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 THE NOCHOKEPOINTS COALITION

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I. INTRODUCTION AND SUMMARY.

In its Public Notice, the Federal Communications Commission ("FCC" or "Commission") "invite[d] comment on an appropriate analytical framework for examining the various issues that have been raised in the *Special Access NPRM*."[1] In particular, the Public Notice asked for help in designing an analytical framework that would help the Commission assess: (1) whether its pricing flexibility rules ensure just and reasonable rates for special access services; (2) whether, in those areas that remain subject to price caps, the Commission's price cap rules ensure that rates remain just and reasonable; and (3) whether the Commission's rules ensure that terms and conditions in special access tariffs and contracts are just and reasonable.[2]

Special access is a critical component of America's broadband infrastructure, and it is central to the expansion of broadband services, job creation, and innovation. Unreasonably high

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[1] Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the *Special Access NPRM*, 24 FCC Rcd 13638, 13638 (2009) ("*Public Notice*") (citing Special Access Rates for Price Cap Local Exchange Carriers, 20 FCC Rcd 1994 (2005) ("*Special Access NPRM*")).

[2] *Public Notice*, 24 FCC Rcd at 13639.

special access prices—far higher than the "just and reasonable" prices required by the Communications Act[3]—have restrained job growth as well as wireless and wireline broadband deployment. Across the country, telecommunications businesses are overpaying for special access, thereby diverting investment from the deployment of advanced services. Large and small employers that would otherwise invest in job creation are instead forced to pay monopoly rents to incumbent LECs. And broadband adoption rates in rural areas are depressed, in part because rural ISPs must charge rates high enough to cover extraordinarily high backhaul costs to reach the Internet backbone. The NoChokePoints Coalition therefore applauds the FCC's decision to move forward with urgently needed special access reform. Efforts to gather data rapidly and thoroughly so the Commission can understand and reform the special access market are critical.

In its comments, the NoChokePoints Coalition suggested an analytical framework for the Commission's proceeding. First, the Commission should study the level of competition in the market to confirm that for many special access services in most areas, there is no effective competition. Second, the Commission should analyze how, in the absence of adequate regulatory controls, price cap LECs use their market power to set prices at supra-competitive levels, earn supra-competitive profits, and impose onerous terms and conditions on their "discount" plans in order to strangle competition where it might otherwise be possible.

Most commenters responded to the Commission's public notice with constructive and detailed suggestions that strove to address the questions presented. Unfortunately, the price cap LECs did not. Their comments demonstrate that the goal of price cap incumbents is to delay, distract, and deny, rather than to provide any meaningful contribution to the Commission's inquiry. In their comments, the price cap LECs largely dismiss the Commission's *Public Notice*,

[3] 47 U.S.C. § 201(b).

arguing that special access services—which generate billions of dollars in monopoly profits for price cap LECs by extracting excessive fees from competitors, businesses, and consumers—are somehow not worth the Commission's attention. Rather than make affirmative suggestions on an appropriate analytical framework, as requested by the *Public Notice*, the price cap LECs' comments include:

- Unfounded claims about how special access reform would undermine broadband deployment and self-serving misstatements about the supposed unimportance of DS-1 and DS-3 services.

- Clear errors and important omissions in their discussion of relevant product and geographic markets.

- Transparent efforts to avoid meaningful analysis of price cap LEC market dominance, including rejections of all proffered analytical methods without suggesting alternatives.

- Data collection proposals designed to be more onerous than helpful.

- Flat denials that market share or market power analyses are even relevant to the FCC's inquiry.

- And even an effort to limit participation by interested parties by undermining confidentiality.

Price cap LECs also claim, without adequate support, that they use their monopoly profits for broadband investment and that rational special access regulation will somehow undermine broadband deployment. In reality, the incumbents use their special access windfall to boost their rates of return rather than reinvesting in special access infrastructure, as evidenced by the lack of middle mile availability and capacity strains recognized by the FCC.[4] Furthermore, Congress and the FCC long ago correctly found that relying on monopolists to advance the public interest

[4] *See, e.g., Broadband Gaps*, FCC Open Meeting Presentation, Broadband.gov (Nov. 18, 2009) at 12, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294708A1.pdf.

through hidden cross-subsidies drawn from monopoly rents was a hopeless cause, wisely making such hidden cross-subsidies a violation of the Telecommunications Act and Commission rules.[5]

The three price cap LECs' comments stand in stark contrast to those submitted by a substantial majority of commenters, including competitors, public interest groups, and purchasers, which offer clear and comprehensive suggestions on the many issues the Commission raised in the Public Notice. These commenters provided thoughtful analysis and suggestions on how the FCC might analyze market dominance and the abuse of market dominance, specifically by examining whether prices and rates of return are excessive and investigating the presence of anticompetitive terms and conditions in the incumbent LECs' volume/term agreements. Correcting the failures of the special access market, as these commenters indicate, will advance both Commission and Administration broadband policies. Competitors, public interest groups, and purchasers that filed comments demonstrate a commitment to facilitate the Commission's task: to determine how and where the special access market is failing and how to fix it.

The filings made in response to this Public Notice, in addition to the record in the docket below, provide the Commission with a vast record that is more than thorough enough to enable the Commission to take immediate action. The NoChokePoints Coalition urges the Commission to expeditiously issue its data request based on the criteria and parameters suggested in the Coalition's initial comments. As the Coalition noted in its comments, every month that reform is delayed results in the loss of hundreds of millions of dollars in special access overpayments, and further injury to broadband deployment, innovation, and job growth.

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[5] *See infra* part II.A.3.

II. SPECIAL ACCESS REFORM WILL ADVANCE THE FCC'S BROADBAND GOALS, FOR WHICH DS-1 AND DS-3 SERVICES REMAIN CRITICAL.

A. Special Access Reform Will Drive Broadband Deployment And The Commission Should Reject Price Cap LECs' Arguments For Hidden Cross-Subsidies.

The majority of commenters affirm that special access reform will advance broadband deployment because rational special access pricing will support competition and free up funds needed for additional infrastructure investment by competitors and end users.[6] In contrast, AT&T asserts that "price regulation is likely to stifle investment in broadband infrastructure or to discourage broadband service innovation."[7] This is plainly wrong. As demonstrated below, (1) unreasonable and supra-competitive special access prices reduce broadband deployment by forcing purchasers to divert funds from other investments; (2) special access reform will not undermine price cap LECs' incentive to innovate; (3) price cap LECs' call for the FCC to endorse hidden cross-subsidies is counter to the Communications Act and Commission rules and good public policy; and (4) competition, not monopoly pricing, will best incentivize broadband investment and innovation.

1. Unreasonable Special Access Prices And Terms Undermine Broadband Deployment.

A variety of commenters demonstrate that special access reform is needed to advance broadband deployment. Every dollar that a special access purchaser overpays to a price cap LEC for special access is a dollar that is not available to deploy new technology to consumers, upgrade other facilities, construct a new cell site, or invest in research for innovative new

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[6] *See, e.g.*, Letter from Warren G. Lavey, Counsel to U.S. Cellular Corporation, to Marlene Dortch, Secretary, FCC (filed Sept. 9, 2009) Attachment at 10 (noting that special access is a significant cost driver for regional wireless carriers, that the market is not competitive, and that special access is "critical to broadband deployment").

[7] Comments of AT&T Inc. (filed Jan. 19, 2010) at 18 ("AT&T Comments")*; see also* Comments of Qwest Communications International Inc. (filed Jan. 19, 2010) at 17-20 ("Qwest Comments").

products.[8] Special access reform will also promote broadband deployment by increasing the ability of wireless carriers and rural LECs to purchase additional transmission capacity when needed to expand their broadband offerings. To put it in practical terms, it would become easier for a wireless carrier or a rural LEC to justify deploying more or better broadband by increasing capacity—for example, from two DS-1s at a cell site or for backhaul from a rural county to three DS-1s (regardless of whether those are provisioned over copper or fiber)—if doing so were not as expensive.

More broadly, reforming special access prices will encourage efficient investment across the economy. For example, reforming special access will allow manufacturing companies to invest in retooling or hiring additional employees to expand production and increase sales, rather than wasting money on excessive special access prices or being forced to bear the substantial costs of self-provisioning telecommunications services. The same is true for investments by other communications carriers, as XO Communications and others noted in a recent *ex parte*: "the goal of affordable and more widely available broadband services would be better served by allowing carriers to leverage existing plant rather than rewarding incumbents who take those useful assets out of commission and forcing competitors to expend scarce capital (if they can) to support middle mile and last mile deployment."[9]

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[8] *See, e.g.*, Letter from Thomas Jones and Jonathan Lechter, Counsel to tw telecom, to Marlene Dortch, Secretary, FCC, (filed July 9, 2009) at 22-25 ("tw telecom July 9, 2009 *ex parte*").

[9] Petition of XO Communications, LLC, *et al.*, For a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirements of Copper Loops and Copper Subloops (filed Nov. 4, 2009) at iii ("XO Petition").

2. Special Access Reform Will Not Undermine Price Cap LEC Incentives To Invest Or Innovate.

Qwest incorrectly claims that "[t]he *very point* of price cap and other incentive-based regulation is to give ILECs appropriate incentives to pursue high rates of return."[10] The true purpose of price-cap regulation is to mimic a competitive market—that is, to incentivize ILECs to cut costs and increase efficiencies to benefit consumers, not to allow sky-high profit margins. The Commission's goal was not to allow ever-higher profits as the ILECs' costs have become ever lower. Fulfilling the Commission's mandate in Sections 201 and 202 to protect against unreasonable and unjust special access prices—by examining actual profits and returns on investment—will not "subvert" any incentive to invest and innovate. Rather, establishing rational special access regulation will maintain this incentive while encouraging price cap LECs to pursue greater cost-cutting and gains in efficiency.

Additionally, it is important to note that even a substantial reduction in special access prices would leave special access services quite profitable, and incentives very much intact. Special access reform based on the 11.25% benchmark that the FCC long ago established as a reasonable rate of return,[11] a return that in today's economy is more than most companies could hope for, would still provide price cap LECs with a substantial incentive to invest and innovate (and would also allow them to retain past-period windfalls). There has been no suggestion by the NoChokePoints Coalition that special access prices be reduced to a level where price cap

[10] Qwest Comments at 48; *see also* AT&T Comments at 50-52; Comments of Verizon and Verizon Wireless (filed Jan. 19, 2010) at 44 ("Verizon Comments").

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

LECs would earn anything other than a healthy profit. Finally, AT&T's claim that adjustment of the price caps will undermine regulatory credibility[12] is incorrect because it fails to recognize that the FCC has a duty to review its special access regulatory regime in light of current competitive conditions. As Qwest has correctly acknowledged, "the Commission does have a responsibility to revisit its special access regime periodically to ensure that it accurately reflects the extent of competition."[13]

3. The Commission Should Reject The Price Cap LECs' Call For FCC Endorsement Of Improper Cross-Subsidies.

AT&T argues that the price cap LECs need excessive special access profits to continue investing in consumer broadband infrastructure.[14] AT&T claims that it needs the special access windfall because "[t]he returns on capital on the broadband deployments, even in the dense markets, are truly awful."[15] The Telecommunications Act, however, makes it *unlawful* for a carrier to use services that are not competitive to subsidize services that are subject to competition.[16] The Commission therefore must therefore reject AT&T's request on that basis alone.

Even if it would be lawful to accept AT&T's argument—which it is not—such a decision would not be sound public policy. There is no requirement that AT&T, Verizon, or Qwest

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[12] AT&T Comments, Exhibit A at 35-36.

[13] Qwest Comments at 4.

[14] AT&T Comments at 17.

[15] *Id.*

[16] 47 U.S.C. § 254(k). *See also* 47 U.S.C. § 201(b), which as the DC Circuit has explained, requires prices to be cost-based, unless the Commission adequately explains why another approach is appropriate. *See Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 526, 529 (1996). Under that standard, it would be unlawful for the Commission to intentionally set inflated prices for special access at a rate designed to encourage deployment of unrelated services rather than at a rate based on costs.

actually use the outsized profits they earn on special access to deploy broadband facilities, and the price cap LECs provide no evidence that they will. The Commission is all too familiar with the price cap LECs' failure to fulfill past promises to invest in deployment of broadband facilities in exchange for freedom from regulations for other services.[17] The disappointment of such unfulfilled promises aside, the Commission has quite clearly stated that its goal is to eliminate implicit cross-subsidies.[18]

Furthermore, endorsing hidden cross-subsidies is bad public policy because there is no credible evidence that unreasonably high special access prices create an incentive for price cap LECs to deploy more broadband. In fact, the opposite is true. The price cap LECs ignore the long history of competition, rather than monopoly, spurring innovation and deployment.[19] The price cap LECs instead attempt to convince the Commission to adopt the discredited theory that allowing ever-higher profits will somehow lead monopolists to use those profits to promote the public interest by investing in new broadband infrastructure.[20] Such claims are demonstrably false. In fact, price cap LECs have consistently failed to live up to their promises to deploy broadband, instead simply pocketing supra-competitive returns on other services—to the tune of hundreds of billions of dollars. In its overview of fiber optic broadband deployment, the New Networks Institute noted that price cap LECs received relief from rate-of-return regulation based

[17] *See, e.g.*, Bruce Kuchnick, New Networks Institute, *The History, Financial Commitments and Outcomes of Fiber Optic Broadband Deployment in America: 1990-2004*, at 51-53, GN Docket No. 09-47 (filed Dec. 4, 2009) ("*Fiber Optic Broadband Deployment Report*").

[18] *See, e.g.*, Access Charge Reform, 15 FCC Rcd 12962, 12977 ¶ 36 (2000) ("*CALLS Order*").

[19] This willful ignorance comes despite the fact that price cap LECs' investment in their own wireline broadband products, like AT&T's U-Verse and Verizon's FiOS, are clearly being driven by the competitive threat from cable, and not because incumbents are using their monopoly rents to cross-subsidize these services out of the goodness of their hearts.

[20] AT&T Comments at 17.

on commitments to deploy broadband facilities, but found that "Verizon, AT&T and Qwest have collected over $300 billion and counting for fiber optic services that were never delivered."[21]

Rather than incentivize broadband deployment, monopoly profits have actually been shown to reduce investment. In its 2010 report, *Regulation, Investment and Jobs: How Regulation of Wholesale Markets can Stimulate Private Sector Broadband Investment and Create Jobs*, Economics and Technology, Inc. ("ETI") found that while investment by both ILECs and CLECs increased immediately following passage of the 1996 Telecommunications Act, that pattern changed once a more deregulatory posture was taken, and the BOCs have actually reduced annual wireline network investments, from over $30 billion per year at their peak to only $17.5 billion per year in 2006 and 2007.[22] The diminishing investments allowed the combined book value of telecom plant for the companies that now comprise AT&T, Verizon and Qwest to deteriorate by over a third—dropping from over $155 billion in 2001 to only $101 billion in 2007. In a 2009 study, ETI found "no evidence of any extraordinary investment programs spurred by the broad regulatory relief that the RBOCs have been granted. In fact, as the data reveal, capital investment by the RBOCs in the US has slowed as regulation has decreased."[23]

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[21] *See, e.g., Fiber Optic Broadband Deployment Report* at 51-53.

[22] Susan M. Gately, *et al*., Economics and Technology, Inc., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets can Stimulate Private Sector Broadband Investment and Create Jobs* at 6-7 (2010).

[23] Lee L. Selwyn *et al*., Economics and Technology, Inc., *The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition* at 22 (2009).

B. DSn Services Are Vital To Broadband Throughout The Country.

Several commenters agree with the NoChokePoints Coalition that DS-1 and DS-3 services are critical to the delivery of broadband services. The Commission should reject the price cap LECs' arguments that these core services are somehow unimportant to this inquiry.

1. DSn Services Are Critical Inputs To Myriad Broadband Products And Will Remain Critical For Years To Come.

NRRI's recent report demonstrates that DS-1 and DS-3 special access is critical to broadband service, explaining that both wireless carriers and competitive wireline carriers use these special access facilities to deliver broadband services to their customers.[24] In the wireless context, the NRRI reported that a single cell site typically requires one or two DS-1 lines, although some sites may require additional capacity.[25] Despite these facts, the price cap LECs assert that DS-1s and DS-3s are inadequate for the bandwidth needs of the future. They argue that wireline broadband is synonymous with fiber optics and suggest that the Commission need not worry about pricing for other special access services because they will not be important in the near future.[26]

This is simply wrong. NoChokePoints Coalition members' experiences are largely in accord with NRRI's conclusion that DS-1 and DS-3 services remain vital to broadband. For example, Sprint was the first carrier to offer 3G wireless service, with its dramatically improved wireless data transmission capacity. Even when delivering 3G service, however, Sprint finds that on average it requires fewer than three DS-1s per cell site. Sprint anticipates that, while its

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[24] Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets* at 6-7 (rev. ed. 2009) ("*NRRI Report*").

[25] *Id.* at 6.

[26] AT&T Comments at 14; Qwest Comments at 18-20.

backhaul needs will continue to grow, it will continue to meet those needs at a substantial majority of its cell sites through the use of multiple DS-1s for quite some time.

Similarly, as the Ad Hoc Telecommunications Users Committee, representing business purchasers of telecommunications services, explains in its reply comments, DS-1s remain critical to these users across the country.[27] Business broadband purchasers use their special access connections intensively for credit card transactions, inventory management, and a wide range of other applications that simply do not require greater capacity than DS-1s can provide in many cases. Additionally, colleges and universities use TDM-based special access connections for applications such as video streaming, two-way interactive TV for instruction, and the exchange of large data sets and research between scholars at different institutions internationally and domestically.

Furthermore, call centers and enterprise wide VOIP and IP PBX systems utilize these broadband capabilities for voice traffic. TDM-based special access also remains a crucial input for carriers to provide channelized voice services as well as broadband services to businesses. For example, one of tw telecom's most popular products, Versipak, provides bundled multi-line voice and internet access service over a single DS-1.[28] TDM-based services are essential for a variety of uses, and there is no indication that intermodal competitors are capable of providing these critical applications to business customers.[29]

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[27] *See* Reply Comments of Ad Hoc Telecommunications Users Committee (filed Feb. 24, 2010) at 2-5.

[28] *See* Reply Comments of tw telecom (filed Feb. 24, 2010) at 10.

[29] *See e.g.*, Comments of tw telecom (filed Jan. 19, 2010) at 11-12 ("tw telecom Comments") (showing that the substantial and persistent retail price differential between DSn-based services and "business-class" cable modem services demonstrate that they do not occupy the same product market).

Even the price cap LECs' own filings show the importance of DSn services. According to Verizon, over 74% of cell sites were served by copper wire backhaul as recently as 2008.[30] Qwest's submission reports that between 80% and 90% of wireless cell sites are still served by copper, TDM-based T1 lines.[31] Verizon also confirms that special access needs are still increasing—by 26.3% per year between 2003 and 2006, and 23.1% between 2006 and 2007, when calculated on a voice-grade equivalent basis.[32] Clearly, based on the price cap LECs' own analysis, DS-1s and DS-3s are not "going the way of the dodo."[33]

The increase in TDM-based special access services is the result of increasing popularity of the wireless and wireline data and voice services provided by purchasers of special access. It is not, as Verizon claims, the "hallmark of increasing buyer welfare and the development of effective competition in a previously regulated industry,"[34] but rather the increase in demand in the retail market for a set of services that can only be delivered by purchasing additional special access services, no matter how unreasonable the price incumbents charge happens to be. To the extent that demand for special access services has increased at a faster pace than the price cap LECs' costs of meeting that demand, this demand stimulation has resulted in a windfall to the incumbents.

This benefit should not fall to the incumbents alone; the rewards of demand stimulation should be shared with the purchasers, consumers, and end users causing that demand. And if prices are brought to a reasonable level, special access purchasers will be able to increase the

[30] Verizon Comments at 16.

[31] Qwest Comments at 20 (citing Letter from Robert Quinn, AT&T, to Marlene Dortch, Secretary, FCC (filed Nov. 4, 2009) at 3 ("AT&T Nov. 2009 *ex parte*").

[32] Verizon Comments at 8-9.

[33] AT&T Comments at 13.

[34] Verizon Comments at 8.

deployment of competitive services which will bring down the prices for end users. The Commission has rejected windfalls created by increased demand in the past. For example, the "g" factor the Commission first adopted in the original price cap formula for the common line basket[35] was intended to measure changes in the common line demand growth and was specifically devised "to protect ratepayers from paying common line charges that are unreasonably high in light of demand growth."[36] Here, the Commission should likewise ensure that consumers and end users ultimately are the beneficiaries of the increased demand.

Price cap LECs' claims that DSn services are little more than a historical curiosity are particularly ironic in light of their recent claims in the broadband forbearance proceedings. There, they argued[37]—and the Commission accepted—that competitors could use TDM-based services (*i.e.*, DSn services) as inputs to their own competitive Ethernet services, which would provide competition for the services for which price cap LECs sought regulatory forbearance.[38] Now, however, they seek to convince the Commission that such services are essentially useless for delivering broadband and will be unimportant in the future. The two claims are directly contradictory. The Commission could not lawfully conclude on the one hand that deregulation of Ethernet was justified based on the assumption that TDM-based special access services would

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[35] *1993 Annual Access Tariff Filings*, 12 FCC Rcd 6277, 6292 ¶ 25 (1997).

[36] *Id*.

[37] *See* Letter from Frank S. Simone, Executive Director, Federal Regulatory, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket. No. 06-125 (filed Sept. 13, 2007) ("We explained that Ethernet services can be provisioned over TDM loops, such as the DS-l and DS-3 special access services that are not subject to AT&T's forbearance request.") (emphasis omitted).

[38] *See* Petitions of AT&T Inc. & BellSouth Corp. for Forbearance, 22 FCC Rcd 18705, 18720-21 ¶¶ 25-26 (concluding that competition will restrain AT&T from imposing unjust and unreasonable prices on packetized broadband services like Ethernet, and concluding that competition can be sustained by competitors using TDM-based special access services); *Ad Hoc Telecomms. Users Comm. v. FCC,* 572 F.3d 903, 910 (D.C. Cir. 2009).

permit competition for Ethernet and on the other hand conclude that TDM-based special access services are not important to broadband.[39]

Demand for higher-capacity services, including Ethernet and OCn services, is indeed increasing, but this does not release the FCC from its continuing obligation to ensure that prices for TDM-based services are just and reasonable *now*. Copper-based DS-1 and DS-3 facilities are how customers transmit data today. Prices for those services must be "just and reasonable" at this time, notwithstanding the increasing demand for other services.

2. AT&T And Verizon Wireless Have Declined To Provide Hard Data On Their Own Special Access Use.

As the largest special access purchasers in the country, the interexchange and wireless affiliates of both AT&T and Verizon could provide data on their use of TDM-based services. But these entities have declined to provide data on what special access services they buy from their respective ILEC affiliates and from competitive providers, instead relying on vague claims from other companies' websites and analysts' reports.[40] Their refusal to provide this information is particularly ironic in view of their demands that other purchasers and competitors provide such data. As part of its broader data collection from purchasers and competitors, the FCC should therefore collect data on price cap LEC affiliates' purchase of various special access products, by capacity, and on their purchase of special access services from non-ILEC competitive providers, broken down by in-territory and out-of-territory purchases. In addition, the price cap LECs

[39] The truth, of course, is that TDM-based special access services are important and will continue to be important for a long time for a myriad of uses. Nevertheless, while it is *technically* possible to use them as an input to deliver Ethernet services, doing so is *not* generally economic, and is practical in only extremely limited circumstances. *See* Letter from Jonathan Lechter, Counsel to tw telecom, to Marlene H. Dortch, Secretary, FCC, GN Docket. No. 09-51 (filed Dec. 22, 2009) at 9-10.

[40] Qwest Comments at 20 (citing AT&T Nov. 2009 *ex parte* at 3); Verizon Comments at 9.

themselves should be required to identify whether they purchase services (and, if they do, what types of services) from competitors in their regions. And, to the extent that price cap LEC affiliates other than wireless and IXC affiliates offer competitive services outside their regions, they should identify their special access purchases, by type and capacity, as well.

3. The Commission Should Carefully Analyze The Market For Ethernet Services.

While it is clear that DS-1 and DS-3 services remain critical to both narrowband and broadband services, Ethernet access services also require Commission attention, as many retail customers' demand shifts to Ethernet over the long term.[41] The inability of competitors to economically serve off-net locations with Ethernet service via TDM-special access inputs or obtain reasonably priced Ethernet special access services from incumbent LECs will lead inexorably to incumbent LEC dominance of the retail Ethernet market. Indeed, this is already beginning to occur. According to a just-released report, AT&T is maintaining and extending its lead in the retail Ethernet market.[42]

The FCC therefore also should carefully analyze the market for Ethernet services and ensure that those markets are either actually and effectively competitive or are properly

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[41] *See* Verizon Comments at 14 ("New technologies such as…. Carrier Ethernet and Internet Protocol Virtual Private Networks (IP-VPN) are replacing traditional services, such as [TDM-based] special access, and are leading corporate data growth.").

[42] Mike Robuck, *Cox top MSO for business Ethernet services; AT&T No. 1 overall,* CEDMagazine.com, http://www.cedmagazine.com/News-Cox-MSO-business-Ethernet-ATT-No1-overall-020210.aspx ("'Business Ethernet is not a mass-market offering in the U.S. yet. However, in 2009 we watched Ethernet emerge as the most significant strategic product in service providers' data portfolios. With upward demand from enterprise customers for higher access speeds, service providers are being challenged to increase network capacity and decrease installation cycle times,' said Rick Malone, principal at Vertical Systems Group. 'AT&T heads our leaderboard for the second year in a row by increasing its business Ethernet base more rapidly than the overall market.'").

regulated. As the D.C. Circuit noted in its review of the broadband forbearance orders, the FCC remains free to reverse its decision granting forbearance for such services.[43] In this regard, the FCC must keep in mind that particular technologies are not more or less susceptible to monopoly. The source of market power is the network—not the electronics.

III. PRICE CAP LECS' COMMENTS CONTAIN INSUFFICIENT ANALYSIS OF RELEVANT PRODUCT AND GEOGRAPHIC MARKETS.

To understand whether the Commission's special access rules are working properly to ensure just and reasonable rates and terms, the Commission must study the state of the market. This means the FCC must examine whether and where incumbents face competition in a properly defined market.[44] To do this, the Commission must first define the relevant markets for analysis. Though many commenters provided useful suggestions in this regard, AT&T, Verizon, and Qwest gave short shrift to this essential task in their comments. And where the price cap LECs did comment on market definition, their analysis included errors and important omissions.

A. The Relevant Product Market.

As the NoChokePoints Coalition explained in its comments, a relevant product market encompasses products to which purchasers would switch in response to a small but significant non-transitory increase in price of one product.[45] Applying this definition, there is not just a single "special access" or "high capacity services" market. Rather, there are several different

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[43] *See Ad Hoc Telecomms*., 572 F.3d at 911.

[44] As AT&T acknowledges, phase II pricing flexibility should be granted only where "'almost all special access customers have a competitive alternative.'" AT&T Comments at 26 (quoting *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 142 (1999) (*1999 Pricing Flexibility Order*)). Yet AT&T fails to suggest any reasonable way for the Commission to actually test whether that condition exists for any plausibly defined market.

[45] Comments of the NoChokePoints Coalition (filed Jan. 19, 2010) at 9 ("NoChokePoints Comments") (citing U.S. Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 1.11 (1992 rev. 1997)).

special access product markets. Two distinctions, in particular, bear emphasizing. *First*, for TDM-based special access services, channel terminations should be distinguished from interoffice transport.[46] *Second*, services of different throughput capacities or speeds are in different product markets.[47]

The price cap LECs' comments essentially ignore the first distinction—the difference between channel terminations and interoffice transport. The omission is telling because the distinction is not new or subtle. When the Commission created pricing flexibility triggers in 1999, it explicitly recognized the different competitive characteristics of those facilities and described them as being in separate markets.[48] And a NoChokePoints Coalition *ex parte* repeated the point as recently as October 27, 2009.[49]

Furthermore, Verizon denies entirely the second distinction—that different bandwidth services are in different product markets. Verizon claims, to the contrary, that "there is no basis

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[46] *See* NoChokePoints Comments at 9-10. In addition, the characteristics of the products are different from the seller's perspective. As the Commission recognized when it set the pricing flexibility triggers in 1999, the fact that interoffice transport facilities carry traffic between points of traffic aggregation (aggregating the traffic of many customers) while channel terminations connect to a single customer location makes competitive entry far more likely for interoffice transport. *See 1999 Pricing Flexibility Order*, 14 FCC Rcd at 14278-79 ¶ 102; for Ethernet, it does not appear that channel terminations are in a different product market from interoffice transport. *See* tw telecom Comments at 10; note that the NoChokePoints Coalition's statement in its comments that Ethernet can be a substitute for TDM-based services in some contexts, NoChokePoints Comments at 10, does not necessarily mean that Ethernet should be considered part of the same product market as TDM-based services of equivalent bandwidths in a market analysis; *Cf*. tw telecom Comments at 10. It means only that both markets may be relevant to certain applications.

[47] NoChokePoints Comments at 10.

[48] *See 1999 Pricing Flexibility Order*, 14 FCC Rcd at 14278-79 ¶ 102 ("[C]ompetitors are likely to enter the *market* for entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport before they enter the *market* for channel terminations between a LEC end office and a customer premises.") (emphasis added).

[49] *See* Letter from Paul Margie, Counsel to Sprint Nextel, to Marlene Dortch, Secretary, FCC (filed Oct. 27, 2009), attachment at 11 ("[H]igh-capacity transport market and core channel terminations market are very different.").

for referring to separate product markets for different bandwidths or speeds of high capacity service."[50] Verizon's argument is based on the premise that it is possible for buyers to switch between different services and that "the economics of such services—from both the demand and supply side—make one bandwidth or speed of service viable substitutes for other speeds of service."[51]

Verizon's position is untenable. Indeed, the Commission rejected just such an argument in the *Triennial Review Remand Order*.[52] The reasons are not complicated. While it may be *possible* for a customer to switch between different speeds of service, that does not mean the services are in the same market for the purposes of any rational analysis. That is like saying that a bicycle is in the same product market as a Ferrari: just because a person can use either to take a weekend road trip does not mean that they are in the same product market. Likewise, while the costs of deploying fiber optics might be somewhat similar regardless of the capacity of the services delivered over them, it is simply not true that the costs to the purchaser of obtaining DS-1 services are similar to the costs to the purchaser of obtaining OC-192 services. The fact that these services are priced differently suggests that they are in different product markets. And in terms of the relevant test, they certainly are: a small but significant non-transitory increase in price for DS-1s will not cause a purchaser to switch to purchasing a DS-3. Notably, though Verizon attempts to bolster its claim with references to its attached declaration by Michael Topper, the careful reader will search in vain for any statement by Professor Topper that suggests he actually agrees that all these services should be analyzed as part of the same product market. And, unsurprisingly, when Ofcom, the United Kingdom's telecommunications regulator,

[50] Verizon Comments at 18.

[51] *Id*. at 17-18.

[52] Unbundled Access to Network Elements, 20 FCC Rcd 2533, 285-86 ¶ 86 (2005) ("*TRRO*").

conducted its recent analysis of the market for special access-like services in the UK, it found that the relevant product markets should be divided to separate higher-bandwidth services from lower-bandwidth services.[53]

B. The Relevant Geographic Market.

The comments do not show any significant disagreement about the fact that, at least as a theoretical matter, the relevant market the Commission should consider is the point-to-point market linking two locations. As the NoChokePoints Coalition explained, this means that as a practical matter competition can fruitfully be analyzed at the building or cell site level,[54] and buildings exhibiting "'similar competitive characteristics'" could be grouped together for analysis.[55]

Of course, even an analysis focused on individual buildings is an oversimplification. In fact, the relevant market for a specific special access application consists of the point-to-point links necessary to establish all the necessary connections. Thus, a business with three locations needs to be able to connect all three locations; a competitor that can reach only two of those locations cannot serve the customer's needs if it cannot obtain a connection to the third location from the incumbent at just and reasonable rates. Because of ILECs' ubiquitous networks, they

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[53] *See* Comments of BT Americas (filed Jan. 19, 2010) at 3. *See also* Business Connectivity Market Review, Statement and Consultation, Ofcom, §§ 3, 5 (Dec. 8, 2008) ("*Ofcom Market Review*") (analyzing the retail and wholesale product markets for special access-like services). For traditional services like DS-n and OC-n services, Ofcom grouped services into the following categories: (a) less than or equal to 8 Mbps; (b) greater than 8 Mbps but no more than 45 Mbps; (c) greater than 45 Mbps but no more than 155 Mbps; and (d) greater than 155 Mbps. For Ethernet (which Ofcom found was not in the same product market as traditional services), Ofcom found there were two product markets: (a) for services less than or equal to 1 Gbps and (b) for services greater than 1 Gbps.

[54] *See* NoChokePoints Comments at 7.

[55] *Id.* (citing Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, 12 FCC Rcd 15756, 15794 ¶ 66).

have a substantial advantage in competing for such customers. Nevertheless, analyzing competition at the building level, while it overstates the degree of competition to the extent it discounts these network effects, does provide a reasonably good picture of the level of competition in many circumstances.

While analyzing competition at the building level would be the best approach as a theoretical matter, the NoChokePoints Coalition recognizes that the Commission may determine that doing so would not be practicable. According to AT&T, Verizon, and Qwest, such practical concerns counsel for analyzing competition at the MSA level.[56] While members of the NoChokePoints Coalition have differing views on what the proper geographic market should be for purposes of this analysis, they agree that the key to any useful analysis of competition, no matter what size geographic market the Commission chooses to use, is that the competitive environment should be relatively uniform throughout the entire geographic market selected. Only if this is the case can the entire area reasonably be treated the same for regulatory purposes. That is, if the Commission uses MSAs to conduct its analysis as the price cap LECs urge, and if it maintains pricing flexibility triggers based on the extent of competition within the entire MSA, as they also urge, the Commission should not grant flexibility unless the *entire* MSA exhibits sufficient levels of competition to warrant it.

Thus, the Commission should not conclude, as the price cap LECs suggest, that because most special access demand is concentrated in the downtown area of each MSA, the entire MSA should be considered to be as competitive as its most competitive part.[57] Unless *all* (or essentially all) demand within an MSA is in that downtown area (which of course it is not), then this is actually an argument for *not* using MSAs as the relevant geographic market.

[56] Qwest Comments at 26-27; Verizon Comments at 31-32; AT&T Comments at 44-45.
[57] *Cf.* AT&T Comments at 44.

The price cap LECs argue that because of MSA-wide pricing, prices in one part of an MSA impose price constraints on other parts of the same MSA. But that is wrong, too, because the fact that price cap LECs' prices are uniform does not suggest that they are subject to competitive pressure throughout the MSA. Indeed, price cap LECs are generally not *required* to price uniformly throughout an MSA,[58] and if competition were constraining their prices where it did exist, the price cap LECs would have powerful incentives *not* to price uniformly throughout the MSA. The fact that ILECs impose MSA-wide pricing suggests that the presence of competition for some services in some locations actually has little impact on special access prices in the MSA. In fact, because of network effects and purchasers' need to find one supplier that can serve sites throughout an MSA, competitors are frequently at a substantial disadvantage even in the more-competitive downtown areas and so the presence of competitors may not have as much effect on prices as the price cap LECs would like the FCC to believe. Anticompetitive terms and conditions also stifle competition in such areas: a customer might pay more for ILEC special access facilities than that customer would have to pay for a competitor's facility because the customer has volume requirements or other obligations to fulfill. Thus it is not surprising that, as tw telecom has shown, price cap LECs' prices are consistently above competitor prices.[59]

One additional point deserves mention in this regard. AT&T's experts argue that using MSA-based triggers for pricing flexibility appears to be both over- and under-inclusive, in that

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[58] The 1999 Pricing Flexibility Order permitted incumbent LECs to establish multiple pricing zones in each study area. *See 1999 Pricing Flexibility Order*, 14 FCC Rcd at 14233 ¶ 22 (1999) ("Accordingly, for purposes of deaveraging rates for services in the trunking basket, we eliminate the limitations inherent in our current density zone pricing plan and allow price cap LECs to define the scope and number of zones within a study area, provided that each zone, except the highest-cost zone, accounts for at least 15 percent of the incumbent LEC's trunking basket revenues in the study area and that annual price increases within a zone do not exceed 15 percent.").

[59] *See* tw telecom July 9, 2009 e*x parte* at 2.

the triggers may permit pricing flexibility in areas that are not competitive but may also deny flexibility in entire MSAs (such as Chicago and New York) where the experts believe that at least some portions of the MSAs should be subject to phase II pricing flexibility. They further claim that they are "aware of no basis to conclude that the MSA-based approach has systematically led to more widespread pricing flexibility than would rules based on more targeted geographic areas."[60] But this misses the point entirely. The point is that *because* the triggers do permit pricing flexibility in areas that are not competitive, they *do* systematically permit more widespread pricing flexibility than would more targeted triggers. They may *also* have the effect of denying (upward) pricing flexibility elsewhere. But the two harms are not symmetrical. There is no reason to believe that, in areas where the price caps are in effect, price cap LECs are not already recovering their costs plus a reasonable profit—prices are too high even where the price caps are in effect. On the other hand, granting flexibility where flexibility is not warranted permits the price cap LECs to extract even greater monopoly profits than they already do under the current too-lax price cap rules.

IV. THOUGH PRICE CAP LECS SEEK TO AVOID A MEANINGFUL ANALYSIS OF THEIR MARKET DOMINANCE, SUCH AN ANALYSIS IS CENTRAL TO THE COMMISSION'S INQUIRY.

A. The Commission Should Dismiss Price Cap LECs' Objections To Meaningful Analysis Of Their Market Dominance.

In its Public Notice, the Commission sought "concrete suggestions" on how to determine whether its current special access rules are working.[61] Many commenters provided such suggestions, discussing the best way to examine the market to analyze whether the current system is broken. In contrast, the price cap LECs' comments focus on why the Commission

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[60] *See* AT&T Comments, Exhibit A, Declaration of Dennis W. Carlton and Hal S. Sider, at 20 ¶ 36 ("*Carlton-Sider Declaration*").

[61] *Public Notice,* 24 FCC Rcd at 13639.

should not even attempt to analyze their dominance of special access markets or unreasonable prices. The price cap LECs apparently hope to convince the Commission that it is impossible to regulate their monopoly special access services, so the Commission will give up and ignore the problem. But that is not a lawful option, and choosing to ignore special access reform would undermine broadband policy. The Commission should reject these attempts to avoid a meaningful inquiry.

In their comments, the price cap LECs repeat, yet again, their argument that the Commission cannot rely on ARMIS in any way.[62] Yet they do not, as the Public Notice requested, "propose a different analytical framework for measuring special access profitability."[63] The NoChokePoints Coalition will not here repeat all of the arguments in the record about the usefulness of ARMIS.[64] But it bears emphasis that, as noted in the report by Economics and Technology, Inc., the price cap LECs themselves have relied on ARMIS when its data supports a position that they advance.[65] If the ILECs can present no alternative to ARMIS, yet use it themselves when it is convenient, the Commission should find that they have conceded that it is the best available tool for the FCC's inquiry.

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[62] *See, e.g.*, AT&T Comments at 57-61 & Exhibit B, Declaration of Ron Hilyer and Thomas Makarewicz; Verizon Comments at 45-48.

[63] *Public Notice*, 24 FCC Rcd at 13642.

[64] *See, e.g.*, Comments of Ad Hoc Telecommunications Users Committee (filed Jan. 19, 2010) Attachment B at 9-19 ("Ad Hoc Comments") (addressing price cap LEC complaints about ARMIS); Reply Comments of T-Mobile USA, Inc. (filed July 29, 2005) at 7-9 & Attachment A, Declaration of Simon Wilkie, at 3-5; Letter from Gil M. Strobel, Counsel to Sprint Nextel, to Marlene H. Dortch, Secretary, FCC (filed Oct. 5, 2007), Attachment at 15-17 (noting, among other things, that ARMIS data are useful in evaluating the ability of incumbent LECs to realize increasing economies of scale in the provision of special access over time).

[65] Ad Hoc Comments, Attachment B at 17-19.

In addition to criticizing ARMIS, AT&T rejects the notion that the Commission could adopt a new X-factor in order to bring prices to reasonable levels.[66] But AT&T seems to forget that an X-factor is today, and always has been, an integral part of the Commission's price cap rules. The price cap rules would never have been adopted and could hardly be justified if there were not some X-factor-like mechanism for adjusting prices over time.

AT&T also emphasizes that the Commission has "never adopted any permanent X-factor that has been upheld."[67] AT&T overstates the legal difficulties the X-factor has faced. The Commission has had no trouble defending interim X-factors against challenge,[68] and the 6.5 percent permanent X-factor that was invalidated by the D.C. Circuit was struck down not because the concept of the X-factor was rejected but only because the Commission had not adequately explained itself.[69] Indeed, in that case, it appears that the *range* of the historic productivity component of the X-factor that the Commission could have chosen from (5.2 to 6.3) was not even in dispute. It should be beyond question that the price cap LECs could not have complained if the Commission had chosen a number at the low end of that range as the permanent X-factor.[70] Notably, even a 5.2 percent X-factor, the lowest of that range, would have resulted in much lower prices than the current regulatory regime has.

Despite AT&T's arguments against any change in the X-factor, it does not even attempt to justify the current X-factor. The current X-factor is set to counterbalance the effect that the inflation adjustment would otherwise have on the price cap indices. But there can hardly be a

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[66] *See* AT&T Comments at 73-74.

[67] *Id*. (emphasis omitted).

[68] *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996).

[69] *See United States Tel. Ass'n v. FCC*, 188 F.3d 521, 526-27 (D.C. Cir. 1999).

[70] *See id*. at 525.

theoretical justification for *that* regime. It is completely irrational for the real price of special access services to be tied solely to the level of inflation—where higher inflation in the rest of the economy would produce greater declines in real prices for special access. Perhaps AT&T could try to defend it by saying that it was based on an agreement among many (but not all) industry players—the CALLS plan. That is true as far as it goes, but the CALLS plan was only intended to last for five years, until 2005.[71] Without more, that cannot be sufficient to justify continued use of the current X-factor. The question is not whether a change is justified, but rather what change the Commission believes is most appropriate.

AT&T goes yet further, however, in attacking the very notion that regulators could ever actually regulate its non-competitive special access services. AT&T claims that under price cap regulation, the profitability of special access services is *irrelevant* because the very point of moving to price caps was to provide the LECs with a profit incentive to improve efficiency, and focusing on rates of return would punish those companies that have achieved the greatest efficiencies.[72] Even if price cap LECs' profits could be attributed to efficiencies (as opposed to mostly being due to increased demand), AT&T would still be wrong. The FCC, in moving to price cap regulation from rate of return regulation, may have decided not to focus on the profitability of one firm versus another to reset prices. But the FCC affirmatively *did* indicate that it would look at the "performance" of the X-factor, which is to say it would look at the profitability of regulated firms as a whole under the X-factor.[73] Price cap regulation was not

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[71] *See CALLS Order*, 15 FCC Rcd at 12974 ¶ 29.

[72] *See* AT&T Comments at 51-54.

[73] Price Cap Performance Review for Local Exchange Carriers, 12 FCC Rcd 16642, 16707-08 (1997) (rejecting price cap LEC argument against considering earnings in price cap performance reviews and noting that future adjustments to the price cap mechanism would be based on "demonstrated industry-wide performance or other generic factors, rather than adjustments that are tied to a particular price cap incumbent LEC's interstate earnings").

designed merely to give incentives to price cap carriers to become more productive (and profitable)—it was designed to ensure that customers received some of the benefit of that increased productivity through lower prices, as would happen in a competitive market.[74] That, of course, was one reason to have kept ARMIS rate-of-return reporting requirements in place: to evaluate whether the price caps were working.

In addition to their litany of arguments against any method for actually attempting to regulate their monopoly special access services, the price cap LECs attempt to throw up another roadblock to reform: their concept of a "data request." Verizon, for example, asserts that the Commission should obtain data on all facilities that competitors "own, lease or otherwise obtain" as well as all data on where such entities plan to offer service in the future, and argues that all this information should be available for competitors to review.[75]

This request does not appear to be designed to help the FCC elicit information about the state of the market—for example, Verizon does not explain why, if it believes the relevant geographic area is the MSA or a wire center, the precise location of competitors' facilities is even relevant. Instead, the data request instead appears to be designed to make the reform process as onerous as possible for the Commission and proponents of reform while requiring as little useful information from the price cap LECs as possible. This explains why the price cap

[74] *See, e.g.*, Price Cap Performance Review for Local Exchange Carriers, 14 FCC Rcd 19717, 19719 ¶ 5 (1999) (explaining that "the Commission determined that an incentive-based price cap system would more closely represent the results of a competitive market than did the prior regulatory method of rate-of-return regulation" and that the price ceiling must be set appropriately because "[i]f prices were set too high, consumers would fail to reap the benefits of the carriers' efficiency"); Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6790 ¶ 30 (noting that price cap regulation encourages carriers to become more efficient and that "[t]he downward pressure on price ceilings requires LECs to share the benefits of increased productivity with ratepayers in the form of lower rates").

[75] Verizon Comments at 35-38.

LECs call for data on the precise location of competitor facilities (but not their own);[76] it also explains why they argue that market share information, which is easy to obtain and quite relevant, should not be relied upon.

Another roadblock the price cap LECs would put in front of reform is their invented notion of a "burden" that special access purchasers must somehow meet to show that reform is necessary.[77] They are mistaken. Rather, as the Commission recognized in its 2005 *Special Access NPRM*, the burden is on the FCC to determine whether the predictions that it made when it established the regulatory regime governing special access were borne out, and whether the rules work to ensure just and reasonable rates.[78]

B. The Commission Should Reject The Price Cap LECs' Attempts To Bias The FCC's Market Analysis.

In addition to throwing up obstacles to any meaningful analysis of the price cap LECs' exploitation of their market power, incumbents attempt to stack the deck in any FCC market analysis. For example, while price cap LECs fail to adequately address the product and geographic markets that would be relevant for the analysis,[79] they try to bias the analysis to their advantage through baseless "weighting" and by calling on the Commission to disregard data that shows the extent of their market domination.

Qwest's proposed "competitive availability" formula is just such a bias-producing suggestion. Qwest argues that, for any given geographic area, the Commission should weight buildings with higher demand more than buildings with lower demand, though it is curiously

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[76] *See* AT&T Comments at 41-42.

[77] *See, e.g.*, AT&T Comments at 6; Qwest Comments at 33.

[78] *Special Access NPRM*, 20 FCC Rcd at 1995, 1996-97 ¶¶ 2, 5 & n.10.

[79] *See supra* part III.

silent about *why* the Commission should do so.[80] The Commission should reject Qwest's proposal. The effect of using such a weighting would be to undermine the assessment entirely. Rather than determining whether competition actually exists throughout the area, which is or ought to be the point of any assessment, such weighting would count the area as competitive if a few locations with extremely high demand had even a little competition. Suppose, for example, that there are two areas, each of which has a large number of special access customers, with each customer requiring no more than one or two DS-1 channel terminations. The two areas are otherwise identical, but in one of those areas, there is a handful of buildings with extremely high demand, and competitors have deployed facilities to those few high-demand buildings (it is of course well accepted that competitors are far more likely to deploy facilities to high-demand locations than locations with low demand). The second area could be deemed "competitive" under Qwest's proposed demand weighting. But that does not mean that the rest of that area is competitive at all. Even AT&T acknowledges that competitive triggers are supposed to identify where "almost all special access customers have a competitive alternative"—not just those customers in the building with the highest demand.[81] Qwest's "weighting" would distort the competitive picture.

The price cap LECs also reprise their argument that "static" market shares are unhelpful to the Commission's analysis of the "dynamically changing" special access market.[82] But after 10 years of pricing flexibility, predictions of competition have not come true for many special access services. Indeed, while it may be that market share numbers for a single point in time

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[80] *See* Qwest Comments, Declaration of Timothy J. Tardiff and Dennis L. Weisman, at 37 ("*Tardiff-Weisman Declaration*").

[81] AT&T Comments at 26 (quoting *1999 Pricing Flexibility Order*, 14 FCC Rcd at 14221 ¶ 142).

[82] *See, e.g,* AT&T Comments at 42-43.

may not reveal the entire picture, the trend in market share over the past decade is telling: price cap LECs continue to control the overwhelming share of the special access market, and, in this case, the trend is entirely consistent with the "static" market share estimate. Market share information is clearly highly relevant to the question of whether the Commission's predictions have actually been proved correct.[83] The Commission can, of course, also assess the likelihood of potential competition, as the NoChokePoints comments suggest. It can do so by analyzing competitors' (including the price cap LECs where they are not incumbents) build/buy analyses[84] as well as the competitive screen identified by the Department of Justice in its review of the AT&T/SBC and Verizon/MCI mergers.[85] Indeed, AT&T seems to agree with the propriety of using such competitive screens.[86]

Similarly, the Commission may be able to simplify its analysis (and its regulations) if it determines, as did the UK regulator Ofcom, that there are certain products for which there is no effective competition on a nationwide basis.[87] In fact, the Commission previously concluded in

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[83] Verizon's argument that the lack of entry by competitors does not indicate that the incumbent is exercising market power is highly implausible. *See* Verizon Comments, Attachment A, Declaration of Michael Topper, at 28-29. The extensive barriers to entry in the special access market that are well documented in the record, *see* NoChokePoints Comments at 12-14, indicate that an incumbent will have significant opportunity and incentive to charge above a competitive price without drawing entry.

[84] *See, e.g.*, Comments of XO Communications, LLC, *et al*. (filed Aug. 8, 2007), Attachment, Declaration of Ajay Govil ¶ 19, (XO will not consider constructing a lateral unless customer demand exceeds at least 3 DS-3s).

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

[86] *See, e.g.*, AT&T comments at 25 n.38 (citing the use of the competitive screens approvingly); *Carlton-Sider Declaration* at 9 n.12, 17 ¶ 29.

[87] *See Ofcom Business Connectivity Market Review* at 6 (Dec. 8, 2008) (concluding that British Telecom has significant market power in both the retail and wholesale markets for low-bandwidth (up to 8 Mbps) traditional special access-like services).

the unbundling context that there would never be competition to deliver standalone DS-1 loops, but that competition for DS-1 loops would be possible only where competitors deployed DS-3 loops, since those facilities could be channelized to offer DS-1 service.[88] The Commission could now, five years later, inquire whether there are any parts of the Nation where such competitive DS-3 channel terminations are indeed deployed ubiquitously throughout the relevant area. If there are not such areas, the Commission has already made the necessary findings to establish that DS-1 channel terminations are not generally competitive in any area. Of course, given the price cap LECs' claim that the costs of replicating their networks have gone up,[89] it makes even less sense to deploy low-bandwidth facilities than it did even a few years ago, suggesting that competition is even less likely today than it was when DOJ developed its competitive screens and the Commission conducted its *Triennial Review Remand Order* analysis.

The price cap LECs continue to try to make hay about statements by competitors about their future competitive prospects as part of their efforts to overstate the prospects for competition.[90] The Commission should consider such statements only to the extent that they reveal actual information about facilities those competitors have or that shed light on the build/buy analysis. Statements that are little more than a general assertion that a competitor is near a particular number of buildings or sources of demand should be analyzed in light of the build/buy analysis: as the Commission has recognized, being "near" a building that has modest demand does not mean that extending a lateral connection to that building will make economic sense, and therefore mere proximity cannot constitute competitive pressure on the ILEC.[91]

[88] *See TRRO*, 20 FCC Rcd at 2628 ¶ 171.

[89] *See* AT&T Comments at 71.

[90] *See, e.g.*, AT&T Comments at 34-35.

[91] *See TRRO*, 20 FCC Rcd at 2628 ¶ 171.

While the Commission can reasonably look to potential competition, it should be particularly cautious about its predictions in this regard since its previous predictions of the prospects of competition have proven to be overly optimistic (a fact that will certainly be confirmed in any reasonable market analysis).[92]

In a similar vein, the price cap LECs trumpet the *possibility* of intermodal competition from fixed wireless.[93] They suggest that, although fixed wireless services have only a tiny fraction of the market share of traditional wireline services,[94] they nevertheless pose (or soon will pose) a significant competitive threat to more-traditional special access services. The claim cannot withstand scrutiny.

What matters for purposes of this analysis is whether special access rates are reasonable under Section 201, not whether another competitor might emerge at some point in the indefinite future. To the extent potential future competitors may someday provide price discipline, those proposing that microwave will compete in the relevant market should explain the proper framework for analyzing and benchmarking this possibility. But those touting the potential of microwave competition to discipline prices propose no test to determine the impact of this

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[92] *See, e.g.*, *Special Access NPRM*, 20 FCC Rcd at 1996-97 ¶ 5 (2005) (noting that the Commission's special access pricing flexibility rules were "based on the Commission's predictive judgment"); *id*. at 2001 ¶ 15 (discussing Commission's hope that competition would arise during the period of the CALLS plan so that access prices could be deregulated); Access Charge Reform, 15 FCC Rcd 12962, 12977 ¶ 36 (2000) (explaining that the CALLS plan "is a transitional plan that moves the marketplace closer to economically rational competition" which "will enable [the Commission], once such competition develops, to adjust [FCC] rules in light of relevant market developments"); *id*. at 13031 ¶ 166 ("[W]e believe that increased competition will serve to constrain access rates in the later years of the CALLS Proposal as X-factor reductions are phased out."). *Cf. NRRI Report* at 42 tbl. 3 (noting that ILEC market shares for DS-1 and DS-3 channel terminations were above 90% in both 2001 and 2007).

[93] *See, e.g.*, AT&T Comments at 30-34.

[94] NRRI Report at 52 (reporting an estimate that outsourced fixed wireless backhaul could increase from 1% of the market in 2006 to perhaps 5% in 2011).

potential competitor, nor any useful metrics for benchmarking the increase in availability of microwave facilities, nor how to address those markets where no microwave provider appears likely to emerge.

Even leaving aside these deficiencies, however, the claim is simply wrong. As an initial matter, it is notable that similar predictions have been made for *years*. Indeed, the Commission itself, in 2005, pointed to the promise of competition from intermodal competitors in justifying deregulation of incumbent LEC transmission facilities.[95] Yet the competition from such services, always promised to be just around the corner, has never materialized. The reasons why are familiar.

Fixed microwave has not become a competitive option for a variety of technical reasons. For example, fixed microwave is a line-of-sight service, and it is therefore difficult to use, as a technical matter, in many applications, such as where the proposed transmission path would be blocked by another building or elevated landscape. Fixed wireless is also a “top-down” technology, which is to say that the aggregation and transmission point for a building’s traffic is on its roof rather than at the street. As a consequence, installing fixed wireless often requires extensive rewiring to a building that would switch from traditional wireline special access to wireless service. Furthermore, zoning regulations often make it impossible or impractical to use fixed wireless in many locations. And, even where zoning regulations would permit its use, gaining access to roofs and access to spectrum frequently poses a significant difficulty and can sometimes be completely impractical.

[95] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14853, 14884 ¶ 57 (2005).

Extremely high up-front costs[96] also significantly diminish the ability of fixed wireless technologies to support any real competition with ILEC special access. These costs can only be justified—*in the locations where fixed wireless is even possible*—where demand at a particular location is very high. Importantly, the price cap LECs themselves do not face these barriers because ratepayers have already paid for the deployment of the facilities the ILECs use for special access facilities many times over, and they have enjoyed unique building and conduit access for more than a century.

Microwave is an important technology with powerful applications, but its technical limitations, logistical challenges, and high costs result in it be being only a niche player[97] in the special access arena, and very rarely a possibility for customers such as mobile carriers that need service at the DS-1 level for cell towers. Microwave may be an alternative for some special access services in certain limited situations, but there is simply no evidence that it is now or will be anytime in the foreseeable future a real competitive option for most special access services.[98]

If the Commission properly defines product and geographic markets and conducts a solid analysis, rejecting price cap LECs' attempts to bias the results, two things will become apparent. First, under the threshold identified by this Commission and quoted by AT&T itself—that almost all purchasers have a competitive option—phase II pricing flexibility relief cannot be justified for most special access products in most areas. Second, the analysis will demonstrate that using

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[96] One of the many costs associated with fixed wireless is the high cost of equipment. The Commission recognized that such costs pose a substantial obstacle to deployment of wireless services, and granted extension for hundreds of LMDS licensees based on these costs. *See Applications Filed by Licensees in LMDS Seeking Waiver*, 23 FCC Rcd 5894, 5905-06 ¶¶ 24-26 (2008). It is notable that AT&T was one of the parties requesting an extension.

[97] *See supra* at n.94.

[98] *See NRRI Report* at 57. *See also* twtc July 9, 2009 ex parte at 17-20 (noting that neither fixed wireless nor cable is a significant competitor to incumbent LEC special access services).

collocation—which bears no relationship to the actual deployment of competitive facilities—as a proxy for the deployment of channel terminations cannot be justified. Whatever else is done to reform the triggers, they must be modified so that phase II flexibility is not granted with regard to channel terminations without either (i) actual evidence of competition for channel terminations of that bandwidth deployed throughout the relevant area or (ii) evidence that a chosen proxy has actually been shown to correlate to such deployment (*i.e.*, a new proxy that has been shown to be accurate).[99]

C. Price Cap LECs' Arguments That Allegedly Falling Prices And Increasing Output Demonstrate Competition For Special Access Services Are Unpersuasive.

Price cap LECs would have the Commission believe that prices for special access have declined over time. At first glance it appears that incumbents argue that declining prices with increasing output proves that the special access market is competitive.[100] But a close reading shows that they do not quite make that argument. Instead, AT&T argues that "average revenue per unit" or ARPU has declined over time.[101] Qwest argues that "average revenues" have declined.[102] Verizon argues that prices have gone down, but actually cites declarations dealing

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[99] The Commission should reject out of hand AT&T's suggestion that transport should be subject to phase II pricing flexibility nationwide because competitors have a total of 100,000 miles of fiber transport. *See* AT&T Comments at 38. Much of that fiber covers the same areas—downtown districts—several times over, so the figure AT&T cites is misleadingly high. But to put that number in even clearer context, the Commission should note that AT&T *alone* claims to have over 90,000 miles of long-haul transport and over 308,000 miles of metro and local facilities in just its 22-state region. *See* http://www.business.att.com/content/productbrochures/GobalNetwork.pdf.

[100] *See, e.g.*, Verizon Comments at 5 ("These two readily-observable market factors—declining prices and growing output—demonstrate that special access services are subject to effective competition.").

[101] *Carlton-Sider Declaration* at 30-31.

[102] *See Tardiff-Weisman Declaration* at 9 ¶ 17 n.12.

with ARPU[103] and *ex parte* filings that do not even identify what they purport to measure.[104] All of these related arguments are meritless.

As an initial matter, the evidence that price cap LECs provide on the trajectory of special access prices is a red herring. There are, of course, a host of reasons why a monopolist might raise or lower prices that have nothing to do with competitive pressure.[105] As Dr. Stanley Besen has explained, "the difference between a competitive and a monopolistic industry is not the direction of, or the 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."[106] Moreover, in an industry characterized by significant economies of scale and scope, costs decline considerably as scale increases. That suggests that, if prices were in any way restrained by competition (or were somehow otherwise related to cost), prices would have come down dramatically as the demand for special access services increased over the past decade. Yet there is no evidence that they have done so.[107] Although the incumbents focus on ARPU trends, such trends do not indicate that underlying prices are actually declining, and are even less

[103] *See, e.g.*, Verizon Comments at 6 & nn.4-5 (citing Comments of Verizon (filed Aug. 15, 2007), Attachment A, Supplemental Declaration of William E. Taylor, at ¶ 7).

[104] *See, e.g.*, Verizon Comments at 8 n.11 (citing Letter from Donna Epps, Verizon, to Marlene Dortch, Secretary, FCC (filed Oct. 20, 2009)).

[105] Price changes can also be attributable to changes in demand, changes in the cost of some inputs, or other factors. *See* Declaration of Stanley Besen, attached to tw telecom July 9, 2009 *ex parte*, at 4-5 ¶ 8 ("Prices can change for a large number of reasons, only one of which is a change in competitive conditions.").

[106] *Id*. at 3-4 ¶ 5.

[107] *Cf*. NoChokePoints Comments at 18-21 (discussing evidence that prices have not gone down, even in areas where the Commission's pricing flexibility rules predict that competition should restrain prices).

relevant than a focus on actual *price*.[108] For these reasons, the incumbents' evidence regarding alleged price reductions is little more than a distraction from the real issue.

The most probative indication of whether the price cap LECs face competition sufficient to restrain prices is neither changes in price standing alone nor the entirely unreliable ARPU, but rather profit margins. If the price cap LECs are earning monopoly profits, then they do not face sufficient competition (and are not being regulated appropriately).

Even if the Commission nevertheless wishes to analyze prices, the price cap LECs' evidence on this point has been inadequate to date. As explained, ARPU provides essentially no useful information about pricing. If the Commission wishes to assess pricing, it should demand *actual pricing information*, not self-serving analyses of pricing data.[109] As the NoChokePoints

[108] ARPU might go down even as prices go *up*. To take just a single example, ARPU is heavily dependent on the mix of products that the price cap LEC sells. Assume, for example, that a price cap LEC sells 100 DS-1 channel terminations in a central business district for $200 each and 30 DS-1 channel terminations to outlying cell sites for $400 each, because of a higher charge for longer loops. In that situation, ARPU is $246.15. Assume the price cap LEC raises prices by $5 for each, to $205 and $405. If 20 additional businesses in the downtown district purchase DS-1 channel terminations, which are now priced at $205, but no additional customers purchase capacity in the outlying areas (where prices are now $405), ARPU would now be ((120 * 205) + (30 * 405))/150 or $245. ARPU has gone down slightly but prices actually increased. Qwest's attempt to resolve these difficulties through a resort to "average unit revenue" for a hypothetical standardized circuit also fails. *See Tardiff-Weisman Declaration* at 9 ¶ 17 n.12. Changes in average unit revenue could reflect changes in the proportion of circuits purchased under "discount" plans, which could simply reflect a change in the nature of the customers purchasing circuits. For example, if customers that can commit to purchasing under long-term contracts purchase more new circuits, average revenues will decline even though prices and terms have not changed. *See* Comments of Sprint Nextel Corp. (filed Jan. 19, 2010), Attachment, Declaration of Bridger M. Mitchell, at 24 ¶ 103. Indeed, price cap LECs' own wireless and IXC affiliates purchase special access from the LECs under discount plans that "lock in" those purchases under terms that a non-affiliate would be much more reluctant to take. So, if price cap LECs' own affiliates' purchases increase relative to non-affiliate purchases, that alone could change average revenues without reflecting any change at all in non-affiliate purchases or prices. Moreover, focusing on average revenues ignores the value (and corresponding cost) associated with the onerous terms and conditions in "discount" plans.

[109] For example, Verizon's assertion that the "real" prices customers have paid have decreased 24 percent between 2002-2008, *see* Verizon Comments at 8, is precisely the sort of mis-

Coalition has previously stated, the Commission should require complete price change information for all elements of prices, with identification of which price changes were caused by regulatory requirements (adjustments under the price cap rules or merger conditions, for example) and which were not.[110] And of course price changes associated with discount plans (or new plans) should be separately identified and described, along with all relevant terms (such as term length or volume commitments or other restrictions).[111]

If the Commission does analyze prices, it should focus its analysis on rack rates for all elements. The requirement that rates must be "just and reasonable" under the Act does not apply only to rates under discount plans. It applies to *all* rates, including rack rates.[112] Furthermore, unreasonable and onerous rack rates create the leverage that price cap LECs need to force purchasers into discount plans with anticompetitive terms and conditions. And of course, if rack rates are just and reasonable, then the Commission could reasonably presume that discount prices were also just and reasonable. Analyzing rack rates is also likely to be easier than attempting to assign price equivalents to all of the varied terms and conditions in order to assess how much a price has really "declined" if it is now subject to different terms.

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information that only serves to confuse the issue. For one thing, under the CALLS plan, prices were *required* to go down during that period. For another, even under the current price caps, prices are required to go down in "real" terms, because the X-factor is designed to offset the increase in prices that inflation would normally permit. To say that prices have gone down in "real" terms when prices are *required* to do so says nothing about whether competition has any effect on prices.

[110] Such data should be provided in electronic format as well as on paper to facilitate analysis.

[111] Obviously, the price cap LECs place a value on the restrictive terms they impose on their discount tariffs. A "price reduction" that comes with an additional term commitment is not free to the purchaser or value-less to the seller. A "price reduction" is a reduction in price for something when no other terms or conditions change.

[112] 47 U.S.C. § 201(b).

In addition to being wrong about what conclusions the Commission should draw from ARPU, the price cap LECs are wrong about the conclusions that the Commission should draw from the fact that output has increased. Verizon's theory that a monopolist will reduce output to increase price is simply incorrect.[113] The proper comparison is not between one time period and another, it is between a competitive market and a non-competitive market. That is, a monopolist does not necessarily raise prices and reduce output over time; rather, a monopolist sets a price above what a competitive market would provide, and output is below what would be produced in a competitive market. Indeed, in the special access market, where demand has increased substantially over time (and which is subject to substantial economies of scale), it would be nothing short of startling if output had actually declined.

D. The Commission Should Analyze Price Cap LECs' Abuse Of Market Dominance.

As set forth in the NoChokePoints Coalition's comments, the Commission should assess the effectiveness of its regulations by examining how price cap LECs have been able to use their dominant market position to maintain unreasonable prices, rates of return, and terms and conditions.[114] Ample information already in the record confirms that the price cap LECs are doing just that.[115] Perhaps unsurprisingly, the price cap LECs' comments reveal that their goal, rather than to assist the Commission in conducting such an analysis, is to derail it.

1. The Commission Should Analyze Price Cap LECs' Special Access Profitability.

Notwithstanding the fact that measuring price cap LEC profits is directly relevant to the question of whether their prices are even close to just and reasonable, the price cap LECs deny

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[113] *See* Verizon Comments at 4-5.

[114] *See* NoChokePoints Comments at 18.

[115] *See* NoChokePoints Comments at 18-32.

that it is even possible to analyze their rates of return.[116] Yet of course the price cap LECs do not deny that special access is profitable. Nor do they deny that there are costs associated with providing it. Despite this, the price cap LECs continue to claim that they cannot provide any reliable information about either profits or costs. In other access charge contexts, AT&T argues that the Commission should consider cost and efficiency gains in determining the reasonableness of access prices.[117] AT&T apparently believes that the same principles do not apply to special access, and has fought hard throughout this proceeding to avoid any scrutiny of special access costs, efficiency, and profits, though it does not explain why that would be so. A reasonable person might wonder why the price cap LECs fight so hard, if not to maintain unreasonably high prices and profits.

Information about cost, productivity, and profitability are highly relevant to the question whether the Commission's regulations are working as intended, regardless of AT&T's reasons for asking the Commission to consider the same factors elsewhere that it denies the Commission

[116] *See, e.g.*, AT&T Comments at 57-67. It would be hard to imagine that the price cap LECs do not have rates of return or profit numbers to provide analysts and their own internal management. Presumably they do not simply throw up their hands and say that it is impossible to even begin to assess.

[117] AT&T has explained, for example, that traffic pumping is profitable for local exchange carriers because costs do not rise as demand rises, which causes profits to be excessive and renders rates no longer just and reasonable as required by the Act. *See, e.g.*, Comments of AT&T, Inc., WC Docket No. 07-135 (filed Dec. 17, 2007) at 12, 16-17. Special access is, similarly, a context where additional demand can be (and has been) met by incumbent carriers at very low additional cost, which, in a similar manner, renders price cap LEC prices no longer just and reasonable under the Act. To paraphrase AT&T, "any additional costs associated with the increased [demand for special access] do not remotely rise in proportion to the increases in [revenue] associated with [special access.]" *Id*. at 17 n.29. The principle is the same in both contexts. Indeed, the difference between the traffic pumpers and the price cap LECs' special access services largely comes down to the cause of their unjust and unreasonable prices: the traffic pumpers have engaged in "access stimulation" while the price cap LECs are more accurately described as the beneficiaries of dramatic increases in demand that they did not conspire to create (though, as this proceeding demonstrates, they *have* thrown up every possible obstacle to the Commission's attempts to reform special access regulation to bring their prices down to a just and reasonable level).

should consider in the special access context. Of course it is true that any such analysis may not be perfect, but, as AT&T itself has pointed out, the Commission need not achieve perfection.[118] Indeed, the Commission's regulations need only be reasonable. And it can hardly be disputed that allowing monopoly carriers like AT&T to charge whatever they wish for noncompetitive special access services does not pass *that* test. For that matter, neither does a regulatory regime that "freezes" nominal price levels while, in a market characterized by significant economies of scale and scope and almost negligible marginal costs, demand increases substantially.

2. The Commission Should Consider Appropriate Benchmarks As It Analyzes Special Access Prices.

Qwest suggests that an appropriate way to analyze whether the price cap LECs are abusing their market position where they do not face competition is to use pricing benchmarks.[119] On this point, Qwest should be commended for—alone among the price cap LECs—actually attempting to advance the Commission's process by providing a constructive response to the Public Notice. The members of the NoChokePoints Coalition agree that benchmarks can be a useful tool. The crucial but difficult task, however, is to find the correct benchmark. Because of the lack of a competitive market for most special access services, the fact that price cap LECs' prices tend to be substantially higher than competitors' prices, and the fact that the network effects of the price cap LECs' ubiquitous networks give them a substantial competitive advantage, it appears quite unlikely that that price cap LECs' prices for many services are actually competitive or that they could properly be used as benchmarks. Indeed, any reasonable analysis is almost certain to conclude that for some products there is likely to be no

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[118] *See, e.g.*, AT&T Comments at 7 (noting that the relevant question is not whether the pricing flexibility triggers are perfect but rather whether they are reasonable); *Carlton-Sider Declaration* at 14 (noting that all regulatory regimes are necessarily imperfect).

[119] *See* Qwest Comments at 21-22.

effective competition *anywhere*. That is what Ofcom found for bandwidths below 8 Mbps in the UK. And the Department of Justice similarly found that there is unlikely to be effective competition for channel terminations of less than 2 DS-3s located more than 1/10th of a mile from competitive facilities.

These facts suggest that the Commission will likely need to look elsewhere to find appropriate benchmarks for special access services. UNE prices, which are based on cost plus a reasonable profit, are an appropriate candidate.[120] The NoChokePoints Coalition has also suggested that using prices for products like FiOS—a product for which there is at least *some* competition—as a benchmark could be helpful.[121] But what the Commission should not do, if it wishes to conduct a sound analysis of the special access market, is to rely on benchmarks that are more misleading than helpful.

3. The Commission Should Examine Terms And Conditions.

As the NoChokePoints Coalition noted in its comments, the price cap LECs impose anticompetitive terms and conditions on their so-called discount offerings.[122] Such terms and

[120] Verizon's economist criticizes UNE prices as being too low, *see Declaration of Michael Topper* at 36 ¶ 67, but does not suggest they are *half* what they should be. *Cf.* NoChokePoints Comments at 22 (noting that Sprint compared month-to-month UNE prices to price cap prices subject to a five-year term commitment (*i.e.*, prices much lower than "rack" prices) and found UNE prices for DS-1s were one-half the price of price-cap DS-1s). Even setting special access prices at UNE prices plus an *additional* amount of profit would result in dramatic price reductions.

[121] *See* NoChokePoints Comments at 23-24. FiOS largely competes against the same company's own DSL service and the local cable company's cable modem service, and is accordingly competing in a market with essentially one other competitor. Such a market is far from the ideally competitive markets of economic theory that would be most useful in producing a reliable benchmark. Yet even using FiOS as a benchmark, as imperfect as it is, suggests that special access prices are far too high.

[122] *See* NoChokePoints Comments at 27-28.

conditions, including "take-or-pay *more*" termination fees,[123] demonstrate a lack of competition in the market, and they also hamper competition from arising. AT&T argues that these anticompetitive terms and conditions are voluntarily agreed to by consumers "in a competitive context"[124] and that they raise no serious questions.[125] In reality, special access purchasers have little choice: either accept the discount with the onerous terms and conditions or pay more. Of course, if there were extensive competition for these special access services, the Commission could reasonably assume that terms and conditions associated with discounts were likely reasonable. But the Commission can also reasonably assume that just as there is a "monopoly price" that a monopolist will attempt to charge, a monopolist will also try to impose terms and conditions that favor it and protect its monopoly where the market does not prevent it from doing so. In a market where fixed, sunk investment costs are high but the costs of actually serving a customer are low, a monopolist quite reasonably wants to make *entry* difficult, which is why the terms and conditions of the "discount" plans are designed to do just that.

Moreover, as Paetec and Sprint argued, these discount contracts should be analyzed as illegal tying arrangements in which the incumbent LEC conditions the availability of "discounted" prices for the portion of a customers' demand over which the incumbent LEC has a monopoly on the customer's commitment to purchase service from the incumbent LEC in areas subject to competitive supply.[126] In this way, the incumbent is able to leverage its monopoly position to lock-in the customers' entire demand while maintaining prices for all services under

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[123] *See* NoChokePoints Comments at 28-29.

[124] AT&T Comments at 77.

[125] *See id*. at 76-81.

[126] *See* Comments of PAETEC Holdings, *et al.*, (filed Jan. 19, 2010) at 82-84 ("PAETEC Comments"); *See also* Comments of Sprint Nextel Corp. (filed Jan. 19, 2010) at 42.

the contract that are well above cost.[127] Such above-cost tying arrangements have been condemned by the courts as a violation of the antitrust laws.[128]

E. The Commission Should Provide For Appropriate Confidentiality.

The price cap LECs' attempt to put up obstacles to the Commission's evaluation of the special access market extends beyond the technical question of what data the Commission should collect and how the Commission should conduct its analysis. In addition, they take aim at what should be a relatively uncontroversial point: appropriate confidentiality will assist the Commission in conducting its analysis. That this is true should be obvious. To the extent the Commission is requesting that parties offer information voluntarily, those parties will be more likely to provide the most useful information if they are comfortable that in doing so they will not compromise sensitive competitive secrets.

The NoChokePoints Coalition has endorsed a confidentiality proposal offered by Sprint which would allow certain information to be submitted in secret to the Commission where it would be aggregated into a report that would then be made publicly available for review.[129] Of course, whether that degree of confidentiality is appropriate will depend on the nature of the information the Commission requests. Less sensitive information would presumably require less protection. So, for example, if the Commission requests data on which zip codes or wire centers a competitor has some facilities in, the current protective order may be sufficient. But if the

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[127] For this reason, the incumbents' arguments that any harms from its contracts would arise from below-cost predatory practices are a red herring. *See* AT&T Comments at 76 ("But such a predatory strategy has nowhere been alleged. To the contrary, the parties that object to the incumbents' term and volume discounts have expressly denied that the incumbents' prices are below cost, contending that even the discounted rates are excessive.").

[128] *See* PAETEC Comments at 83 n.282 (citing *Lepage's Inc. v. 3M*, 324 F.3d 141, 155 (3rd Cir. 2003)).

[129] *See* NoChokePoints Comments at 36-38

Commission seeks actual building or cell site deployment information, additional protection would likely be the best way to convince competitive providers to provide it.

Qwest argues, almost in passing, that such a confidentiality regime would be unlawful, citing to a letter filed by AT&T responding to Sprint's suggestion.[130] Qwest offers no actual legal analysis of the question, however, and ignores Sprint's reply to AT&T's letter.[131] Qwest's conclusory assertions about the lawfulness of such an approach should not be considered. Qwest also criticizes Sprint's confidentiality proposal by citing "one illustrative example" where, Qwest argues, such confidentiality would be unwise.[132] Qwest has missed the point of the example it cites. Qwest refers to the NoChokePoints Coalition's suggestion that providers should provide data from a "'representative subset of the areas' in which it provides service."[133] What qualified as a "representative subset of the areas" was never intended to be determined by the provider with no opportunity for others to challenge the assumptions used to select the subset. Rather, the idea was that the Commission should determine specifically what kinds of information it wants (and the criteria for selecting it) with the assistance of parties to this proceeding, but that the data itself—if it is secret—should be presented to the Commission which would then aggregate it.

V. CONCLUSION.

The NoChokePoints Coalition appreciates the priority that the Commission has given to the special access proceeding. Special access is a crucial part of the Nation's broadband infrastructure, and at the core of efforts by businesses, innovators and telecommunications competitors to create jobs, new products, and competition. Now that the Commission has

[130] *See* Qwest Comments at 33 & n.83.

[131] *Cf*. NoChokePoints Comments at 37 & n.80 (discussing the dispute and citing the original letter from Sprint, the letter from A&T criticizing Sprint's proposal, and Sprint's reply).

[132] Qwest Comments at 33-34.

[133] *Id*.

received comment on the framework for its effort to fix the broken special access market it is time to take the next step and issue a data request as soon as possible. Undoubtedly, just as price cap LEC comments attempt to throw roadblocks in the way of the FCC's inquiry, these companies will do everything in their power to cause further delay in this exceptionally drawn out proceeding. The members of the NoChokePoints Coalition stand ready to assist the Commission as it moves forward, and urge it to do so immediately.

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