup> Mem. Op. & Order, *Petition of AT&T for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705, 18718 ¶ 21(2007).

<sup>72</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14297 ¶ 144.

<sup>73</sup> Second Further Notice of Proposed Rulemaking, *Further Notice of Proposed Rulemaking, Price Cap Performance Review for Local Exchange Carriers; Treatment of Operator Services Under Price Cap Regulation; Revisions to Price Cap Rules for AT&T*, 11 F.C.C.R. 858, 916 ¶ 126 (1995).

<sup>74</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14260 ¶ 74.

Finally, a more granular market definition would not even be necessary to protect competition for individual routes even if such routes were the appropriate focus of inquiry. If competitive special access providers must have access to low regulated rates for particular routes in order to compete effectively, they can often invoke Section 251(c)(3) to purchase unbundled network elements to serve those routes—and that option essentially equalizes the potential for competition across the entire MSA. Thus, the analysis established in the *Triennial Review Remand Order* for UNE transport purposes makes it unnecessary (and duplicative) to conduct this same analysis for purposes of evaluating the reasonableness of special access rates.<sup>75</sup>

## **II. THE COMMISSION SHOULD COMPILE ALL DATA NEEDED TO CONDUCT A GENUINE MARKET-POWER ANALYSIS WITHIN ITS SAMPLE MARKETS.**

As discussed in Section III, the market-power analysis proposed here would serve multiple objectives. First, it would serve as a basis for measuring whether rates in any market are just and reasonable. Once the Commission determines that ILECs face competition and thus lack market power within some or all of the Phase II markets within the sample—*i.e.*, the only markets where ILEC rates are unconstrained by price regulation—the ILECs' prices in those markets will be “just and reasonable” by definition. *See* p. 21, *supra*. Moreover, under the methodology proposed below, those prices will serve as the benchmarks the Commission needs to determine the reasonableness of ILEC rates in *all other* markets, whether subject to competition or not. In addition, this market-power analysis would enable the Commission to assess whether the current competitive triggers serve as accurate proxies for competition. For example, if the Commission determines that some or all of the sampled Phase I markets are competitive, that would demonstrate both that those markets should be reclassified as Phase II

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<sup>75</sup> Order on Remand, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2581-82 ¶¶ 79-80 (2005) (“*TRRO*”).

markets and that the Commission's triggers are underinclusive—because, for example, they overlook wholly facilities-based competition—and should be modified. But before the Commission can conduct this analysis and reach these conclusions, it must first elicit comprehensive competitive data from a fair cross-section of Phase I and Phase II markets.

The Commission is no stranger to such a market-power analysis, given the central role of that analysis in merger, nondominance, and forbearance proceedings. As the Commission noted not long ago, “careful evaluation of firm own-price elasticities of demand, the market elasticity of demand, the elasticity of supply of rivals, market share, and other variables may be necessary to assess the extent of a firm’s market power.”<sup>76</sup> Put simply, the Commission has recognized that determining the level of competition in a market requires identifying “what firms produce the [relevant products in the relevant geographic market] (‘market participants’), and what other firms might be able to produce substitutes if the price were to rise (‘market entrants’).”<sup>77</sup> No matter how that test is articulated, any serious market-power analysis can be performed only if the Commission collects the data concerning *all* competitors in a given special access market—and data from the *customers* whose needs and choices are relevant to determining demand and substitutability.

There is now, for the first time, an emerging industry consensus that the Commission *should* collect such data from the major stakeholders before resolving the critical questions presented in this proceeding. In April 2009, USTelecom submitted a detailed proposal for collecting data from competitive providers and their customers, and Qwest generally agrees with

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<sup>76</sup> Second Report, *Second Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, 23 FCC Rcd 15170, 15194 ¶ 80 (2008).

<sup>77</sup> Mem. Op. & Order, *News Corporation and the DirectTV Group, Inc. Transfers*, 23 FCC Rcd 3265, 3280 ¶ 28 (2008).

that proposed approach as a basis for collecting competitive data in a statistically valid cross-section of Phase I and Phase II markets.<sup>78</sup> Until then, virtually all major special access competitors had balked at producing any of their own competitive information, even in the teeth of requests by the U.S. Government Accountability Office and NRRI to produce it.<sup>79</sup> But in June 2009, in response to the USTelecom proposal, a broad coalition of the ILECs' primary competitors and potential customers ("CCIA Coalition") finally acknowledged "the Commission's desire for additional data," "commit[ted] to working with the Commission to find a solution to this important problem," and offered its own counterproposal for a comprehensive data-collection program.<sup>80</sup>

To be sure, the parties are not fully aligned on what types of data should be collected. For example, unlike USTelecom, the CCIA Coalition does not include in its proposal the disclosure of network mapping information needed to demonstrate the location of competitors' facilities and thus their *potential* to offer competition. But such information is critical to the Commission's competitive analysis. And surely these providers cannot object to a government

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<sup>78</sup> *Ex Parte* Letter of USTelecom, WC Docket 05-25 (filed Apr. 27, 2009) ("*USTelecom Letter*").

<sup>79</sup> *See id.* at 2-3. In the past, some parties have encouraged the Commission to shortcut meaningful data collection by instead limiting its inquiry to information about customers' special access purchasing decisions, or by looking to ILECs' 499-A reports to determine ILEC special access revenue shares. *See, e.g.*, Written *Ex Parte* Presentation of Sprint Nextel Corp., WC Docket Nos. 05-25, at 19 (filed Oct. 5, 2007) ("*Sprint Special Access Pricing Ex Parte*"). But as AT&T has explained, under-reporting and other flaws make these highly unreliable proxies for actual and potential competition. *See AT&T Feb. 2008 Ex Parte* at 15-16. Moreover, even apart from those flaws, such static snapshots of market conditions say nothing about *potential* market entry or competitive trends, both of which are critical elements of any assessment of market power.

<sup>80</sup> *Ex Parte* Letter of Computer & Communications Industry Association *et al.*, WC Docket 05-25, at 2 (filed June 3, 2009) ("*CCIA Letter*"). The signatories to this letter include CCIA, Ad Hoc Telecommunications Users Group (which represents certain enterprise customers), BT Americas, T-Mobile, Sprint Nextel, Integra Telecom, One Communications, tw telecom, Cbeyond, and XO.

inquiry into the accuracy of the statements many of them have been making to shareholders and potential customers about the extent of their networks and the ease of serving potential customers.<sup>81</sup>

USTelecom and the CCIA Coalition have also become bogged down in a procedural debate about whether the collected data should be withheld from participants in the proceeding and analyzed exclusively by Commission staff and consultants.<sup>82</sup> In Qwest's view, there is no reason to subject the data collected in this proceeding to super-secret protections more stringent than those the Commission has used successfully in even the most sensitive merger proceedings. And the CCIA Coalition's proposal to withhold much of the data from interested parties, if adopted by the Commission, would not withstand judicial scrutiny, particularly since the burden of proof lies with the advocates of re-regulation to abandon the existing regime.<sup>83</sup> Billions of dollars are at stake in this rulemaking proceeding, and interested parties have a clear right to assess the sufficiency and accuracy of the submitted data and to challenge relevant assumptions. To take just one illustrative example, the CCIA Coalition suggests that each provider should provide certain build-buy-related data only from a "representative subset of the areas" in which it

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<sup>81</sup> See Background § A, *supra* (describing plans of tw telecom and others to build out their existing networks to reach hundreds of thousands of nearby commercial buildings). Where a carrier has made such claims and does not provide responsive data to the Commission, the Commission should treat the marketing statements as evidence of the facts asserted therein.

<sup>82</sup> See *CCIA Letter* at 3 (data should be made available "only to Commission staff and Commission-contracted consultants who then aggregate the data into a report").

<sup>83</sup> See, e.g., *American Radio Relay League v. FCC*, 524 F.3d 227 (D.C. Cir. 2008); see generally Letter from David Lawson, AT&T, to Marlene Dortch, WC Docket No. 05-25 (July 10, 2009).

provides service.<sup>84</sup> If such a limitation were adopted, other parties should be entitled to challenge the provider's assumptions in selecting the relevant "subset."

In all events, the details about *how* these critical data should be collected and protected should not obscure the central significance of this development: a general consensus has now emerged that, to resolve the core disputes in this proceeding, the Commission needs to collect comprehensive data from all relevant stakeholders, and not just from ILECs. This new consensus confirms what the Phoenix Center made clear in a study it conducted last spring: "At the end of the day, the crux of the problem [in resolving the special access debate] is that there *simply is not sufficient data to make an informed decision* about the state of competition in the markets for high capacity services and, by extension, whether additional regulation is warranted."<sup>85</sup>

The Commission should accordingly adopt a plan to collect comprehensive competitive data for each of the areas that it chooses as a sample market in connection with the proposal discussed below. It should collect such data not just from ILECs and conventional wireline CLECs, but also from the cable companies and wireless backhaul providers that are current or potential providers of special access services in direct competition with ILECs. *See* pp. 13-15, *supra*. It should collect information about all transmission services that those competitors provide, including not just literal substitutes for the TDM-based DS<sub>n</sub>-level ILEC services at issue here (including channelized fiber facilities), but all other services as well, since in many

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<sup>84</sup> *CCIA Letter* at 7, § III.B.1.b ("For a representative subset of the areas in which the alternative provider offers service, [it should] provide the number of commercial buildings to which the competitor has not deployed Transmission Facilities but that meets the competitor's criteria for deploying Transmission Facilities pursuant to its build/buy analysis.").

<sup>85</sup> George S. Ford & Lawrence J. Spiwak, *The Need for Better Analysis of High Capacity Services*, Phoenix Center Policy Paper No. 35, at 39 (June 2009), <http://www.phoenix-center.org/pcpp/PCPP35Final.pdf> (emphasis added).

contexts those other services compete with these ILEC services and thus constrain their prices. The Commission should likewise collect competitive data from *wholesale fiber providers*, which likewise compete with ILECs as well in the provision of telecommunications solutions to both carriers and enterprise customers. *See* p. 17, *supra*. Finally, the Commission should also collect relevant data from all special access customers that elect to participate in this proceeding—including (though not limited to) the members of Ad Hoc and the wireless carriers that appear in this proceeding as *consumers* of special access services.

The substantive types of data the Commission should collect are well summarized in the USTelecom Letter, which *does* include important network mapping information, and Qwest agrees that the “build/buy decision” data that is included as Category III in the CCIA Letter should be included in the list as well. That category should be expanded, and phrased less negatively, to include each competitor’s full analysis of the costs of extending existing facilities (such as laterals from fiber rings) to serve new customers (such as commercial tenants in unserved buildings). Competitors should be required to explain their assessment of those costs, including what role UNEs, leased conduit, and other alternatives to special access services play within their analyses.

For the markets it studies, the Commission should also collect ILEC special access pricing data. Given that customers may buy under tariff, under general discount plans, and under more specialized pricing arrangements, the best measure of an ILEC’s special access prices within an MSA is the average per-unit revenue it collects in that MSA.<sup>86</sup> However the Commission proceeds, it should use the same “pricing” measure across all markets it intends to compare.

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<sup>86</sup> *See* Tardiff-Weisman Decl. at ¶ 17 n.12.

Finally, as it begins collecting market-specific data, the Commission should elicit more specific comment on the criteria it should use to determine whether particular markets are sufficiently subject to competition that the rates ILECs charge for special access in those markets can be deemed just and reasonable by definition. In formulating those criteria, the Commission should bear the following key points in mind, which are discussed more fully in the attached declaration of Dr. Tardiff and Professor Weisman.

*First*, the goal of performing a market *power* analysis is not to identify current market *share*. As the Commission and the courts have long emphasized, a competitor can discipline special access prices even in places where it does not *currently* offer service so long as it has facilities nearby and could cost-efficiently extend them to provide competitive services if the incumbent were to raise its prices. And the presence of *one* competitor in a market—whether or not it has yet captured significant market share—may indicate that competition is feasible and that expansion and further competitive entry are possible too.

These points are not subject to serious dispute. After the D.C. Circuit criticized the FCC’s failure to account for such factors when implementing the Section 251 unbundling rules,<sup>87</sup> the Commission acknowledged on remand that it must “account[] for actual *and potential* deployment”—in part by “inferring from competitors’ facilities deployment in one market the ability of a reasonably efficient competitor to enter in another, similar market in an economic manner.”<sup>88</sup> The Commission has similarly relied on potential entry in many other contexts, finding that “emerging competition” from intermodal competitors can pressure incumbents to

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<sup>87</sup> *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) (“*USTA II*”) (“We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment.”).

<sup>88</sup> *TRRO*, 20 FCC Rcd 2533, 2558-59 ¶ 43.

offer their customers “reasonable rates and terms.”<sup>89</sup> It has especially stressed the significance of potential entry in dynamic marketplaces, where “snapshot [market share] data . . . may quickly and predictably be rendered obsolete as this market continues to evolve.”<sup>90</sup> And the D.C. Circuit recently reaffirmed once more that whether a provider “can exercise ‘bottleneck monopoly power depends . . . not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition.”<sup>91</sup> In sum, “[i]t has been “many years since anyone knowledgeable about [competitive analysis] thought that concentration by itself imported a diminution in competition.”<sup>92</sup>

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<sup>89</sup> Mem. Op. & Order, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958, 1988 ¶ 45 n.144 (2007); see also *SBC Communications Inc. & AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18313 ¶ 44 (2005) (“*SBC/AT&T Merger Order*”) (finding that even in wire centers where the merger would eliminate the one, existing, facilities-based competitor, competitors after the merger are likely to have incentives to construct substitute collocations. The extensive local fiber networks already deployed by other competitors . . . indicate that these competitors are likely to find it both technically and economically feasible to construct additional collocations.”); Mem. Op. & Order, *Verizon Communications Inc. and MCI Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18455 ¶ 44 (2005) (“*Verizon/MCI Merger Order*”); *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 18313 ¶ 51.

<sup>90</sup> Report & Order & Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50 (2005); *Enterprise Broadband Forbearance Order*, 22 FCC Rcd at 18719 ¶ 23 (“In light of . . . the emerging and evolving nature of this market, and consistent with traditional market power analysis, we do not find it essential to have such detailed [market share] information and would not give significant weight to static market share information in any event.”).

<sup>91</sup> *Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009) (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 661 (1994); *Time Warner Entm’t Co. v. FCC*, 240 F.3d 1126, 1134 (2001)); see also *United States v. Syufy Enters.*, 903 F.2d 659, 665-66 (9th Cir. 1990) (“In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.”) (emphasis added); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (market share is imperfect measure because market must be examined in light of access to alternative supplies); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (market share statistics “misleading” in a “volatile and shifting” market).

<sup>92</sup> *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994).

*Second*, the number of competitive alternatives—actual and potential—need not be particularly large in order to limit an ILEC’s market power, given the high fixed costs and low marginal costs of providing special access services. Faced with any competitive threat, ILECs will have unusually strong incentives to keep prices low to retain and recruit as many customers as possible, in that few costs are avoided, yet substantial revenues are lost, if any customer defects to an alternative provider.<sup>93</sup> *Third*, the number of competitive alternatives should be measured on the basis of a demand-weighted index that assigns a greater weight to actual and potential competition for customers and locations with greater potential revenues. In other words, that number should *not* be based on a simplistic metric that treats real or potential competition for every gas station or drycleaner as though it were the equivalent of competition for the commercial tenants in a 50-story office building.<sup>94</sup>

The data the *US Telecom Letter* identifies, together with the expanded build-buy decision and other data described above, should help the Commission identify existing competition and market shares, as well as the potential for market expansion and entry by the many different competitors in this marketplace. Of course, the analysis here may be complex: different providers have different cost structures, and competition may be more or less economically feasible depending on the facilities involved (*e.g.*, wireless backhaul versus copper or fiber facilities). But only a robust analysis of all the data will permit a meaningful market-power assessment that takes into account the likely evolution of the market over the next several years.

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<sup>93</sup> See Timothy J. Tardiff, *Changes in Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications*, 4 Int’l Econ. & Econ. Pol. 109 (2007); see also Tardiff-Weisman Decl. at ¶ 13.

<sup>94</sup> See Tardiff-Weisman Decl. at ¶ 50 & n.52.

### III. THE COMMISSION SHOULD CONDUCT A MARKET-POWER ANALYSIS FOR A STATISTICALLY VALID CROSS-SECTION OF PHASE I AND PHASE II MARKETS.

Until its June 2009 about-face, the CLEC community, even while calling for multi-billion-dollar price reductions on the false premise that the special access market is “uncompetitive,” had long resisted any methodical collection of the competitive special access data needed to test that premise, all on the pretext that it would be too burdensome to provide such information and would take too long. That was a mere diversionary tactic, which the CCIA Coalition has now apparently abandoned. Qwest agrees that the Commission could not administrably collect the needed data and conduct a market-power analysis for *every* market within the United States—or even for every *Phase II* market. But the Commission can and should conduct such an analysis for a statistically fair cross-section of relevant markets. Again, Qwest proposes that the Commission select a statistically valid cross-section of Phase I and Phase II markets, stratified to ensure, for example, that the sample set includes markets from different regions with different ILECs and different population and economic characteristics.<sup>95</sup> For each of the markets in the sample, the Commission would then collect the relevant data from the various stakeholders and conduct the market power analysis described above. In these markets, the Commission also would collect ILEC pricing data, as discussed above.

The results of this analysis will allow the Commission to make a number of assessments concerning whether the Commission’s existing collocation triggers are accurate proxies for competition and, more generally, whether the proponents of re-regulation have met their burden of showing that special access rates are unreasonable.

*First*, the data will enable the Commission to draw several conclusions with respect to *Phase II markets* in particular. As discussed, if a sampled Phase II market is found to be

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<sup>95</sup> See Tardiff-Weisman Decl. ¶ 45.

competitive, the rates an ILEC charges in that market are just and reasonable by definition. If virtually all of the statistically sampled Phase II markets are competitive, the Commission could reasonably extrapolate that rates in the *non-sampled* Phase II markets are also just and reasonable. Similarly, if the Commission finds that virtually all of the sampled Phase II markets are competitive, that finding would undermine the claim of re-regulation advocates that the Commission's existing collocation triggers produce many "false positives": *i.e.*, that they treat many markets as competitive when they are not. If the analysis were to show instead that a significant number of sampled Phase II markets are *not* competitive, that might give the Commission a basis, depending on the data, for altering its collocation triggers or choosing new competitive proxies—just as a finding that some sampled *Phase I* markets are *competitive* would warrant adjustments to the existing proxies to make them more inclusive (see below). Of course, any finding that a Phase II market is less than fully competitive would not require any change to the actual rate levels in that market unless, among other things, the parties seeking such a change meet their burden of demonstrating that those rate levels are unjust and unreasonable (*e.g.*, by using the benchmark methodology described below).

Significantly, although the ultimate competitive analysis should be conducted at an MSA level for the reasons discussed above, the results would also address arguments by CLECs, Sprint, and others about the feasibility of providing special access services to particular sites, even in Phase II MSAs. For the first time, the Commission will have hard data about the location of competitors' facilities and the cost of extending those facilities to individual customer locations. The data collected will also permit the Commission to resolve, once and for all, a variety of dubious claims by CLECs and others that cable companies serve only residential neighborhoods and not business districts; that wireless carriers cannot feasibly bypass ILEC

networks for backhaul from cell towers; and that CLECs cannot feasibly provide Ethernet over DS-1s and DS-3s.

*Second*, because ILEC rates in a Phase II market that is deemed competitive are necessarily the product of competition, they are “just and reasonable” by definition, and the Commission can use such rates as benchmarks for judging the reasonableness of rates *in non-Phase II markets*.<sup>96</sup> Suppose, for example, the Commission wishes to assess the reasonableness of an ILEC’s special access rate in a particular Phase I or price cap market (the “*target market*”). The Commission could select one or more of the sampled Phase II markets that are most comparable to the target market: for example, a market or markets with the same ILEC, in the same geographic region, with similar density, etc. The evidence may well show that, because price cap levels have been set too low, the rates in Phase I and price cap markets are comparable to or indeed lower than the rates in the Phase II markets that the Commission confirms are competitive. If so, the rates in Phase I and price cap markets are necessarily reasonable as well from the perspective of any customer, because in general the per-unit network costs in such markets are comparable to or—particularly in the case of price cap markets—*higher* than the corresponding costs in competitive Phase II markets, which typically attract competitive entry precisely because they feature robust economies of scale and density. Of course, if the rates in relevant Phase I or price cap markets are higher than the benchmark rates in competitive Phase II markets, further investigation may be warranted to explain the discrepancy.

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<sup>96</sup> By contrast, the rates even in a competitive Phase I sampled market would *not* be appropriate for use as a benchmark for assessing the reasonableness of rates in other markets. While the rates in such a Phase I market will be constrained by competition and thus be no *higher* than just and reasonable levels, regulation may nonetheless have artificially depressed the rates *below* the levels that would emerge in an unregulated, competitive market. As a result, the rates in such markets could not serve as appropriate benchmarks. See Tardiff-Weisman Decl. at ¶¶ 54-55.

Further, if the comparison shows that rates in price cap markets are roughly equal to or lower than those in competitive markets, that would put an end to hyper-regulatory proposals for lowering price caps through rate “reinitialization,” the imposition of a new “productivity factor,” or otherwise. Indeed, such a finding may well indicate that the Commission should increase price cap levels or otherwise provide greater rate flexibility for ILECs in those markets.

The Commission will need to ensure sound, apples-to-apples comparisons for purposes of this analysis. In particular, because the purpose of these comparisons is to assess the reasonableness of rates for *ILEC* services in the target markets, the appropriate point of comparison in the *sampled* market will also be rates for the same ILEC services.<sup>97</sup> The rates for other providers’ services are irrelevant, and in any event, both cost differences and differences in the way ILECs and their competitors offer (and guarantee) their services generally preclude meaningful comparisons *between* ILEC and CLEC (or wireless or cable) rates. *See* p. 24, *supra*. An apples-to-apples comparison of ILEC rates is also far preferable simply from an administrability perspective, because it would avoid intractable disputes about whether a given CLEC service in the sampled market is the “same” service as the ILEC service in the target market.

The Commission could repeat this benchmark analysis for any Phase I and price cap markets it chooses. That inquiry would be highly administrable because it would not require any additional data collection or detailed market analysis. Again, moreover, it would allow the Commission to make a reasonableness determination based *on actual rate data* in competitive markets, rather than on indirect measures such as rate-of-return figures. As discussed below, such indirect measures cannot provide a defensible basis for assessing the reasonableness of

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<sup>97</sup> As discussed, the Commission may need to compare average revenue per unit rather than individual prices to get a sense of the rates that ILECs actually charge their customers.

ILEC rates, particularly where, as here, the Commission has access to *direct* evidence of the rates that market forces deem reasonable in *actual competitive markets*.

*Third*, the Commission should collect data from sample *Phase I* markets as well.

Although data from a sample of Phase II markets could confirm that the triggers are not *overinclusive*, such data would not provide a full basis for evaluating whether, as Qwest believes, the triggers are *underinclusive* because they fail to capture competition from cable companies and other competitive providers that avoid any need to collocate within ILEC central offices. A rigorous competitive analysis of sample Phase I markets would help resolve that longstanding concern.

As with Phase II markets, the sample of Phase I markets should be stratified to ensure that it picks up a range of markets for each ILEC. These include, in Qwest's case, such large Phase I markets as Denver, Minneapolis, and Seattle, which remain improperly classified as Phase I for channel terminations despite the proliferation of intermodal competition. If at least some Phase I markets are fully competitive even though they do not meet the existing triggers for Phase II pricing flexibility, it would follow both that those markets should be reclassified as Phase II markets and that the triggers should be revised to capture the full range of special access competition. Of course, any *absence* of competition found in non-Phase II markets would not, of itself, establish that more stringent regulation is needed; it may alternatively be that regulation itself has artificially deterred competitive entry by keeping ILEC prices below competitive levels, and further inquiry into those issues would be needed.<sup>98</sup>

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<sup>98</sup> See Tardiff-Weisman Decl. at ¶ 56.

**IV. THE COMMISSION SHOULD REJECT PROPOSALS TO ASSESS THE REASONABLENESS OF SPECIAL ACCESS RATES USING INDIRECT RATE-OF-RETURN ANALYSIS.**

Pro-regulation advocates have repeatedly cited ARMIS data as evidence that ILECs are earning “too much” for special access services. In Section IV.A below, and in the attached declaration of Dr. Tardiff and Professor Weisman, we briefly summarize why—as Qwest and others have exhaustively explained before—ARMIS data are irremediably flawed as a basis for drawing any conclusion about rates of return for any ILEC’s special access services. In Section IV.B, we then explain, more generally, why it is inappropriate to rely on *any* rate-of-return analysis as a basis for indirectly assessing the “reasonableness” of rates in a historically regulated industry, particularly where—as discussed—direct evidence of rates is available for the relevant services in competitive markets.

**A. ARMIS Provides No Basis for Concluding That ILEC Rates Of Return Are “Too High”.**

As the Commission has recognized, ARMIS data—which record the historical costs of joint-use facilities—are not intended to serve as a basis for assessing the reasonableness of service-specific rates.<sup>99</sup> Nothing has changed in the meantime to draw that conclusion into doubt; to the contrary, because of cost-allocation anomalies, ARMIS has become steadily *less* reliable as a basis for assessing the reasonableness of special access rates in particular. Because Qwest and others have addressed this issue at length in previous comment rounds,<sup>100</sup> we provide here only a very brief summary of the main points.

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<sup>99</sup> Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Red 2637, 2730 ¶ 199 (1991) (category-specific returns reported in ARMIS “do[] not serve a ratemaking purpose”).

<sup>100</sup> See, e.g., *Qwest 2007 Comments* at 50-53; *AT&T 2007 Comments* at 34-39. Even the NRRI Report “agree[s]” that “the ARMIS figures are virtually meaningless.” *NRRI Report* at 74.

ILECs report their ARMIS results after applying the Commission's Part 36 and Part 69 rules to apportion their plant investment into interstate and intrastate buckets and then further separate them into various categories, including special access and switched access.<sup>101</sup> As the Commission has long explained, that allocation process is inherently arbitrary, because there is no definitive way to apportion common and shared costs among different services or between the interstate and intrastate portions of particular investments.<sup>102</sup> And the separation factors—arbitrary to begin with—have been frozen since 2001, based on 2000 data.<sup>103</sup>

The Commission has repeatedly extended that freeze, most recently last year.<sup>104</sup> As a result, to the extent that ARMIS results ever bore a meaningful relationship to reality, they have become increasingly unhinged from it year after year. Since 2000, special access volumes and revenues have increased, while ILEC *switched* access volumes and revenues have decreased. The separations freeze, however, keeps ILECs from adjusting their ARMIS allocations to account for the increasing percentage of investment and costs that should be attributed to special access services. ARMIS data thus show increasing special access *revenues* while grossly understating the *costs* associated with those services—thereby producing radically overstated rate-of-return figures. The ARMIS data's departure from reality has grown exponentially worse over time as the amount of special access growth (and switched access loss) has accelerated.

The FCC's decision to relieve Qwest and other ILECs from certain elements of the ARMIS

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<sup>101</sup> See 47 C.F.R. Parts 36, 69.

<sup>102</sup> See Fourth Further Notice of Proposed Rulemaking, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 13659, 13669 ¶ 63 (1995) (finding “no evidence that there was an economically meaningful way to divide and measure the facilities used for the provision of interstate service from facilities used for provision of intrastate services”).

<sup>103</sup> See Report & Order, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 16 FCC Rcd 11382, 11383 ¶ 2 (2001).

<sup>104</sup> Report & Order, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, 24 FCC Rcd. 6162 (2009).

reporting requirements two years ago has unmoored ARMIS results even further from the economic reality of special access costs.<sup>105</sup>

**B. Net Revenues Are Not a Legitimate Basis to Assess the Reasonableness of Rates.**

Even apart from the specific deficiencies of ARMIS data, a provider's accounting rate of return does not reliably indicate anything about the reasonableness of its rates. First, as policymakers and economists have long understood, it is economically meaningless to allocate specific rates of return to particular services provided over mixed-use facilities, particularly those deployed in the past and subject to varying depreciation schedules.<sup>106</sup> It would be especially meaningless to apply such service-specific rates of return to the traditional special access services at issue in this proceeding: TDM-based DS<sub>n</sub>-level circuits, which ILECs typically

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<sup>105</sup> Mem. Op. & Order, *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(C)*, 23 FCC Rcd 18483 (2008). Perhaps recognizing the flaws in ARMIS, some advocates have instead suggested that the Commission assess the reasonableness of ILEC special access rates by comparing those rates to TELRIC costs instead. See, e.g., *Sprint Special Access Pricing Ex Parte* at 86-90. But the Commission itself has recognized that TELRIC "understat[es] forward-looking costs," "might not . . . achieve fully the Commission's goal of sending appropriate economic signals," is "extremely complicated," "excessively hypothetical," and "very general," and leads to highly "variable results" in UNE prices that do not in fact "reflect genuine cost differences." Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, 18947, 18949 ¶¶ 3, 6, 7 (2003) ("*TELRIC NPRM*"). It would thus make no sense to compare an ILEC's *real world* rates and net revenues to entirely *hypothetical* costs. Moreover, if the Commission were to force down special access rates to TELRIC, it would unlawfully conflate special access services with unbundled network elements and violate the statutory limits on access to such elements. See, e.g., 47 U.S.C. § 251(d)(2); see generally *Qwest 2007 Reply Comments* at 11-13.

<sup>106</sup> See Tardiff-Weisman Decl. ¶ 23-24 (citing scholarship of Professors William Baumol, Robert Willig, and Alfred Kahn, among others); see also *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1117 (7th Cir. 1983) (noting academic consensus that any derivation of "fully allocated cost" for a given product produced by a multi-product firm is "a mare's nest of arbitrary calculations parading as substantive information") (quoting William Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1, 9 n.26 (1979)).

provide over legacy copper facilities. As discussed, the future of this industry belongs to highly competitive, fiber based, OCn-level services. ILECs therefore no longer concentrate their investment in DSn-level facilities, many of which are substantially depreciated. Under any assessment, therefore, and using any set of cost data, the “costs” (including depreciation expense) for those facilities reflected on ILEC books have dropped considerably. The result: a special access rate that might have produced a low rate of return a few years ago could produce an artificially high rate of return today—not because the rates themselves suddenly became unreasonable, but because of the peculiarities of accounting data.

In the attached declaration, Dr. Tardiff and Professor Weisman demonstrate this phenomenon in detail. They show how investment that produces a steady *economic return* over its lifetime would nevertheless produce a higher and higher *accounting* rate of return as the underlying investment is depreciated—even if the revenues each year remain entirely uniform.<sup>107</sup> In other words, accounting rates are entirely artificial measures of net revenues that depend on judgmental and/or arbitrary factors such as depreciation “and the pattern of net revenues over the lifetime of the assets.”<sup>108</sup> In practice, the authors explain, the high margins that result from a cursory analysis of Qwest’s and other ILECs’ ARMIS data do not reflect some unjust increase in revenues or even real profitability. Instead, they are merely “an artifact of [the reduced depreciation cost assigned to] relatively old assets (which, in turn is the result of the relatively slow pace of new investment), rather than supracompetitive economic profits.”<sup>109</sup> This analysis bears out the observation of Professor Jonathan Baker (now FCC Chief Economist) that “the way accountants spread costs over time and adjust asset values for depreciation frequently causes

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<sup>107</sup> See Tardiff-Weisman Decl. ¶¶ 22-37.

<sup>108</sup> *Id.* at ¶ 24.

<sup>109</sup> *Id.* at ¶ 28.

accounting measures of profit to bear little relation to those underlying economic concepts that might in principle be related to market power.”<sup>110</sup>

In any event, even if there *were* some economically defensible way to derive service-specific rates of return for legacy special access facilities, forcing down ILEC rate levels based on the outcomes of such inquiries would undermine 20 years of regulatory progress since the rate-of-return era. The *very point* of price cap and other incentive-based regulation is to give ILECs appropriate incentives to pursue high rates of return by cutting costs and increasing efficiencies. Penalizing ILECs now for earning “too high” a rate of return would subvert those very incentives. As the Commission has acknowledged, once a regulator abandons rate-of-return regulation, it would be “unreasonable” to assert that a provider’s “prices are ‘too high’ (*i.e.*, they exceed accounting measures of underlying costs)” to “fall within a zone of reasonableness” and should therefore be ratcheted down on the basis of accounting data.<sup>111</sup> Indeed, any regime that periodically recalibrates rates on the basis of ILEC rates of return would constitute rate-of-return regulation by another name. As the Commission itself has explained:

Because the basic theory of our existing price cap regime is that the prospect of retaining higher earnings gives carriers an incentive to become more efficient, we believe that *rate of return-based reinitialization would have substantial pernicious effects on the efficiency objectives of our current policies*. In this regard, we have often expressed concern in past price cap orders that maintaining links between rate levels and a carrier's achieved rate of return would *undercut the efficiency incentives price cap regulation was designed to encourage*.<sup>112</sup>

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<sup>110</sup> Baker & Bresnahan, *supra*, at 5.

<sup>111</sup> Report & Order, *Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates*, 10 FCC Rcd 7486, 7538 ¶ 118 (1995).

<sup>112</sup> *Access Charge Reform Order*, 12 FCC Rcd at 16107-08, ¶ 292 (emphasis added; footnote omitted).

Exactly so. And the Commission has no reasoned basis for concluding otherwise now or for resurrecting rate-of-return regulation, whether explicitly or implicitly.

Finally, the Commission could not reasonably address any allegedly “high” rate of return for special access services without addressing the overall effect of its actions on each ILEC’s overall financial health, its ability to continue providing carrier-of-last-resort service in high-cost areas, and its capacity for making enormous capital investments in broadband infrastructure.<sup>113</sup> The risk of regulation-induced undercapitalization is particularly acute for Qwest, since it stands alone among most major ILECs in that it lacks a wireless business. As a result, Qwest faces even greater challenges generating revenues for next-generation investment than many other ILECs do.<sup>114</sup> As Dr. Tardiff and Professor Weisman explain, in an era of increasing competition and falling revenues across most legacy services such as ordinary switched access over the PSTN, Qwest and other ILECs would have little opportunity to make up lost special access revenues through an offsetting price increase for other services. Indeed, under some scenarios, forcing down special access rates could reduce Qwest’s rate of return to dangerously low and potentially confiscatory levels.<sup>115</sup> That would undermine Qwest’s ability to undertake infrastructure investment, cost-reducing innovation, and network modernization: all of which

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<sup>113</sup> The Commission’s system of cross-subsidization across the ILECs’ various services is deliberate and longstanding. *See, e.g., Qwest Communications Int’l, Inc. v. FCC*, 398 F.3d 1222, 1238 (10th Cir. 2005); *NASUCA v. FCC*, 372 F.3d 454, 459 (D.C. Cir. 2004) (FCC acknowledged that access charges continue to provide implicit subsidies); Order on Remand, Further Notice of Proposed Rulemaking, Mem. Op. & Order, *Federal-State Joint Board on Universal Service*, 18 FCC Rcd 22559, 22561, 22567-69, 22571-72, 22621-22, ¶¶ 2, 14, 15, 22, 105 (2003) (describing implicit support mechanisms).

<sup>114</sup> *See, e.g., Andrew Berg, AT&T’s Profits Soar on Wireless, U-Verse Revenues*, CedMagazine.com, Oct. 22, 2009, <http://www.cedmagazine.com/ATTprofits-wireless-U-verse-revenues-102209.aspx>; Dianne See Morrison, *Earnings: Verizon Earnings Up 15 Percent, Boosted By Wireless And Broadband Units*, CBS News, Jan. 27, 2009, <http://www.cbsnews.com/stories/2009/01/27/paidcontent/main4755666.shtml>.

<sup>115</sup> Tardiff-Weisman Decl. ¶ 35.

are necessary to meet this Commission's supervening goal of ubiquitous broadband deployment to all American communities.

### CONCLUSION

The Commission should base any adjustments to its existing special access regime on a genuine market-power analysis, based on competitive data, rather than on alleged ILEC rates of return.

Respectfully submitted,

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