Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

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Sprint Nextel Corporation ("Sprint") submits these reply comments in response to the *Public Notice* issued by the Federal Communications Commission ("FCC" or "Commission") on November 5, 2009, in the above-captioned proceedings, seeking comment on the analytical framework necessary to resolve outstanding issues related to special access.[1]

I. INTRODUCTION AND SUMMARY

In its initial comments, Sprint provided the FCC with a robust analytical framework that the Commission could use to evaluate the efficacy of its existing price

[1] Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd 13638 (2009) ("*Public Notice*"); *see also* Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM; Extension of Reply Comment Date to February 24, 2010*, WC Docket No. 05-25, RM-10593, DA 10-244 (rel. Feb. 12, 2010).

cap and pricing flexibility rules and which would provide the FCC the necessary information to modify these rules if it determined such action was appropriate.

Sprint noted the importance of defining relevant geographic and product markets, and provided guidance regarding how the Commission should undertake that process.[2] Sprint also discussed the various factors the Commission should use to analyze whether the incumbent local exchange carriers ("LECs") remain dominant in the provision of special access, including market shares and concentration, demand elasticity, supply responsiveness and cost structure.[3] In addition, Sprint recognized the need for the Commission to collect and analyze additional data from a variety of parties – including incumbent and competitive providers as well as purchasers of special access services – as part of its comprehensive effort to determine the effectiveness of the current rules governing special access pricing.[4] Finally, based on the current record, Sprint recommended that the Commission provide interim relief while it collects the data necessary under Sprint's proposed analytical framework.[5]

The Bell Operating Companies' ("BOCs'") filings, in contrast, were short on details about an appropriate analytical framework but long on misguided rhetoric about what the collection of relevant data might show about special access prices. The BOCs

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2 Comments of Sprint Nextel Corporation at 9-16 ("Sprint Comments"). (Unless otherwise indicated, all comments cited herein were filed in WC Docket No. 05-25 on January 19, 2010.)

3 Sprint Comments at 17-24.

4 Sprint Comments at 45.

5 Once it completes its evaluation of the special access marketplace, the Commission should adopt permanent reforms of its price cap and pricing flexibility rules to address the problems revealed by its analysis.

wrongly attempted to convince the Commission that the elements of a competitive analysis – such as market share and the relationship between the price and costs of special access services – are irrelevant, meaningless, unknowable, or otherwise not worthy of the Commission's time and attention.[6] Unsurprisingly, despite their resistance to providing data themselves, the BOCs urged the Commission to extract voluminous amounts of information from other carriers about a wide range of topics.[7] The relevant information remains with the BOCs and the Commission should not hesitate to request that it be provided.

The Commission should reject the efforts by the BOCs and other incumbent LECs to severely limit the rigorous analytical process that the FCC initiated in the *Public Notice*. Instead, the FCC should move forward expeditiously and issue a request seeking

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[6] Comments of AT&T Inc. at 42-43 (disputing the relevance of market share data) ("AT&T Comments"); *id.* at 10 ("there is no economically meaningful or legally sustainable way to determine special access 'profits'"); Comments of Verizon and Verizon Wireless at 29-30 (downplaying the significance of market share analyses) ("Verizon Comments"); *id.* at 43 (it would not be "practical or feasible" for the FCC to calculate special access profits); Comments of Qwest Communications International Inc. at 36-37 (market share data quickly becomes obsolete and fails to signify market power) ("Qwest Comments"); *id.* at 4 ("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." (emphasis omitted)).

[7] AT&T Comments at 40-44; Verizon Comments at 34-36 (arguing, *inter alia*, that competitive providers of high capacity services should be required to "provide data or maps that show the location of all of their transmission facilities, whether wireline or wireless, that they or their affiliates own, lease or otherwise obtain that are capable of providing high capacity transmission for their own use or for their retail or wholesale customers"); Qwest Comments at 31-35; *see also, e.g.*, Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, WC Docket No. 05-25, at 1-2 (June 18, 2009) (urging the Commission to obtain additional data from competitive providers). Indeed, AT&T and Verizon even urge the Commission to require competitive access providers to provide highly proprietary information about their future build-out plans. *See* AT&T Comments at 41-42; Verizon Comments at 36.

relevant data that will permit it to complete its analysis in accordance with the framework described by Sprint.[8] Sprint is confident that the analysis will confirm what the evidence currently in the record already shows: that the incumbent LECs remain dominant in the provision of special access and that the current rules allow the incumbents to charge excessive rates and impose unjust and unreasonable terms and conditions.[9]

The incumbent LECs' ability to exploit their market power has created well-documented harms to purchasers of special access service and, thus, to the U.S. economy as a whole.[10] The burdens that unjust and unreasonable special access prices, terms and conditions impose on Sprint and other customers have increased over the years that the current regulatory regime has been in effect, retarding the development of competition and harming consumers that rely on the wide range of services that depend on special access as a key input. And these burdens show no sign of abating. Therefore, it is critical that the FCC act swiftly to reform the existing special access rules to protect

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8 Sprint Comments at Section II; Declaration of Bridger M. Mitchell, Attachment A to Sprint Comments, at Section III ("Mitchell Decl.").

9 Sprint Comments at 25-30 and Section VI; Comments of the Ad Hoc Telecommunications Users Committee at 3-4, 9 ("Ad Hoc Comments"); Comments of COMPTEL at 4-6 ("COMPTEL Comments"); Comments of the NoChokePoints Coalition at 18-19 ("NoChokePoints Comments"); Comments of PAETEC Holdings Inc.; TDS Metrocom, LLC; U.S. TelePacific Corp., d/b/a TelePacific Communications and Mpower Communications Corp., d/b/a TelePacific Communications; Masergy Communications, Inc.; and New Edge Network, Inc., at 9-10 ("PAETEC, *et al.* Comments"); Comments of Level 3 Communications, LLC (Redacted Version) at 24-26 ("Level 3 Redacted Comments").

10 *See, e.g.*, Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, at 6 (Aug. 8, 2007) (noting that special access overcharges were costing businesses over $20 million per day); Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 33-36 (Aug. 8, 2007).

special access customers from further harm, to promote competition, and to provide a much-needed stimulus to the U.S. economy.

II. THE FCC SHOULD EXPEDITIOUSLY ISSUE A DATA REQUEST BASED ON THE COMPREHENSIVE ANALYTICAL FRAMEWORK SET FORTH BY SPRINT AND OTHER PARTIES

A. The FCC's Analytical Framework Must Address DS1 and DS3 Services

1. DSn Services Are Essential Inputs, Both Currently and for the Foreseeable Future, to Many Retail Services

DSn-level special access services currently are critical inputs to a wide range of services, including traditional wireless and wireline offerings as well as numerous broadband services. Therefore, it is vital that the Commission fulfill its statutory mandate to ensure that DS1 and DS3 special access services are available at rates, and on terms and conditions, that are just and reasonable.[11]

The BOCs attempt to minimize the importance of DS1 and DS3 services, arguing, in effect, that the Commission should not be concerned about whether these services are priced at just and reasonable levels.[12] The BOCs' arguments are belied by the fact that demand for DS1s and DS3s accounts for billions of dollars in special access revenues annually and comprises a significant percentage of overall special access revenues.[13] As

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[11] 47 U.S.C. § 201(b) (requiring that all charges, practices and classifications for and in connection with interstate common carrier services must be just and reasonable, and requiring that any charge, practice or classification that is unjust or unreasonable must be declared to be unlawful).

[12] *See, e.g.,* AT&T Comments at 13 (arguing that broadband is making DSn-level special access services obsolete); Qwest Comments at 19; Verizon Comments at 15.

[13] *See* the price cap revenues reported in AT&T's and Verizon's RTE-1 reports contained in the Tariff Review Plans filed with their 2009 annual access filings (showing that Verizon and AT&T had nearly $4 billion dollars in revenues from DS1 and DS3 services under price caps alone, representing *82%* of all special access revenues still under price caps). Even these figures underestimate the significance of DS1 and DS3

Footnote continued on next page

Sprint has previously noted, it currently provides EvDO Rev A data services and voice service to the majority of the POPs in the United States using three or fewer DS1 circuits.[14] In short, DSn services remain a central component of current networks.

It is also incorrect to suggest that DSn circuits are limited to providers of legacy services. To the contrary, DS1 and DS3 services are essential inputs for the provision of both wireless and wireline broadband services.[15] Even AT&T has acknowledged the role that DS1 and DS3 facilities play in the provision of competitive broadband services.[16] Indeed, DSn services remain the primary source of broadband connectivity for the vast majority of businesses in the United States.[17]

Nor is the need for DSn facilities likely to diminish significantly for the foreseeable future. Major special access customers, including Sprint, Level 3 and T-Mobile, have emphasized that they will continue to rely heavily on DS1 and DS3

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revenues, given that they do not account for the billions of dollars in additional revenues the incumbent LECs likely earn from DS1 and DS3 services that are no longer subject to price caps.

[14] Comments of Sprint Nextel Corporation, GN Docket Nos. 09-47, 09-51, and 09-137, at 5 (Nov. 4, 2009) ("Sprint NBP PN #11 Comments").

[15] *See* Comments of Sprint Nextel Corporation, GN Docket No. 09-51, at 11-12 (June 8, 2009); *see also* "Expanding Wireless Broadband," presentation attached to letter from Paul Margie, Counsel for Sprint Nextel, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 7 (Jan. 13, 2010).

[16] *See* Opposition of AT&T Inc. to Cbeyond's Petition for Expedited Rulemaking, WC Docket No. 09-223, at 21 (Jan. 22, 2010) (stating, in response to CBeyond's request for access to fiber and hybrid loops to provide broadband services, including high-speed Internet access to small businesses, that "a DS-3 loop, for example, offers 44.7 Mbps of capacity, which is many times the amount that Cbeyond supposedly needs. Cbeyond also could obtain multiple DS-l loops [to meet its needs] at a given location.").

[17] *See, e.g.*, Ad Hoc Comments at 1 (explaining that its member businesses continue to rely on "workhorse DS1s").

facilities to provide both mobile and fixed broadband services for many years to come.[18] Accordingly, the Commission should not be swayed by the BOCs' arguments that these services need not be examined as part of the FCC's analysis of special access services.[19]

2. Needed Reform of the Commission's Special Access Regulatory Regime Will Promote Investment in Broadband Facilities

The BOCs allege that regulatory reforms that reduce their rates for DSn-level services would cause them to reduce their broadband investments.[20] The Commission must disregard this line of reasoning for two reasons. First, the Communications Act does not permit a carrier to assess unreasonable prices for its monopoly services, regardless of the carrier's purported motive in setting those prices or the carrier's promises to use its profits to fulfill particular goals, no matter how laudable those goals

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18 *See, e.g.*, Sprint NBP PN #11 Comments at 8-12; Level 3 Redacted Comments at 2, 8-9 (providing estimates of the DS1 and DS3 facilities Level 3 purchases from incumbent LECs today and noting that "Level 3 is a significant purchaser of ILEC special access services and will remain so for the foreseeable future"); *see also* Comments – NBP Public Notice # 11 of T-Mobile USA, Inc., GN Docket Nos. 09-47, 09-51, and 09-137, at 6 (Nov. 4, 2009) ("many mobile broadband providers will likely need a mix of DS1s, DS3s, and Ethernet to satisfy their second- and middle-mile connectivity needs for the near future").

19 Although DSn services should be a critical part of the FCC's analysis, the Commission should not limit itself only to DSn services. Rather, the FCC's analytical framework should include an examination of OCn services, Ethernet services, and other technologies or facilities that are used to provide dedicated, unswitched, transmission links. *See, e.g.,* Sprint Comments at 2 n.4 (defining special access), and at 21 n.66 (discussing the economics of offering Ethernet services); *see also infra* at Section II.F.2 (discussing the need for the Commission to include OCn facilities in its analysis).

20 *See, e.g.,* AT&T Comments at 3.

may be.[21] Second, the BOCs' use of special access profits to subsidize their broadband deployment directly undermines the development of real competition.

The BOCs apparently believe that they should be permitted to generate excessive profits from their non-competitive special access offerings as long as they express an intent to use those profits to finance the construction and operation of broadband network offerings. However, the Communications Act does not permit the BOCs to justify their overpriced special access services by claiming that the excessive profits they earn on special access will be used to fund their broadband offerings or support their entry into the video entertainment business.[22] Section 201 requires the Commission to ensure that rates are just and reasonable, not to allow rates to be set at excessive levels in order to generate subsidies to be used to promote the business plans of particular companies.

More fundamentally, however, reform of the Commission's special access regulatory regime is needed to promote, not hinder, the development and availability of competitive broadband services. Evidence in the record amply demonstrates that excessive special access rates have already caused carriers to divert billions of dollars to the BOCs' overpriced special access services that competitive carriers otherwise could have invested in their own networks or passed on to their customers in the form of

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[21] 47 U.S.C. § 201(b) (prohibiting carriers from charging unjust or unreasonable rates). Moreover, the BOCs' promises have frequently proven hollow. *See* New Networks Institute, "The History, Financial Commitments and Outcomes of Fiber Optic Broadband Deployment in America: 1990-2004," GN Docket Nos. 09-47, 09-51, and 09-137, at 51-53 (Dec. 4, 2009).

[22] Section 201(b) makes no exceptions for unjust and unreasonable rates that are used to enter new lines of business or cross-subsidize other services.

reduced retail rates.[23] If the FCC were to reduce special access prices to just and reasonable levels, funds that currently go to enriching the BOCs could be redirected more productively to the continued expansion of competitive broadband offerings. Competitive broadband offerings, not implicit subsidies, will best serve consumers.

In the end, the entire debate over whether the BOCs should be permitted to continue to receive subsidies for their broadband deployment (or video entertainment services) is merely a distraction from the serious issue before the Commission: What is the appropriate analytical framework for assessing the special access marketplace and ensuring that customers are able to obtain just and reasonable rates, terms and conditions? The Commission should not be distracted by the BOCs' diversions. Instead, the FCC should focus on ensuring a level playing field for all competitors.

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[23] *See* Sprint NBP PN #11 Comments at 3, 14; NoChokePoints Comments at 1 ("Every day without reform is another day that special access purchasers are forced to overpay millions of dollars in unreasonable and supra-competitive special access prices."); *id.* at 5 ("Reducing prices to a just and reasonable level will generate billions of dollars in cost savings . . . . Rural carriers will be able to invest in bringing high-speed Internet access to more consumers. Wireless carriers will be able to upgrade data facilities at more cell sites. Universities will have additional funds to restrain tuition increases, hire more educators, and pay for new facilities. Hospitals will have more money to invest in advanced medical technologies or hire additional staff. And businesses will be able to use money saved on their telecommunications bills to invest in new products and hire workers."); *see also* COMPTEL Comments at 2 n.2 (explaining that the BOCs' practice of "gouging" carriers that purchase special access "limits these carriers' resources to invest and compete in broadband infrastructure").

B. The FCC's Analytical Framework Must Include an Examination of the Incumbent LECs' Market Power

Any meaningful analysis of the special access marketplace must include an evaluation of the incumbent LECs' market power.[24] Although the FCC should collect whatever additional data it feels it needs to conduct its analysis, the record already contains overwhelming evidence that incumbent LECs not only have market power, but are exercising their dominance to impose unjust and unreasonable prices, terms, and conditions for special access services.[25]

The FCC's market power analysis should be based on the facts as they exist today, not on the BOCs' self-serving and highly speculative predictions of how the facts may change in the future.[26] When the Commission first adopted the current pricing flexibility rules in 1999, it unfortunately placed its faith in predictions of special access

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[24] Market power is evident where a firm has the ability to profitably maintain prices above competitive levels for a significant period, without customer loss and without attracting competitive entry. U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines," Section 0.1 (Apr. 2, 1992, revised Apr. 8, 1997), *available at*: <http://www.justice.gov/atr/public/guidelines/horiz_book/hmg1.html>. The Commission has found that the criteria for dominance are high market share, limited supply elasticity, limited substitution elasticity for consumers, and cost structure and resources that confer an advantage over competitors. *See Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963, ¶ 36 (1996); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 38 (1995); *see also* Mitchell Decl. ¶ 3.

[25] *See, e.g.*, Comments of the Massachusetts Department of Telecommunications and Cable at 5 ("[T]he record indicates that the current regulations for interstate special access circuits have created conditions in which dominant providers are using their market power to charge high prices and impose unreasonable non-price terms and conditions.") ("Massachusetts DTC Comments"); Sprint Comments at 36.

[26] *See* AT&T Comments at 18 (arguing that the Commission should focus on "future realities"); Verizon Comments at 9-10, 12-18 (arguing that the Commission's analytical framework should "look forward").

competition which never materialized. The delay in initiating and completing a comprehensive review of special access upon expiration of the CALLS Plan further exacerbated the adverse effects of the Phase II pricing flexibility rules. Nearly a decade's worth of empirical data irrefutably demonstrates that the Commission's Phase II pricing flexibility rules relied too heavily on an unfounded belief that effective alternatives to the incumbent LECs' offerings would develop on a widespread basis or that the potential emergence of such alternatives would constrain the incumbent LECs' practices.[27] Ignoring these lessons from the past, the BOCs urge the Commission to refrain from a data-driven analysis of the effectiveness of the existing special access regime.[28]

Despite the BOCs' attempts to discredit the available evidence, the record clearly illustrates a consistent trend of increasing market share and ever-rising profits for the BOCs. Although either of these factors alone might not be problematic, considered together they are inconsistent with the existence or development of a competitive marketplace and reveal a decade-long trend of increasing BOC market power over special access. This trend must be addressed, because the harm caused by this trend extends well beyond just special access services – it affects important downstream services, as well.[29]

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[27] *See* NoChokePoints Comments at 12 ("The record in this long-pending proceeding demonstrates that potential competition is not disciplining ILEC behavior in special access markets."); *see also* Ad Hoc Comments at 9 ("It is already clear from the excessive level of special access rates that the threat of competitive entry is not, and has not been, sufficient to constrain special access pricing.").

[28] Verizon Comments at 17 (claiming that it "does not make sense to analyze . . . current competitive conditions"); AT&T Comments at 43.

[29] *See* Mitchell Decl. ¶ 4 ("When these dominance factors obtain they convey market power to the incumbent LEC and crucially affect the performance of special access markets. Where special access is supplied by an incumbent LEC that also supplies

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C. The FCC's Analytical Framework Must Include an Assessment of the Incumbent LECs' Share of the Relevant Markets

The Commission has long recognized that market share is one of the key indicators of dominance.[30] Verizon's argument that the Commission should not consider market share as part of its analytical framework flies in the face of this well-established precedent and should be rejected.[31] At the same time, Sprint is confident that a market share analysis that includes the collection of data on intermodal competition, as suggested by Verizon,[32] will support the evidence already in the record showing that fixed wireless services are not suitable substitutes for landline special access services in the vast majority of cases and that cable companies do not serve many cell sites, particularly outside of urban areas.[33]

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interexchange and wireless services the incumbent LEC's market power in special access can be leveraged into those additional markets and can harm their performance as well. A dominant carrier has the ability to raise and maintain the price of special access services; to foreclose competition in the supply of special access; and to raise rivals' costs even if it cannot foreclose entry completely.").

30 *See, e.g., Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963, ¶ 36 (1996); *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 38 (1995).

31 *See* Verizon Comments at 10, 17-18.

32 *See, e.g.*, Verizon Comments at 19-27.

33 *See, e.g.*, Sprint Comments at 19-21 (explaining why neither cable nor fixed wireless are viable substitutes for incumbent LEC special access services in the vast majority of locations and are unlikely to supplant DS1 and DS3 wireline facilities for years to come). The FCC also could include questions about microwave backhaul and other potential intermodal alternatives to traditional special access services in its data request to assist in its determination of the extent to which these services offer a viable competitive substitute to incumbent LEC special access services.

D. The FCC's Analytical Framework Must Include an Evaluation of the Incumbent LECs' Profit Margins

As one element of its analytical framework, the Commission should examine the available evidence regarding the relationship between special access costs and prices. In a competitive market, rival offerings tend to move prices toward economic costs and erode excessive profit margins.[34] Indeed, the BOCs themselves have acknowledged the relationship between costs and prices.[35] Accordingly, determining incumbent LECs' special access profits should be an important part of the Commission's analytical framework.[36]

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[34] *See* Comments of BT Americas Inc. on Behalf of Itself and Other BT Entities at 23 ("As costs fall, prices should be expected to fall commensurately if competition is effective."); Comments of XO Communications, LLC at 4 n.9 ("a monopolist charges a *higher* price relative to marginal cost than does a competitive firm") ("XO Comments") (emphasis in original).

[35] *See, e.g.*, Comments of AT&T Inc., CC Docket No. 01-92, at 18 (Nov. 26, 2008) (explaining that, under elementary principles of economics, companies offering competitive services will be forced to pass through much, if not all, of their intercarrier compensation savings to consumers through, *inter alia*, lower retail rates); Comments of Verizon on Video Franchising, MB Docket No. 05-311, at 77 (Feb. 13, 2006) (explaining that ubiquitous competition from strong and entrenched competitors leads to lower market share and lower profit margins).

[36] *See* Letter from Thomas Jones, Attorney for tw telecom inc., to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 10 (Redacted Version attached to Erratum) (July 9, 2009) ("[T]he incumbents' profit margins are the most probative evidence of the extent to which they have market power."). The *Public Notice* itself, through the information it seeks, acknowledges the importance of measuring special access profits when analyzing whether special access rates are just and reasonable. *See Public Notice* at 5.

The BOCs, however, argue that the profitability of their special access services is both irrelevant[37] and – astonishingly – unknowable.[38] This simply is not true. A key element of the BOCs' claims is that because they are unable to allocate joint and common costs to special access services on a cost-causative basis, they cannot calculate a service-specific measure of profitability.[39] The fact that there is no definitive cost-causative means of allocating joint and common costs to special access services does not mean that there are not reasonable alternative approaches to determining the costs of providing special access.[40] The Commission's accounting, separations and access charge rules, for example, specify procedures for allocating joint and common costs among services that use common plant.[41] Further, the BOCs, like other firms that offer multiple products that use the same facilities, must have a system for allocating joint and common costs between their various services for purposes of determining the rates they need to charge for those services. To the extent that the Commission currently lacks the information necessary to determine the magnitude of the incumbent LECs' special access profitability, it can seek additional data from the incumbent LECs, including information

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37 *See, e.g.,* Qwest Comments at 46; AT&T Comments at 60-62 (arguing that service-specific rates of return for special access services would be meaningless).

38 *See, e.g.,* AT&T Comments at 49, 57-74 ("the Commission cannot rationally attempt to determine if price cap LECs are earning excessive profits from the provision of DSn level special access services").

39 *See* Verizon Comments at 43; Qwest Comments at 3-4, 22-23.

40 *See, e.g., Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 150 (1930) ("extreme nicety" is not required in allocating revenues and expenses between interstate and intrastate services); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564 (D.C. Cir. 1992).

41 *See, e.g.,* 47 C.F.R. §§ 32.14(c), 32.23(c), 36.1(c), 36.2(b), 36.121, 69.306.

about the costs the incumbents incur to provide special access services and the data the incumbent LECs use to set their special access prices.

It is not necessary to achieve perfection in measuring incumbent LECs' profitability in order to determine whether special access prices are excessive or signal the unreasonable exercise of market power.[42] Using information that is currently available, or that it obtains through data requests, the Commission should be able to determine whether incumbent LEC special access profits fall within a "zone of reasonableness."[43]

In the absence of precise cost data, the FCC can rely on other indicators to assess whether the incumbent LECs' special access prices are unreasonable. For example, as Sprint and others have explained, the rates for high-capacity unbundled network elements ("UNEs") are an effective proxy for the prices that incumbent LECs would be expected to charge for analogous special access services in a competitive marketplace.[44] These UNEs are the functional equivalents of special access services and their rates have been established by state public utility commissions in contested proceedings and on the basis

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42 *Cf.* AT&T Comments at 26 (pricing flexibility triggers need not be perfect).

43 *See* AT&T Comments at 49-51 (one cannot pinpoint a reasonable rate, but must instead consider whether the rates fall within a "zone of reasonableness").

44 *See* Comments of tw telecom inc. at 30 ("TWTC Comments"); COMPTEL Comments at 12-14 and n.36 ("Even if one were to suggest that special access rates should not equal the corresponding TELRIC rates, it [is] disingenuous for one to argue that the special access rates are just and reasonable given the substantial disparity in the current rates."); Sprint Comments at 26-27 (the record before the Commission indicates that incumbent LEC special access prices in Phase II pricing flexibility areas are substantially higher than the forward-looking cost-based UNE rates for comparable services).

of forward-looking cost studies. In addition, the prices for other competitively-offered retail high-bandwidth services, such as digital subscriber line ("DSL") and fiber-optic-based Internet services ("FiOS") offered by incumbent LECs and cable modem services offered by cable operators, provide another benchmark that can be used to determine whether incumbent LECs' special access prices are unreasonable.[45] Finally, the Commission can and should examine other indicia, such as rates for comparable services in foreign markets,[46] profitability as revealed by ARMIS data,[47] and comparisons between incumbent LECs' pricing flexibility rates and price cap rates,[48] to determine whether incumbent LEC special access services rates are excessive. These elements, taken together, paint a clear picture of excessively-priced interstate special access services.

E. The FCC's Analytical Framework Must Include a Review of Incumbent LECs' Special Access Terms and Conditions

The Commission's analytical framework should include an assessment of the reasonableness of the terms and conditions of incumbent LEC special access offerings. AT&T correctly notes that many of the terms and conditions employed by the incumbent

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45 *See* Sprint Comments at 27-28. Although there are differences between special access services and the other retail broadband services that may justify some price differential, the differences in the services do not account for the wide disparity in prices. In addition, the retail high-bandwidth services include costs that are not included in wholesale special access services. *See id.* at 28 n.91.

46 *See, e.g.*, Comments of BT Americas Inc., WC Docket No. 05-25, at 16-17 and Attachment A (Aug. 8, 2007); *see also* Comments of BT Americas Inc., WC Docket No. 05-25, at 5-6 (June 13, 2005).

47 *See, e.g.,* Ad Hoc Comments at 8, 15, and Attachment B.

48 *See* Sprint Comments at 29-30.

LECs are similar to those available in competitive markets.[49] As Sprint and others have explained, however, in non-competitive markets, the same terms and conditions that benefit consumers in competitive marketplaces can be extremely harmful to consumers (and to actual or potential competitors) by undermining the growth of reasonably-priced alternatives.[50] For example, in an industry dominated by a single provider, volume and term discounts can stifle competition by deterring new entry.[51]

AT&T erroneously asserts that discounts cannot be harmful if they do not result in below-cost (predatory) pricing.[52] As Dr. Mitchell explained, however, special access discount plans offered by the incumbent LECs can have substantial adverse effects on competition even if the resulting prices are not predatory. For example, many of the terms and conditions that the incumbent LECs include in their discount plans vastly increase the volume and array of services that a new entrant must be prepared to supply in order to match or improve upon the terms of purchase offered by the incumbent LEC.[53]

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49 AT&T Comments at 77-78.

50 *See, e.g.,* Sprint Comments at 38-39; Comments of Global Crossing North America, Inc. at 4; XO Comments at 10-11 ("In competitive markets, contracts with volume and term discounts do not generally raise competitive concerns, and, in fact, can be beneficial. However, in markets where firms possess market power (indicated by having supra-competitive profit margins), that is not the case, and such terms and conditions – which XO argues are present in many ILEC special access contracts – can be wielded as weapons to sustain such market power.").

51 Mitchell Decl. ¶¶ 116, 119-120.

52 AT&T Comments at 76.

53 Mitchell Decl. ¶¶ 119-120.

AT&T similarly argues that its exclusionary terms and conditions are not predatory (*i.e.*, they result in prices that are at or above cost) and therefore should be not only permitted, but encouraged.[54] As the NoChokePoints Coalition noted, however, the

> ILECs insist on anticompetitive terms and conditions in special access contracts to strangle competition in the crib in markets where it may be possible. Their ability to secure tying provisions, excessive early termination fees, and lock-in through minimum commitments and "move" penalties is both a clear symptom of market dominance and another example of the abuse of this dominance.[55]

AT&T also touts the "voluntary" nature of its special access terms and conditions and boasts that "customers are subject to them only because they freely agreed to them in a market in which they had choices."[56] AT&T's position, of course, erroneously assumes the availability of competitive options.[57]

Finally, AT&T seeks to discourage any inquiry into unreasonable special access terms and conditions by suggesting that such efforts would be overturned on appeal. In

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[54] AT&T Comments at 76 (arguing that discounts must be encouraged absent proof that the discounts result in below-cost pricing).

[55] NoChokePoints Comments at 27. *See also, e.g.,* TWTC Comments at 22 ("[T]he FCC should examine closely conditions on the availability of discounts that do not reduce the incumbent LEC's costs in providing the special access service."); COMPTEL Comments at 21 ("COMPTEL is not suggesting the incumbents be barred from offering discounts plans. Rather, the Commission must ensure that the rack rates these discount plans are based on are just and reasonable, i.e., cost-based.").

[56] AT&T Comment at 81.

[57] As Level 3 explained: "Although ILECs often claim that the terms and conditions of pricing flexibility contract offers are freely negotiated at arm's length, this presumes the existence of a competitive market that affords purchasers the ability to seek services elsewhere if they do not like the ILECs' terms and conditions. . . . [T]his presumption is not borne out when one considers the lack of competitive penetration, particularly in the channel termination product markets." Level 3 Redacted Comments at 24.

making this argument, AT&T cites only a single case – *BellSouth v. FCC*[58] – and distorts the court's holding even in that lone case.[59] The *BellSouth* decision focused exclusively on whether BellSouth's special access volume discount discriminated in favor of its long distance affiliate in violation of section 272(c)(1).[60] The court made no finding about whether the discount plan was anti-competitive. Indeed, the court explicitly acknowledged that it lacked sufficient information to determine whether the discount plan had harmed other carriers.[61] Nowhere in the decision did the court make any determination about whether the discount plan at issue would withstand scrutiny as a just and reasonable practice under section 201 of the Communications Act.[62] In short, the case relied upon by AT&T is wholly inapposite to determinations of the lawfulness of terms and conditions under section 201 and should not deter the Commission from inquiring into the unreasonableness of incumbent LECs' special access terms and conditions. Rather, the Commission should collect and analyze data on special access

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58 *BellSouth Telecommunications Inc.* v. *FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

59 AT&T Comments at 79-80.

60 Although the court, in *dicta*, suggested that the complaining carrier's harm was a result of its "free choice" for entering into the discount plan, *BellSouth v. FCC*, 469 F.3d at 1059, that observation was not based on a finding that alternatives to the BellSouth offering were available. The decision does not indicate that the court conducted an analysis of whether any meaningful alternative existed or whether the discount plan represented an abusive exercise of BellSouth's market power.

61 *BellSouth v. FCC*, 469 F.3d at 1059 ("[W]ithout more explanation, we cannot discern what harm, if any, Sprint suffered due to the 90% requirement").

62 Before the Commission had the opportunity to issue a ruling on remand, the parties filed a Motion to Dismiss because, by the time the matter returned to the Commission, both the sole complainant, AT&T Corp., and the sole defendant, BellSouth Telecommunications, Inc., were wholly-owned affiliates of AT&T Inc. The Commission therefore granted the Motion to Dismiss. *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Order of Dismissal, 22 FCC Rcd 7374 (2007).

terms and conditions in order to determine whether the contractual provisions employed by the incumbent LECs harm consumers and competition.

F. The FCC Must Revise the Current Phase II Pricing Flexibility Triggers to Reflect Marketplace Realities

1. The Current Rules Have Failed To Ensure Just and Reasonable Rates

Contrary to the BOCs' claims, the current Phase II pricing flexibility rules are fundamentally flawed. As Sprint and others have demonstrated, the current Phase II pricing flexibility triggers grant relief in overly broad geographic areas,[63] and are not based on reliable indicators of the presence of competitive alternatives.[64] The FCC must, therefore, modify the current triggers to ensure that Phase II relief is available only where sufficient competition exists to constrain incumbent LEC pricing and practices.

The mere fact that the current rules have been in place for over a decade cannot be used to justify their continued application in light of overwhelming evidence that the rules have failed to ensure that customers are able to obtain special access services at just

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[63] Sprint Comments at 31-33 (collocation in one wire center does not constrain prices for lines served out of other wire centers, even if the wire centers are located within the same MSA); PAETEC, *et al.* Comments at 16-17 ("the MSA is an inappropriate geographic area in which to grant pricing flexibility"); Level 3 Redacted Comments at 13; Massachusetts DTC Comments at 10-12.

[64] Sprint Comments at 33-34 (reliance on the presence of collocation facilities as a surrogate for competitive special access alternatives is flawed); PAETEC, *et al.* Comments at 13-16; Massachusetts DTC Comments at 9-10; NoChokePoints Comments at 15 ("[T]he Commission itself has recognized that competitor collocation is a poor proxy for special access competition, especially for competition for channel termination services.").

and reasonable rates.[65] Furthermore, the Commission has a long history of re-examining its rules to ensure their continued relevance and effectiveness.[66]

Since adoption of the pricing flexibility rules, there have been significant changes in the marketplace that the Commission could not have anticipated in 1999. Perhaps most importantly, the industry has undergone substantial consolidation. For example, the telecommunications investment bubble burst, forcing many competitive providers into bankruptcy soon after the pricing flexibility rules were adopted. In addition, Verizon's acquisition of MCI, SBC's acquisition of AT&T, and subsequent acquisition (as AT&T) of BellSouth further entrenched their dominance over special access.[67] These significant developments since 1999 simply underscore the need for a comprehensive review of current marketplace conditions and the effectiveness of the Commission's special access regime.

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65 *See, e.g.,* AT&T Comments at 6 (emphasizing the fact that the existing pricing flexibility rules "have been in place for over ten years.").

66 *See, e.g., Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, ¶ 1 (2007) (seeking "to ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the Act in light of our experience over the last decade, advances in technology, and developments in the markets for telecommunications and video services"); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 23 FCC Rcd 1467, ¶ 1 (2008) (seeking comment on elimination of the Universal Service High Cost Fund's identical support rule); *see also Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405, 409 (D.C. Cir. 1991) ("According agencies the power to change their minds about their own policies, practices and procedures rests on a sound policy basis. Agencies need some flexibility in carrying out their authority. This is particularly true of the FCC.").

67 MCI and legacy AT&T were the two largest competitive LECs at the time of the mergers. Thus, the transactions eliminated the largest competitive checks on the incumbent LECs' market power.

In revising its rules, the Commission should ensure that the updated regulatory scheme promotes: (1) wholesale and retail competition; (2) efficient broadband investment;[68] (3) efficient competitive entry; and (4) the broader public interest. Sprint, in its initial comments, proposed an analytical framework that would achieve all of these goals.[69] Adopting the framework proposed by Sprint would not require the Commission to dispense entirely with its existing pricing flexibility framework. Rather, as Sprint explained in its initial comments, the Commission simply should redefine the geographic markets it examines in evaluating whether to grant pricing flexibility and recalibrate its pricing flexibility triggers to better reflect the presence (or absence) of competition.[70]

Contrary to the BOCs' assertions, however, the goal is not to ensure that reasonably-priced special access services are available to some, or even most, customers.[71] Rather, the Commission's statutory obligation is to ensure that special access prices are set at just and reasonable levels for all customers throughout the

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68 As explained above, this does not mean that the BOCs should be permitted to subsidize their competitive broadband services with inflated profits from non-competitive special access services. *See* Section II.A.2, *supra; Cf.* AT&T Comments at 17, 48 (reductions in DS1 and DS3 prices will depress broadband investment).

69 *See* Sprint Comments at Section II; Mitchell Decl. at Section III.

70 *See* Mitchell Decl. ¶¶ 34-49. In addition to adjusting its pricing flexibility triggers, the FCC also should consider the relief it grants when various triggers are met. As discussed above, the FCC's pricing flexibility regime must include a mechanism for protecting the incumbent LECs' customers and competitors from unjust and unreasonable conditions. *See* section II.E, *infra* (discussing terms and conditions); *see also* Sprint Comments at 44-46.

71 *See, e.g.,* Qwest Comments at 29; Verizon Comments at 10-11, 18-19 (focusing on demand in the top 25 MSAs).

country.[72] In geographic areas where sufficient competition exists to constrain incumbent LEC prices, the Commission can grant pricing flexibility and rely on marketplace forces to set prices. In geographic areas where insufficient competition exists, however, the Commission's price cap regulations should be applied to reflect technological and economic productivity such that special access prices are set at levels that would be expected to prevail in a competitive marketplace.[73]

2. In Revising Its Phase II Pricing Flexibility Triggers, the FCC Should Adopt Benchmarks that Will Accurately Reflect Changing Marketplace Conditions

As discussed above, Sprint is confident that the Commission's analysis will lead it to conclude that the current Phase II pricing flexibility triggers allow incumbent LECs to avoid price cap regulation in markets where there is insufficient competition to constrain the incumbents' ability to exploit their market power over special access. Unfortunately, the FCC will have to devote a great deal of time and significant administrative resources to reach a conclusion that has been widely recognized in the marketplace for years. In order to avoid having to undertake a similarly comprehensive analysis every few years – and to avoid future delays in responding to marketplace conditions – the Commission should use this proceeding to adopt new pricing flexibility triggers that can adjust automatically as the competitive marketplace evolves.

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72 47 U.S.C. § 201(b).

73 As part of its analysis, the Commission should examine whether it needs to adjust its existing rules in order to ensure that special access rates are just and reasonable in areas subject to price caps. *See* Mitchell Decl. ¶¶ 14-15 (discussing evidence showing that in both price cap areas and price flexibility areas, special access prices are consistently well above the available measures of forward-looking costs).

For example, some of the BOCs predict that DSn level services eventually will become obsolete and be replaced by OCn level services.[74] Only time will tell if these predictions are accurate. Sprint, for one, has already stated that it expects to rely on DS1 and DS3 services for the foreseeable future to serve both its cell sites and its enterprise customers.[75] Other carriers have also noted that they anticipate relying on incumbent LEC-provided DS1 and DS3 services for the foreseeable future.[76] In addition, in contrast to OCn transport facilities today that typically serve multiple customers along high-volume routes, OCn channel termination circuits to cell sites usually will serve only a single cell tower. The risk of stranded investment therefore will remain significantly higher in providing such services to a cell site than in offering transport services along high-volume, multi-customer routes. Thus, the economics of deploying OCn channel termination circuits to cell sites underscore the importance of distinguishing between channel termination and channel mileage services when considering the adoption of a new pricing flexibility framework.[77]

Moreover, even if the BOCs' predictions do come to pass, and demand for DSn level services eventually is replaced by demand for OCn level services, there is no reason

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[74] *See, e.g.,* AT&T Comments at 13; Qwest Comments at 19.

[75] Even with the expansion of 4G services, Sprint expects that it will continue to rely heavily upon DS1 and DS3 facilities to provide backhaul from its cell sites for the foreseeable future. Sprint NBP PN #11 Comments at 8. Similarly, Sprint expects that the majority of its enterprise customers who currently are served by special access DS1 or DS3 facilities will continue to use such facilities for the foreseeable future. *Id.* at 12.

[76] *See, e.g.*, Level 3 Redacted Comments at 2, 8-9.

[77] *See* Sprint Comments at 14-15 (explaining that channel termination and channel mileage services belong in separate product markets).

to think that the incumbent LECs' overwhelming share of the channel termination market will diminish simply because the bandwidth demand at a cell site or customer premises increases. To the contrary, the incumbent LECs almost certainly will retain a substantial economic advantage in providing channel termination connections over their existing networks merely by changing the electronics or stringing new fiber through existing pipes. Competitive carriers, by contrast, still will have to gain access to rights of way, dig trenches and lay new fiber to any given location in order to offer a competing high-capacity service.[78]

The FCC's pricing flexibility triggers should be adaptable enough to account for changes in the marketplace, such as increased capacity demands that drive customers from DSn to OCn facilities. Thus, for example, the FCC's data request should include questions about not only DSn services, but also about the deployment of higher-capacity (OCn) facilities – including specific questions asking the incumbent LECs how many OCn channel terminations and transport facilities they are installing outside of their home regions. The answers to these questions will help the FCC determine whether it is appropriate to relax regulation of OCn facilities today.[79] The FCC should also be

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[78] *See* Sprint Comments at 22; Mitchell Decl. ¶¶ 70-71 (explaining that a carrier's cost of increasing the capacity of existing circuits used to serve a particular location are likely to be much lower than the costs a carrier incurs to expand its network to reach new locations).

[79] *See, e.g.*, Attachments to Letter from Jonathan Lechter, Counsel to TWTC, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25 (Sept. 18, 2007) (showing that TWTC's prices for OCn circuits were significantly lower than the prices charged by AT&T, Verizon or Qwest).

prepared to revisit the issue in the future to assess the impact of changes in the marketplace, as necessary.

G. The FCC Should Not Rely on the BOCs' Statements Regarding Pricing Trends

The BOCs contend that the pricing trends in special access services show that competition is putting downward pressure on their rates.[80] These claims are highly suspect. For example, the BOCs claim that their prices for special access services have fallen,[81] without providing any detail about how they arrived at this conclusion. In the past, the BOCs have eschewed apples-to-apples comparisons and based their pricing claims on misleading analyses of "average per unit prices" or "average revenue per voice-grade equivalent" ("DS0").[82] As Sprint has explained, these sorts of analyses are inherently flawed and may reflect a change in the mix of services customers purchase, rather than a decline in prices.[83]

Even if there has been some decline in the BOCs' special access prices over time, the evidence in the record suggests that most, if not all, of these changes were due to

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80 *See, e.g.*, Verizon Comments at 5.

81 *See* Verizon Comments at 5-8; AT&T Comments at 25; Qwest Comments at 9.

82 *See, e.g.*, Comments of Verizon (Redacted Version), WC Docket No. 05-25, at 2-3, 10-13 (Aug. 8, 2007); Supplemental Comments of AT&T (Redacted Version), WC Docket No. 05-25, at 2, 8, 21-23 (Aug. 8, 2007); *see also* Declaration of Dennis W. Carlton and Hal S. Sider in Support of AT&T Inc., Exhibit A to AT&T Comments, ¶¶ 52-55 (claiming that AT&T's average revenue per unit has fallen in Phase II areas) ("Carlton-Sider Decl.").

83 *See, e.g.,* Reply Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 15-20 (Aug. 15, 2007); Comments of Time Warner Telecom and One Communications (Redacted Version), WC Docket No. 05-25, at 34-35 (Aug. 8, 2007); "Special Access Pricing," attached to letter from Counsel for Sprint Nextel Corporation to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, at 50-53 (Oct. 5, 2007).

regulatory factors, such as merger conditions[84] and the imposition of X-factors during the initial period that the CALLS Plan was in effect.[85] The BOCs have not provided any persuasive evidence that competition has caused material reductions in special access prices.[86]

Moreover, even if some BOC special access prices have declined below the levels that were required by regulatory agreements or requirements, such declines in prices would not necessarily indicate that a market is competitive: Even a monopolist can be expected to pass some of its costs savings on to consumers as part of its efforts to

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[84] Verizon and SBC agreed to price-related conditions as part of their mergers with MCI and AT&T, respectively. *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433 at Appendix G (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290 at Appendix F (2005).

[85] Some of the "pricing reductions" may also be the product of BOC-applied adjustments designed to reflect inflation. *See, e.g.,* Carlton-Sider Decl. ¶¶ 51-53 (claiming that special access prices fell "in real terms," *i.e.*, net of inflation).

[86] *See* United States Government Accountability Office ("GAO"), Report to the Chairman, Committee on Government Reform, House of Representatives, *Telecommunications: FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services,* GAO Report No. GAO-07-80, at 13 (Nov. 2006), *available at*: <http://www.gao.gov/new.items/d0780.pdf> ("GAO Report") (finding that the incumbent LECs' prices are higher in those areas in which the LEC has been granted Phase II pricing flexibility than in those areas still under Phase I or price caps); *see also* Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets,* Revised Ed., at 65-66 (first issued Jan. 21, 2009, and commissioned by the National Association of Regulatory Utility Commissioners) ("NRRI Report"), *available at*: <http://nrri.org/pubs/telecommunications/NRRI_spcl_access_mkts_jan09-02.pdf>; *Cf. Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 75 (2005) (explaining that a firm does not possess market power if *competition* prevents it from maintaining price increases) ("*2005 NPRM*").

maximize profits.[87] As Dr. Besen has explained, the difference between a monopolistic and a competitive industry "is not the direction of, or rate at which, their respective prices *change* during a given period but the fact that a monopolist charges a *higher* price relative to its marginal cost than does a competitive firm."[88] Thus, the key issue is not whether prices have fallen, but the relationship between the incumbent LECs' prices and their marginal costs.[89]

Ultimately, the FCC should draw its own conclusions on price trends after collecting the data it needs to conduct its analysis.[90] At a minimum, the FCC should collect specific pricing data from the incumbent LECs, as well as from special access

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87 Declaration of Stanley M. Besen at 2-3 (Redacted Version) (Apr. 22, 2009), appended as Attachment B to letter from Thomas Jones, Willkie Farr & Gallagher LLP, Attorneys for tw telecom inc., to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (Redacted Version) (July 9, 2009) ("Besen Decl."); *id.* at 3 n.7, citing Oxford Economic Research Associates (OXERA), *Competing Ideas – Cost Pass-Through: What Constitutes a 'Fair Share'?* at 1 (Jan. 2004), *available at*: <http://www.opta.nl/download/cost_pass_through_jan2004.pdf>.

88 Besen Decl. at 3-4.

89 In addition, to the extent that the Commission determines that special access rates have declined in a meaningful manner, it should consider whether those declines are due to customers moving to term and volume discount plans that may impose significant costs that are not captured by a simple price analysis. *See, e.g.*, Sprint Comments at 42-46 (discussing harmful terms and conditions that incumbent LECs impose on their special access customers).

90 In 2005, the FCC invited the incumbent LECs to validate their claims regarding reductions in special access prices by submitting calculations of an Average Price Index ("API") for all special access services; a service band index ("SBI") for each special access service category and subcategory; and the revenues associated with the API and SBIs. *2005 NPRM* ¶ 76. Thus far, the incumbent LECs have declined to submit such calculations. If the Commission believes that pricing trends are a material factor in its analysis of special access pricing, it should require the BOCs to provide such calculations, as well as the data underlying those calculations.

customers.[91] These pricing data should be one factor the Commission considers as it evaluates the incumbent LECs' market power.

H. Next Steps

The Commission should collect data on the network facilities of all firms that provide special access and comparable services, in each geographic market to be analyzed. A coalition of companies, which included Sprint, submitted to the Commission a detailed data request proposal that would involve data collection from incumbent and competitive suppliers of such services and from special access customers.[92] This proposal was designed to:

- establish financial performance and productivity for incumbent price cap carrier special access by gathering historical data on revenues, costs, and inputs;
- identify whether there are any areas of the country where there is sufficient special access competition to protect consumers;
- determine how the current Phase II collocation-based triggers can be modified to reflect actual competition;
- enable a competitive analysis using demand and pricing data from the largest buyers and sellers of special access services; and

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[91] The incumbent LECs should not be permitted to adjust the data they produce to the FCC by, for example, converting all of their circuits into DS0 equivalents. Instead, the pricing data produced by the incumbents should reflect the pricing options presented to special access customers.

[92] *See* Proposed Data Request attached to letter from CCIA, *et al.*, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (June 3, 2009) ("NoChokePoints Data Request Proposal"). Sprint also suggested a methodology to expedite data collection and protect the interests of companies submitting data in the special access docket. *See* Letter from Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (June 22, 2009); *see also* Letter from Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (July 31, 2009) (responding to AT&T's opposition to Sprint's confidentiality proposal).

- facilitate identification of those incumbent LEC special access terms and conditions that thwart competition.

A complete analysis of competitive supply would examine the availability of each special access product on a building-by-building basis. As explained in Sprint's initial comments, however, the Commission may conclude that a building-by-building analysis would be too cumbersome and, therefore, may choose to aggregate markets for purposes of administrative ease. Specifically, as Dr. Mitchell explained, the Commission could conduct the analysis for a sample of buildings that are representative of the variety of conditions present in different parts of an MSA and across different MSAs. Having analyzed competitive conditions in the sampled buildings, the Commission could then aggregate similarly-situated customers by type of building and location.[93]

Sprint urges the Commission to adopt expeditiously the NoChokePoints Data Request Proposal along with Sprint's recommended mechanism for strictly protecting the confidentiality of that data while permitting public access to a report containing aggregated data that would provide the opportunity for meaningful review and comment. Moreover, where the Commission determines that there is insufficient competitive pressure to constrain incumbent LEC special access pricing and practices, the Commission should seek comment on appropriate remedies as soon as possible.

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[93] *See* Mitchell Decl. ¶ 77. Dr. Mitchell explained that, alternatively, for purposes of assessing dominance, demand could be measured for small geographic areas in which customer density is comparable per unit area. *Id.*; *see also* Verizon Comments at 42 (suggesting that the FCC should conduct a competitive analysis in a sample of geographic areas).

In the interim, the Commission should adopt the temporary relief proposed in Sprint's initial comments.[94] In addition, at a minimum, the Commission should immediately adopt the interim special access rate freeze proposed by Level 3 and PAETEC, *et al.*[95] The record contains ample evidence that the incumbent LECs' special access rates are not adequately constrained and are imposing harms on purchasers of special access services. An immediate rate freeze would prevent additional harm from occurring while the Commission conducts its analysis of special access and determines the appropriate long-term relief needed to address the incumbent LECs' unjust and unreasonable special access rates, terms, and conditions. This step would be particularly appropriate given the pending expiration of the AT&T merger conditions.[96] Moreover, an immediate prohibition on special access rate increases would be consistent with

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[94] *See* Sprint Comments at 45-46 (suggesting that the Commission eliminate Phase II pricing flexibility pending reform of the current rules; adopt an interim X-factor of 5.3 percent in time for that X-factor to be applied to the incumbent LECs' next annual access tariff filing; and consider prohibiting the use of anti-competitive terms and conditions).

[95] *See* Level 3 Redacted Comments at 22-23 (asking the FCC to limit increases in incumbent LEC special access rates until the Commission completes its investigation and reforms its special access rules); PAETEC, *et al.* Comments at 85 ("the Commission should 'freeze' or 'cap' ILEC special access rates at their current levels on an interim basis").

[96] *AT&T Inc. and BellSouth Corporation, Applications for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 at Appendix F (2007) (listing special access commitments that were to remain in effect until 42 months from the Merger Closing Date).

measures taken in other proceedings[97] – some of which were supported by the BOCs[98] – to maintain the *status quo* while the Commission considers comprehensive reform.

III. CONCLUSION

Consistent with the discussion above, the Commission should use the analytical framework described in Sprint's Comments to determine whether its current price cap and pricing flexibility rules have succeeded in ensuring that customers are able to purchase special access services from price cap LECs at reasonable rates and on reasonable terms and conditions. If the Commission finds, as the evidence in the record

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97 *See e.g.*, *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Alltel Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers; RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order, 23 FCC Rcd 8834, ¶ 1 (2008) (adopting an interim, emergency cap on the amount of high-cost support that competitive eligible telecommunications carriers could receive, in order to "rein in the explosive growth in high-cost universal service support disbursements"); *Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 24 FCC Rcd 6162, ¶ 1 (2009) (extending the freeze on jurisdictional separations factors to "provide stability for carriers that must comply with the Commission's separations rules while issues related to comprehensive, permanent reform are considered").

98 *See* Comments of AT&T Inc., WC Docket No. 05-337, at 2 (June 6, 2007) (supporting interim cap on CETC high-cost support); Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, at 1 (June 6, 2007) (supporting interim cap on CETC high-cost support); Reply Comments of Qwest Communications International Inc., WC Docket No. 05-337, at 2 (June 21, 2007) (supporting interim cap on CETC high-cost support); Comments of Qwest Corporation, CC Docket No. 80-286, at 1-2 (April 17, 2009) (supporting extension of the freeze on jurisdictional separations factors).

suggests, that its current rules have proven ineffective, it should act immediately to begin remedying the situation.

Respectfully submitted,

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February 24, 2010

Certificate of Service

I hereby certify that on this 24th day of February, 2010, I caused true and correct copies of the foregoing Reply Comments of Sprint Nextel Corporation to be mailed by electronic mail to:

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