

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

COMMENTS OF SPRINT NEXTEL CORPORATION

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EXECUTIVE SUMMARY

Sprint Nextel Corporation (“Sprint”) strongly supports the Commission’s continuing efforts to reform the existing special access regime. Sprint urges the Commission to act expeditiously, however, to adopt remedies that will, at long last, allow meaningful competition to take hold in the special access marketplace and provide effective protections to customers in areas where such competition does not exist. The failure of the current special access rules has created a drag on the U.S. economy for more than a decade, harming consumers, businesses, schools, and all other institutions that depend on special access – or any of the broad array of services that rely on special access – while also allowing the incumbent local exchange carriers (“LECs”) to pocket billions of dollars in monopoly revenues each year. Therefore, while Sprint understands the Commission’s desire to collect as much data as possible and to analyze those data thoroughly, it also asks the Commission to balance that desire against the need to put an end to the long-running harms caused by the current rules.

To this end, Sprint recommends that the Commission’s reevaluation of the special access marketplace begin with a traditional market power analysis. The Commission and other regulatory bodies have long relied on this approach to examine competition issues, and it is well suited to the Commission’s task in this proceeding. Under a traditional market power analysis, the Commission would define the relevant product and geographic markets and determine whether the incumbent LECs remain dominant in those markets. That determination would be made based on key indicators, such as market share and concentration. In conducting its analysis, the Commission must be careful to distinguish between retail and wholesale product markets and between facilities-based and non-facilities-based providers. The evidence in the record shows that the incumbent LECs remain dominant in the provision of special access

services in numerous markets all across the country – a conclusion that the responses to the Commission’s most recent data request will certainly confirm.

The development of a new econometric model could prove useful as a complement to a traditional market power analysis, but only if the new model is carefully designed to account for some of the key variables affecting special access. For example, the model must look at marginal price, not just average price, and must capture the effects that the applicable regulatory regime (*i.e.*, price cap or pricing flexibility) has on pricing and competition in a given area. Moreover, the Commission’s analysis must account for the role that the incumbent LECs’ anticompetitive terms and conditions have on both pricing and competition. The Commission should also recognize the distinction between dedicated special access services, which come with service level guarantees, and “best efforts” services that cannot provide the carrier-grade performance that Sprint and others need to meet their core network needs or to satisfy the demands of their enterprise business customers.

Finally, the Commission should examine the unreasonable terms and conditions that the incumbent LECs impose on their customers and consider remedies to address these terms and conditions. These unjust terms and conditions include (1) loyalty mandates designed to limit competition, (2) excessive early termination fees that also act to limit a customer’s willingness to switch to an alternative provider and (3) circuit migration policies and fees that restrict customers’ ability to move circuits from the incumbent LEC to another provider. Sprint supports the remedies proposed by Level 3 and tw telecom to address some of the more onerous aspects of the incumbent LECs’ terms and conditions and suggests some additional protections aimed at improving the effectiveness of those remedies.

The Commission should adopt the proposed remedies as soon as possible, even as it continues to evaluate pricing and competition in the special access marketplace. The Commission should complete that evaluation expeditiously, however, so that it can finally put in place a new regulatory regime that effectively curbs the incumbent LECs' ability to exploit their market power at the expense of large numbers of consumers and businesses that rely on special access services on a daily basis.

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ATTACHMENT A: Declaration of Paul Schieber

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COMMENTS OF SPRINT NEXTEL CORPORATION

Sprint Nextel Corporation (“Sprint”) submits these comments in response to the Further Notice of Proposed Rulemaking (“FNPRM”) issued by the Federal Communications Commission (“FCC” or “Commission”) on December 18, 2012, in the above-captioned dockets, seeking comment on the approach the Commission should take in analyzing the special access marketplace and asking for information regarding the terms and conditions that incumbent local exchange carriers (“LECs”) impose as part of their special access offerings.¹

I. INTRODUCTION AND SUMMARY

This FNPRM is the latest step in the Commission’s longstanding review of the special access marketplace,² which began in 2002 when AT&T filed a petition for rulemaking asking the FCC to revise the pricing flexibility rules it adopted in 1999.³ As AT&T explained in its original

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153 (rel. Dec. 18, 2012) (“FNPRM”).

² “Special access” refers to all dedicated transmission services that do not use local switches. FNPRM ¶ 1 n.1.

³ *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking (Oct.

petition, the pricing flexibility rules were based on predictions of competition that never materialized. Indeed, over the years, price cap incumbent LECs have been granted pricing flexibility in markets all across the country where they were not subject to meaningful competition. As a result, the incumbent LECs have been able to charge unjust and unreasonable rates – and to impose unjust and unreasonable terms and conditions – unconstrained by competitive pressure or by price cap regulation. The FCC finally began to address the problems caused by the *Pricing Flexibility Order* last year, when it recognized that the pricing flexibility rules were flawed and suspended its rules allowing for automatic grants of pricing flexibility in light of “significant evidence that these rules . . . are not working as predicted.”⁴

In that same Order, the FCC also set forth a path to update its rules to better target regulatory relief to competitive areas.⁵ The FNPRM, along with the accompanying Report and Order and mandatory data request, is the next step on that path and will, hopefully, lead to much needed reform of special access regulation. Such reform is critical to spurring broadband deployment and innovation and to protecting consumers from paying inflated rates for services they depend on in their daily lives.⁶ Despite the seemingly overwhelming evidence already in the record, the Commission appears committed to collecting additional data on the special access

15, 2002); *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999), *aff’d sub nom. WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (“*Pricing Flexibility Order*”).

⁴ *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order, 27 FCC Rcd 10557, ¶ 1 (2012) (“*Pricing Flexibility Suspension Order*”).

⁵ *Id.*

⁶ As Sprint has explained in previous filings, special access is a critical input to broadband, wireless and interexchange services and is used every time a consumer sends an email, surfs the Web, swipes a credit card or uses an automated teller machine. *See, e.g.*, Comments of Sprint Nextel Corp., WC Docket No. 05-25, at i (Jan. 19, 2010) (“2010 Sprint Special Access Comments”).

marketplace and analyzing those data to evaluate the current state of competition for special access services.⁷

Sprint continues to believe that the Commission's examination of the special access marketplace should begin with a traditional market power analysis. As part of that analysis, the Commission should define the relevant geographic and product markets and review data related to market share and other indicators of market power within those defined markets. For administrative ease, the Commission should consider aggregating geographic markets that exhibit similar characteristics (*e.g.*, density of demand) for purposes of its analysis. Consistent with long-standing precedent, the Commission's analysis should also distinguish between facilities-based and non-facilities-based providers and between wholesale and retail product markets. Based on information already in the record, Sprint is confident that a traditional market power analysis will show that the incumbent LECs remain dominant in the provision of last-mile special access facilities in the vast majority of locations nationwide.

The FNPRM also makes clear that the FCC intends to develop a sophisticated economic model to identify the key factors that influence entry decisions and pricing behavior in order to draw conclusions about the competitiveness of the special access marketplace. Although the Commission has not provided a great deal of detail about the proposed model,⁸ the econometric analysis the Commission plans to perform could provide a useful supplement to a traditional market power analysis. The model, however, will produce reliable results only if it properly accounts for all of the variables that may influence its outputs. For example, in examining the role that prices play in determining competitive entry, the Commission should base its analysis

⁷ FNPRM ¶ 1.

⁸ The Commission has noted that a peer review of its analysis may be required. FNPRM ¶ 72 n.163. If the FCC chooses to allow comment on that peer review, Sprint looks forward to participating in that process.

on the marginal prices offered through “loyalty” discount plans and not on the average prices paid for all special access services in a given market. Similarly, any model employed by the Commission should control for the terms and conditions contained in incumbent LEC special access discount contracts because those provisions clearly have a direct and material impact on prices and, hence, on entry decisions.⁹

The Commission also apparently intends to use its model to test whether the presence of “best efforts” services makes a difference in the special access marketplace. As discussed below, and in the attached Declaration, in Sprint’s experience, “best efforts” services provided over hybrid fiber coaxial (“HFC”) cable networks generally are not a realistic alternative to incumbent LEC special access service because, *inter alia*, they do not meet the performance requirements that Sprint’s macro cellular backhaul and core enterprise business services demand.¹⁰ Therefore, the FCC should either exclude best efforts services from its model or ensure that the model accounts for the shortcomings that make such services unsuitable as substitutes for many special access applications.¹¹

Finally, the Commission seeks comment on the reasonableness of the terms and conditions that incumbent LECs impose on special access purchasers, and on remedies to address unreasonable terms and conditions. Sprint addresses these questions below, by: (1) detailing the

⁹ Although the Commission’s data request asks providers to supply information about terms and conditions, the FNPRM does not explain whether or how the FCC will take that information into account in its analysis.

¹⁰ See Declaration of Paul Schieber, appended hereto as Attachment A, ¶¶ 13-14 (“Schieber Decl.”).

¹¹ For example, the model must be sophisticated enough to account for the fact that although best efforts services may be sufficient to satisfy the needs of some small businesses, they cannot replace the carrier-grade dedicated special access services Sprint needs to serve its enterprise customers or to connect its macro cell sites to the rest of its network. See Schieber Decl. ¶¶ 12-14.

types of anticompetitive terms and conditions that are pervasive in incumbent LEC tariffs and plans, (2) explaining that these terms and conditions are in no meaningful way voluntary (and often force Sprint to choose between continuing to pay exorbitant rates to receive special access services from the incumbents LECs, or paying exorbitant penalties to the incumbent LECs for the right to switch to alternative providers), and (3) supporting remedies proposed by Level 3 and tw telecom to reduce the anticompetitive effect of these terms and conditions.

II. THE COMMISSION’S ANALYSIS SHOULD ENABLE IT TO DETERMINE WHETHER PRICE CAP INCUMBENT LECS REMAIN DOMINANT IN THE PROVISION OF SPECIAL ACCESS SERVICES

A. The Commission’s Analysis of the Special Access Marketplace Should Include an Assessment of the Incumbent LECs’ Market Power

The FCC’s review of the state of competition in the special access marketplace should begin with a traditional market power analysis designed to determine whether and where the incumbent LECs continue to be dominant in the provision of special access services.¹² In conducting this analysis, the Commission should employ the framework it adopted years ago and has applied repeatedly, including in the recently upheld *Qwest Order*.¹³ As the Commission noted, that framework is “not only data-driven, economically sound, and predictable, but also

¹² See FNPRM ¶ 1 (announcing the FCC’s intent to review the state of competition in the marketplace for special access services); 2010 Sprint Special Access Comments at 7-8 (noting that the first step in analyzing the special access regime and marketplace is to determine whether price cap incumbent LECs are dominant in the provision of special access services, *i.e.*, whether, absent regulation, the incumbent LECs have sufficient market power to set prices or prescribe material terms and conditions of service unilaterally).

¹³ See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶ 37 (2010), *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) (“*Qwest Order*”).

reflects a forward-looking approach to competition.”¹⁴ The market power framework used in the *Qwest* proceeding also dovetails with the Commission’s stated goals in this proceeding.¹⁵

In accordance with its traditional market power analysis, the Commission should begin by defining the relevant product and geographic markets.¹⁶ To determine whether two services belong in the same product market, the Commission should employ the “SSNIP” test, which examines whether a “hypothetical monopolist” would be able to impose a small but significant and nontransitory increase in price (“SSNIP”) without reducing its profitability.¹⁷ If enough customers of a service would switch to a second service in response to an increase in price so as to render the price increase unprofitable, then the two services belong in the same product

¹⁴ *Qwest Order* ¶ 3. As the Commission has pointed out, the market power analysis it employed in the *Qwest* proceeding is similar to the approach used by the U.S. Department of Justice, Federal Trade Commission and other telecommunications regulators. Brief for Respondent FCC at 7, No. 10-9543 (10th Cir. filed March 18, 2011); *see also Qwest v. FCC*, 689 F.3d 1214, 1220 (10th Cir. 2012).

¹⁵ *Compare* FNPRM ¶ 1 (seeking to promote competition and investment in products and services used to serve consumers), *with* Public Notice, *Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings*, 25 FCC Rcd 8013, DA 10-1115 at 1 (2010) (noting that the traditional market power analysis used in the *Qwest Order* is “well-designed to protect consumers, promote competition and stimulate innovation”).

¹⁶ *Qwest Order* ¶42; *see also* Declaration of Bridger M. Mitchell, Attachment A to 2010 Sprint Special Access Comments, ¶ 27 (Jan. 19, 2010) (“2010 Mitchell Decl.”).

¹⁷ *See Qwest Order* ¶ 56 (explaining that the fundamental question in defining the relevant product market is whether there are a sufficient number of customers of one service that would respond to a price increase in that service by switching to a second service, so as to render the price increase in the first service unprofitable). As explained in Section II.C, *infra*, this test undoubtedly would show that “best efforts” services are not in the same product market as the dedicated special access services that are the subject of this proceeding, because an increase in special access prices is unlikely to drive most customers to switch to best efforts services that cannot provide the same service quality assurances as special access services. *See, e.g.*, Letter from Joshua M. Bobeck, Counsel to PAETEC Holding Corp., and Thomas Cohen, Counsel to XO Communications, LLC, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25, at 26 (May 28, 2010) (“PAETEC and XO May 28, 2010 Letter”) (noting that special access prices are significantly higher than the prices for best efforts services of similar capacity).

market.¹⁸ As Dr. Mitchell has explained, in the special access marketplace, channel termination and channel mileage services are not substitutes for one another and should not be considered in the same product market.¹⁹ In addition, services of different capacity levels (e.g., DS1 vs. DS3) belong to different product markets,²⁰ as do retail and wholesale services.²¹ Other relevant factors that the FCC has considered previously in defining relevant product markets include differences in price and differences in technical characteristics.²²

The relevant geographic market for assessing market power is determined by examining whether a consumer would shift its demand to an alternative supplier of the service in question if such an alternative were available in the particular geographic area.²³ The relevant geographic market for channel terminations is a particular building or customer location.²⁴ It is not practical for the Commission to examine market power on a building-by-building basis across the country,

¹⁸ See *Qwest Order* ¶ 56; U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 4 (Aug. 19, 2010) (“*Merger Guidelines*”), available at: <<http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>> (“Market definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”).

¹⁹ 2010 Mitchell Decl. ¶ 50.

²⁰ See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 166, 170-71 (2005) (“*UNE TRRO*”); 2010 Mitchell Decl. ¶ 51.

²¹ *Qwest Order* ¶ 46.

²² See *UNE TRRO* ¶ 193 (the fact that customers that require DS1 loops have paid “significantly more for them” than for cable modem connections, “indicates that the two are not interchangeable.”); *id.* (“Competitive LEC commenters explain that bandwidth, security, and other technical limitations on cable modem service render it an imperfect substitute for service provided over DS1 loops.”).

²³ See 2010 Mitchell Decl. ¶ 31; see also *Qwest Order* ¶ 42 n.142.

²⁴ See, e.g., *Qwest Order* ¶ 64.

however.²⁵ Thus, in the interest of administrative feasibility, the Commission should aggregate individual geographic markets into broader categories based on areas where customers face similar competitive alternatives.²⁶ For example, the Commission might choose to group customers based on the density of demand at the wire centers serving those customers.²⁷ Similarly, although the relevant geographic market for interoffice transport is the particular route connecting two central offices,²⁸ administrative feasibility may require that the Commission group like routes together for purposes of its analysis.²⁹

Once it has defined the relevant product and geographic markets, the Commission should identify the relevant market participants and determine whether an incumbent LEC is dominant in any of the markets by analyzing factors such as market shares, concentration, demand elasticity, supply responsiveness, and cost structure.³⁰ In examining market shares and concentration, however, the Commission should be careful to differentiate between facilities-based and non-facilities-based competitors and between retail and wholesale products. Thus, for

²⁵ See, e.g., *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order and Third Report and Order, 12 FCC Rcd 15756, ¶ 66 (1997) (“*LEC Classification Order*”) (“assessing market power in each individual point-to-point market would be administratively impractical and inefficient”).

²⁶ See 2010 Mitchell Decl. ¶¶ 32, 34, 38; *Qwest Order* ¶ 64; *LEC Classification Order* ¶ 5.

²⁷ See 2010 Mitchell Decl. ¶¶ 39-45; see also *UNE TRRO* ¶¶ 66, 112-123, 176-178 (grouping wire centers for purposes of conducting an impairment analysis).

²⁸ 2010 Sprint Special Access Comments at 9; 2010 Mitchell Decl. ¶ 36 (explaining that the relevant geographic market for interoffice transport is pairs of wire centers).

²⁹ See 2010 Mitchell Decl. ¶¶ 34, 38-45; *UNE TRRO* ¶¶ 176-178.

³⁰ See *Qwest Order* ¶ 42 n.144; see also *id.* ¶ 38 (explaining that barriers to entry are “key components of a traditional market power analysis”); 2010 Mitchell Decl. ¶ 59. As part of its competitive analysis, the Commission traditionally also considers whether a carrier has advantages in cost structure, size and resources that are so great as to “preclude the effective functioning of a competitive market.” *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 73 (1995) (“*AT&T Nondominance Order*”).

example, in determining market shares, the Commission should consider only those firms that provide service in the relevant geographic markets over their own dedicated facilities.³¹

Similarly, providers that do not offer wholesale services should not be considered competitors to the incumbent LECs' wholesale offerings that Sprint and others depend on as inputs to the retail services they provide to enterprise customers.³² The Commission should also consider the extent to which the terms and conditions imposed by the incumbent LECs reduce customers' incentives to switch special access providers and thus limit the competition that the incumbent LECs would otherwise face.³³

Conducting the traditional market power analysis described above would allow the FCC to determine the relevant markets in which the incumbent LECs remain dominant in their

³¹ See, e.g., *Qwest Order* ¶¶ 71, 99 (restricting the FCC's analysis to competitors that have constructed their own last-mile facilities); see also *id.* ¶¶ 82, 87, 100 (focusing on facilities-based competition).

³² *Qwest Order* ¶¶ 28, 46; see also *id.* ¶ 87 (finding there was insufficient competition in the retail market for enterprise services because competitors offering retail services in the relevant geographic market primarily relied on in the incumbent LEC's wholesale services), ¶ 91 (analyzing the retail market) and ¶¶ 70-73 (analyzing the wholesale market). To the extent the Commission is interested in examining potential competition, in addition to actual competition, it should take into account the barriers to entry that potential competitors face. See, e.g., *Qwest Order* ¶ 38 n.127; see also *id.* ¶ 90 (finding that competitive carriers face "extensive" barriers that significantly hamper their ability to construct new fiber facilities); *UNE TRRO* ¶ 72, 154 (discussing the "substantial fixed and sunk costs" competitive providers must incur to deploy last-mile transmission facilities); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 86 (2003) (same) ("*UNE TRO*"); *Qwest Order* ¶¶ 84, 90 (noting that there was nothing in the record to indicate that the barriers faced by competitive providers were any lower today than at the time of the *UNE TRO* or the *UNE TRRO*).

³³ The terms and conditions imposed by the incumbent LECs often act to limit elasticity of demand. See, e.g., *Petition of Ad Hoc, et al to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services*, WC Docket No. 05-25, at 52 (Nov. 2, 2012) ("*Petition to Reverse Forbearance*") (explaining how incumbent LECs' terms and conditions limit customers' ability to switch from special access services provided by the incumbent LEC to services provided by a competitor).

provision of special access services. Once it has made that determination, the Commission should relieve the incumbent LECs of dominant carrier pricing regulation in areas where they are subject to sufficient competition to constrain their prices. Conversely, the Commission can rely on its market power analysis to identify the areas where dominant carrier regulation remains necessary and can formulate rules designed to prevent the incumbent LECs from exploiting their market power in those areas.

B. An Econometric Analysis of the Special Access Marketplace Should Account for the Effects of Marginal Prices, Terms and Conditions, and FCC Regulations on Competition

In the FNPRM, the Commission proposes to develop a new econometric model that, using the data collected in response to the mandatory data request, will evaluate competition in the special access marketplace.³⁴ Such a model could be a useful supplement to the traditional market power analysis described above. It also could provide additional information that could help the Commission tailor its regulations to ensure reasonable prices, terms and conditions and to promote competition in areas where the incumbent LECs continue to exercise market power. Any new model the Commission develops will have to account for key features of the special access marketplace, however, including, most importantly, the manner in which prices affect competitive investment (and *vice versa*); and the influence of contractual terms and conditions on both special access prices and competitive investment (and *vice versa*). The model also should account for the ways in which the particular regulatory regime in place for any given geographic area (*e.g.*, price cap regulation or pricing flexibility) can affect carriers' behavior. A model that accurately evaluates the factors described above can provide the Commission a "comprehensive analysis of the state of [special access] competition" and facilitate the adoption

³⁴ FNPRM ¶¶ 1, 67.

of new rules that effectively promote the kind of robust “competition, investment, and access to dedicated communications services” that the Commission desires.³⁵

Because the FNPRM describes the proposed model only in general terms, Sprint cannot provide a detailed analysis of how the model may function in practice.³⁶ Based on the description in the FNPRM, however, Sprint believes that the model will be designed to analyze (i) the prices for special access services, (ii) investments by competitive (non-incumbent LEC) providers of those services, and (iii) the relationship between prices and competition.³⁷ Sprint agrees that the proposed analysis would be helpful to the Commission’s evaluation and regulation of the special access marketplace. Sprint also agrees that developing an accurate model of prices and competitive investment will require a “nuanced” approach incorporating “a variety of factors,” including the complex relationship between prices and investment.³⁸

³⁵ *Id.* ¶¶ 1, 70. As discussed below, to the extent that the model includes an analysis of best efforts services, that analysis should reflect the negligible role such services play in constraining special access prices. *See* Section II.C, *infra*.

³⁶ According to the FNPRM, the precise form of the modeling “will be dependent, in large part, on the nature and quality of the data produced in response to the Order.” FNPRM ¶ 68. In these comments, Sprint assumes that the Commission will collect enough data of sufficient quality to allow it to conduct panel regressions, as well as other parts of the Commission’s proposed one-time, multi-faceted market analysis. Nonetheless, as explained above, Sprint believes it would be prudent for the Commission to perform a more traditional market power analysis in conjunction with, or in addition to, its proposed panel regressions and other analyses.

³⁷ *See, e.g.*, FNPRM ¶ 67 (stating that the model will (i) “identify measures of actual and potential competition that are good predictors of competitive behavior, for example, by demonstrating that prices tend to decline with increases in the intensity of various competition measures, holding other things constant”; (ii) relate the price of special access services to “the intensity of various competition measures, holding other things constant,” as well as analyze “what leads firms, including competitive providers, to undertake infrastructure investments”; and (iii) “seek to control for factors that could reasonably be expected to affect prices and competitive investment, such as actual and potential competition from services that are substitutes for special access (regardless of technology), the nature of the services supplied, demand intensity, historical proximity and state and federal regulation”).

³⁸ *Id.* ¶ 70.

As the Commission develops its analytical framework, it should ensure that the proposed model:

- Uses the appropriate measure or measures of “price.” For instance, in assessing the relationship between prices and investments by incumbent LEC competitors, the model should focus on the marginal price of special access services and not the much higher average price;
- Reflects the extent to which terms and conditions in special access contracts influence both prices and competitive investment, and are a manifestation of incumbent LEC market power; and
- Takes into account the particular regulatory regime in place for a given geographic area (*e.g.*, price cap, Phase I pricing flexibility, or Phase II pricing flexibility).

Sprint discusses each of these factors in more detail below. As an initial matter, it is worth noting that because prices, terms and conditions, and regulation in the special access marketplace are closely related concepts, a full consideration of any one of these factors often involves consideration of each of the other factors. The discussion below reflects this high degree of inter-relatedness and Sprint assumes that any econometric model the FCC employs will do so as well.

1. The Model Should Focus on the Marginal Price of Special Access Services as the Relevant Measure of Price Affecting Competitive Entry and Investment

The FNPRM suggests that one important use of the model will be to assess the relationship between special access “prices” and “the intensity of various competition measures.”³⁹ To ensure accuracy, the model must focus on the appropriate measure of “price” for this purpose – in this case, the *marginal* price that purchasers pay under special access contracts.

In many markets, the relevant price from an economic perspective is simply the price that a seller “posts” for a particular good or service; further, this posted price is often identical to both

³⁹ *Id.* ¶ 67.

the marginal price and the average price for that good or service. For instance, if a store advertises and sells a widget at a price of \$10, a consumer will pay \$10 for each widget, no matter how many widgets he or she buys. As a result, both the marginal price (the price paid for the last widget purchased) and the average price (the total amount paid for all widgets purchased divided by the number of widgets purchased) will be \$10, which is the same as the posted (advertised) price. Under these circumstances, it would be accurate to assume that the relevant “price” for the widget was the posted price of \$10, and that there is no need to examine other measures of price, such as the average price or the marginal price.

This is not the case for special access, however, where the price that is relevant for assessing the likelihood of entry by incumbent LEC rivals is not the “posted” price (*e.g.*, the so-called “rack rate” that applies to month-to-month purchases), but rather the (discounted) rate that applies to the “last” unit of service purchased pursuant to volume and/or term plans offered by incumbent LECs. The incumbent LECs’ contracts and tariffs generally contain “loyalty” provisions that (i) provide “discounted” prices as long as the customer buys a certain minimum percentage of its total special access purchases from the incumbent LEC for a particular period of time, and (ii) impose penalties if the minimum percentage threshold is not met for the relevant period.⁴⁰ For services purchased pursuant to these loyalty provisions, the marginal price for the “last” or “next” unit of a special access service will often be much lower than the average price paid for all units of that service.⁴¹

⁴⁰ For a more detailed description of these terms and conditions, *see* Section III, *infra*.

⁴¹ This is true because the unit price that a customer pays for the special access services generally declines as the number of units (or the percentage of its demand) it purchases from the incumbent LEC grows, in some cases precipitously so. The FCC also will have to consider how to treat potential contractual penalties in calculating the marginal price.

Under such circumstances, it is the marginal price (and not the higher average price) that determines the intensity of competition in the marketplace. By definition, competitive providers are competing to take away some special access purchases from the incumbent LECs – either the “last” units that buyers are already purchasing from incumbent LECs, or the “next” units that buyers may seek to add to existing purchases from incumbent LECs. It is the price of these last or next units – that is, the marginal price that a prospective competitor must “beat” – that the prospective competitor must consider in deciding whether to make the investment necessary to expand its network in an attempt to “win” business away from an incumbent LEC. The effect of volume and term discounts (and of shortfall and termination penalties) on competition would be masked if the Commission simply looked at either the posted rack rates or at average prices.⁴²

Therefore, if the Commission intends to model the relationship between special access “prices” and the intensity of competition, it is critical that the Commission base its analysis on the marginal prices paid by special access consumers and not average prices.⁴³ Taking this

⁴² Joseph Farrell provides an example, based on SBC’s “Managed Value Plan”:

a customer switching a part of its business to a non-ILEC provider could lose not only the discount on the portion switched, but also the discount on the portion that remained with the ILEC. . . . [T]he MVP and similar pricing plans can have the effect of requiring a competitive carrier to beat a marginal price that is well below the average price that special access customers pay the ILEC. That is, the ILEC can charge a price . . . that is well above a competitive carrier’s costs, and the competitor will nevertheless find it unprofitable to enter on a small scale, because the customer is penalized on its inframarginal SBC business for giving marginal business to a customer.

Reply Declaration of Joseph Farrell on Behalf of CompTel, attached to Reply Comments of CompTel, et al., WC Docket No. 05-25, ¶¶ 15-16 (July 29, 2005) (“Farrell Decl.”). Although a rival supplier could, in principle, compete for all of the incumbent LEC’s sales, to do so it would have to enter the market at a scale that would enable it to supply nearly all of the customer’s demand across all of its locations, a highly unlikely occurrence, to say the least.

⁴³ Although some customers purchase services under the tariffed “rack rates,” those purchases are too insignificant to have a material effect on competitive entry or investment.

approach will help ensure that the model does not produce misleading conclusions about the state of competition in the special access marketplace and does not lead to misguided policy prescriptions based on those conclusions. For example, the FNPRM suggests that the model will “demonstrat[e] that prices tend to decline with increases in the intensity of various competition measures, holding other things constant.”⁴⁴ Stated differently, the Commission appears to be predicting that higher prices for special access services will attract competitive investment while lower prices will not.

Absent other barriers to entry (such as certain contractual terms and conditions, some of which are discussed in Section III, *infra*),⁴⁵ it seems virtually beyond dispute that high prices will attract investment.⁴⁶ The key question is what measure of price should be used in trying to predict competitive investment.⁴⁷ While a positive correlation between average price and intensity of competition would be expected in many markets where prices are “posted” (and

⁴⁴ FNPRM ¶ 67.

⁴⁵ As the Commission has recognized, competitive carriers also face other “significant barriers to entry” even beyond the anticompetitive terms and conditions incumbent LECs impose on their customers. *Qwest Order* ¶ 72; *see also* note 32, *supra*.

⁴⁶ As described more fully below, as a result of their market power the incumbent LECs are able to charge unreasonably high average prices for special access services, while also imposing terms and conditions that prevent entry by competitors. Because competitive entry is foreclosed even where prices are unreasonably high, the Commission should not interpret a lack of competition as a sign that prices are just and reasonable. At a minimum, the Commission should address the incumbent LECs’ terms and conditions that thwart competitive entry, such as the loyalty provisions discussed below, before it attempts to assess the relationship between price and entry in the special access marketplace. *See* Sections III-IV, *infra*.

⁴⁷ As discussed below, the analysis is complicated by the fact that the incumbent LECs’ special access prices are non-linear. Linear pricing refers to pricing where expenditure increases in proportion to quantity, so expenditure equals price multiplied by quantity. By contrast, in non-linear pricing, expenditure is not proportional to quantity. Because of the terms and conditions imposed by the incumbent LECs, special access expenditures generally increase less than proportionally, so the price of the “last” unit is less than the price of the first unit. Therefore, the average price is greater than the price of the last unit.

there is no difference between the average and marginal price),⁴⁸ such a correlation may not apply to the special access marketplace, where entry may not occur even when the average price is high because the marginal price may be low.⁴⁹ That is, even if average prices are high, competitive suppliers may not enter the special access marketplace, and thus may not compete with the incumbent LECs, because they cannot profitably charge less than the marginal price being charged by the incumbent LEC under loyalty provisions in special access contracts. Thus, it is critically important that the Commission base its analysis of competitive investment and entry on marginal price and not average price.⁵⁰

⁴⁸ Based on economic studies, one would expect to find that prices fall as competition increases (and concentration decreases). Indeed, there is a fairly extensive economic literature on the effect of competitive conditions on prices, at least in markets involving “posted” prices. In general, this literature supports the FCC’s assumption that market power – and prices – increase as concentration increases. Conversely, a reduction in concentration – and an increase in the number of significant competitors – generally leads to lower posted prices and price-cost margins. R. Schmalensee, “Inter-Industry Studies of Structure and Performance,” *Handbook of Industrial Organization*, Vol. II, R. Schmalensee and R.D. Willig (Editors), Amsterdam: North-Holland, 1989, p. 952, summarizes the results of this literature with the following “Stylized Fact”: “In cross-section comparisons involving markets in the same industry, seller concentration is positively related to the level of prices.” R. Schmalensee, “Inter-Industry Studies of Structure and Performance,” *Handbook of Industrial Organization*, Vol. II, R. Schmalensee and R.D. Willig (Editors), Amsterdam: North-Holland, 1989 p. 988. Similarly, Bresnahan observes that “these studies confirm the existence of a relationship between price and concentration, which is at least suggestive of market power increasing with concentration.” T.F. Bresnahan, “Empirical Studies of Industries with Market Power,” *Handbook of Industrial Organization*, Vol. II, op. cit., p. 1043.

⁴⁹ Although high prices are likely to attract competition, the analysis is complicated by the fact that increased competition drives prices down.

⁵⁰ Average price may be useful for other analyses – such as assessing trends over time or across territories (*e.g.*, comparing prices for a fixed quantity and mix of special access services between areas where the incumbent LECs have been granted pricing flexibility and areas where they remain subject to price caps) – but it is not the correct metric for examining the correlation between price and competitive investment.

2. The Model Should Capture the Competitive Effects of Various Terms and Conditions in Incumbent LEC Contracts

Contractual terms and conditions, which are a form of non-linear pricing, affect the analysis of the special access marketplace in several important ways. For instance:

- In order to compare prices over time or between geographic markets – particularly between markets subject to different regulatory regimes – it is necessary to account for the particular terms and conditions that accompany a special access transaction.
- In order to determine the relevant price(s), the analysis must include, among the explanatory variables in the price equation, the salient features of the terms and conditions governing each purchase of special access services, including the volume of the service being purchased, total expenditure on the supplier’s services, and the duration of contract, among other factors.⁵¹
- The existence of market power can be manifested not only in higher prices but also in the imposition of anticompetitive contract terms and conditions.⁵² For example, contractual term and volume discounts can increase the quantity that an entrant must be prepared to supply in order to match or improve on the terms of purchase offered by the incumbent, thereby discouraging or preventing competitive investment.⁵³

For these reasons, any rigorous economic analysis of competitive conditions in the special access marketplace must account for the terms and conditions that apply to various purchases.

To achieve this goal, Sprint urges the Commission to analyze the determinants of the key features of particular terms and conditions in special access contracts with incumbent LECs. The Commission could, for example, develop a third set of equations designed to account for terms

⁵¹ See, e.g., 2010 Mitchell Decl. ¶ 106 (“meaningful analysis of rates requires comparisons that eliminate differences due to change in spending on special access services that result from differences in volume purchased, duration of contract, and aggregation and bundling of services subject to different price regulations”).

⁵² As the FNPRM notes, the Commission has previously found that “firms lacking market power simply cannot rationally price their services in a way which, or *impose terms and conditions* which, would contravene Sections 201(b) and 202(a) of the Act.” FNPRM ¶ 71 n.160 (emphasis added). Thus, unjust and unreasonable prices, terms and conditions would be key indicators of market power.

⁵³ 2010 Mitchell Decl. ¶¶ 116, 119 (explaining that restrictive terms and conditions in incumbent LEC contracts can create barriers that can foreclose competitive entry).

and conditions.⁵⁴ Once established, the results of this analysis could be “fed into” the analyses of the determinants of special access prices and competitive investment. This would allow the Commission to account for the important ways in which terms and conditions influence both prices and investment.⁵⁵ Regardless of whether the Commission develops a third set of equations or takes another approach, it is critically important that the Commission find a way to account for onerous terms and conditions, as well as prices, in its analysis.

To take just one example, a proper focus on terms and conditions could help identify particular geographic markets where incumbent LECs have exerted market power to prevent prospective competitors from entering. In the past, it has proven difficult to identify or analyze such instances because they tend to involve the absence of readily discernible behavior (*i.e.*, a potential competitor’s decision *not* to enter a particular market). As a result, the Commission has tended to focus on the extent to which incumbent LECs’ market power affects the more readily discernible behavior of competitors that have already entered a particular geographic area.⁵⁶ A

⁵⁴ Separate equations likely would be needed to explain, for example: (a) contract durations, (b) minimum volume commitments, and (c) early termination penalties.

⁵⁵ For example, the incumbent LEC can be viewed as setting both the average price and the marginal price as well as the individual contract terms and conditions, and competitors as determining new investment in the market subject to these factors. Likewise, as many observers have noted, the ability of rivals to invest can be importantly influenced by the terms of the contracts that incumbent LECs offer to their special access customers, since those terms affect the prices that rivals take account of in their decisions to enter the market. *See, e.g.*, Letter from Michael J. Mooney, attached to Letter from Erin Boone, Level 3, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25 (Aug. 23, 2012); *Petition to Reverse Forbearance* at 52, 58, 60 (Nov. 2, 2012) (explaining that incumbent LECs use terms and conditions in their special access tariffs and agreements to limit competition).

⁵⁶ In the *2005 Special Access NPRM*, for example, the FCC observed that because “investments were location specific, the entrant incurred sunk costs, making it less likely that the incumbent could successfully use exclusionary strategies to drive the entrant from the market.” *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 109 (2005) (“*2005 Special Access NPRM*”). Thus, the Commission took entry as a given and

model that properly accounts for terms and conditions should help the Commission broaden its focus and determine the effect of incumbent LEC market power on the terms and conditions in special access contracts, which, in turn, can have a large effect on entry by existing and prospective competitors.

3. The Model Should Reflect the Varying Constraints Imposed by Different Regulatory Regimes

Special access pricing, terms and conditions are subject to constraints that may vary significantly depending on the particular regulatory regime that is in effect in any given geographic market. The Commission therefore should design its model to account for the differing constraints imposed by price cap regulation, Phase I pricing flexibility, or Phase II pricing flexibility. As the FNPRM recognizes, these regulatory regimes – in conjunction with other factors, including the intensity of competition – can significantly affect special access prices.⁵⁷

Accounting for the differences between the various regulatory regimes should enhance the model’s ability to assess the effect of pricing flexibility on special access prices, terms and conditions.⁵⁸ It also should help the Commission identify anti-competitive behavior in particular geographic areas. For instance, Dr. Mitchell has previously noted that “[a]n examination of terms and conditions of special access contracts in Phase II areas where incumbent LECs are not constrained by price caps allows inquiry about pricing practices that may foreclose competitive

examined the influence of exclusionary strategies on firms that were already competing in the particular location.

⁵⁷ FNPRM ¶ 68.

⁵⁸ *See id.* ¶ 69 n.153 (noting conflicting evidence about the changes in special access prices in Phase I and Phase II pricing flexibility areas); *id.* ¶ 71 n.162 (“the one-time, multi-faceted market analysis we propose here could well provide additional information such as the efficacy of various forms of regulation, including their effects on both prices and investment”).

entry.”⁵⁹ A reasonable hypothesis is that incumbent LECs adopt certain contractual terms and conditions in areas in which they are granted pricing flexibility in order to maintain high prices while, at the same time, limiting the competition that they face in those areas. A model that accounts for differing regulatory constraints will help the Commission either confirm or deny this hypothesis and craft appropriate remedies.⁶⁰

C. Any Reasonable Analysis Will Show that Best Efforts Services Are Not an Effective Substitute for Special Access Services and Do Not Constrain the Prices for Such Services

The Commission apparently intends to use its model to test the hypothesis that the presence of providers of “best efforts” services has an impact on the special access marketplace.⁶¹ Such an analysis is unnecessary, however, as it is clear that best efforts services are in a separate product market from the dedicated special access services provided by incumbent LECs and do not constrain the prices for such services.⁶² As other parties have explained, “[t]he available evidence in the record indicates that most customers of special access

⁵⁹ 2010 Mitchell Decl. ¶ 95; *see also id.* ¶ 21 (“The pricing flexibility granted by the Commission has freed incumbent LECs to craft terms and conditions for special access customers that penalize customers that purchase service from competitors and that raise barriers to entry.”).

⁶⁰ If the model cannot account adequately for these differing constraints, or if for any other reason it yields flawed or inconclusive results, the Commission can formulate new rules based on the traditional market power analysis described above.

⁶¹ FNPRM ¶ 76 (asking how the FCC’s analysis should account for “best efforts” services and how the price of such services should inform the FCC’s analysis of the justness and reasonableness of special access pricing).

⁶² *See, e.g.*, 2010 Sprint Special Access Comments at 19-20; 2010 Mitchell Decl. ¶¶ 66-68; *see also* PAETEC and XO May 28, 2010 Letter at 24-27 (explaining the services provided over HFC plant are not substitutes for incumbent LEC special access services); Reply Comments of Cbeyond, Integra, One Communications and tw telecom, WC Docket Nos. 06-172 & 07-97, at 11 (Oct. 21, 2009) (“HFC networks, like fixed and mobile wireless and residential FTTH networks, all utilize shared configurations. In these architectures, traffic is aggregated at a local point close to the customer which often has limited capacity. . . . [I]t is difficult if not impossible to deliver the guaranteed service levels demanded by business customers over shared networks, including HFC-based networks.”).

service [(e.g., business customers)] do not view HFC-based services as substitutes for special access services because HFC networks are not capable of providing the features demanded by special access customers[,] such as guaranteed bandwidth and service level agreements.”⁶³

Sprint is familiar with best efforts offerings that are provided over HFC networks and has found those services to be unsuitable for its wireless macrocell-site backhaul needs or as wholesale inputs to the core retail services it sells to its enterprise customers. As explained in the attached declaration of Paul Schieber, best efforts services offered over HFC networks are often not available in the locations Sprint seeks to serve,⁶⁴ and, even if a cable company has HFC facilities that can reach a particular location, it may not be willing to provide access to its facilities on a wholesale basis.⁶⁵

Moreover, best efforts services provided over HFC networks suffer from bandwidth limitations and other technical shortcomings that prevent them from acting as viable substitutes for the special access services Sprint purchases from incumbent LECs. For example, HFC-based services cannot provide the capacity and performance guarantees Sprint requires to meet its

⁶³ PAETEC and XO May 28, 2010 Letter at 24-25; *see also* Reply Declaration of Carlton, *et al.* on behalf of AT&T, attached as Exhibit A to Reply Comments of AT&T, WC Docket No. 05-25, ¶ 24 (Feb. 24, 2010) (explaining the numerous, significant, differences between special access and best efforts services); Declaration of Ajay Govil on behalf of XO Communications, LLC, attached to Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Docket No. 05-25, ¶ 24 (Aug. 8, 2007) (“Govil Declaration”) (“Our assessment is that cable systems normally could not provide the service availability guarantees required by our business customers.”).

⁶⁴ Schieber Decl. ¶ 13 (discussing geographic coverage); PAETEC and XO May 28, 2010 Letter at 26-27 (noting that cable companies provide service “only within their highly fractured franchise footprints which often cover only parts of integrated metro markets . . . mak[ing] it difficult for cable companies to win multi-location customers’ business”).

⁶⁵ *See* Schieber Decl. ¶ 14 (discussing the lack of wholesale best efforts offerings); *see also*, e.g., *Qwest Order* ¶ 69 (noting that Cox “apparently provides little, if any, wholesale service over its cable plant, which is deployed primarily in residential areas”).

macrocell-site backhaul needs.⁶⁶ Nor can they provide the reliability, security or performance that Sprint needs to provide its wireless customers with the service they demand.⁶⁷ Similarly, HFC-based best efforts services cannot provide the performance that Sprint requires to serve the enterprise customers that purchase its core retail wireline services.⁶⁸ Consequently, Sprint does not purchase best efforts services to provide links to its cell sites on its macro network or to its enterprise customers for the provision of traditional Multiprotocol Label Switching (“MPLS”) or Dedicated Internet Access (“DIA”).⁶⁹

Based on the experiences of Sprint and other competitive carriers, it is clear that best efforts services rarely, if ever, provide an effective substitute for incumbent LEC special access services for wireless macro networks or enterprise offerings such as MPLS or DIA.

Accordingly, there is no reason to account for these services under a traditional market power analysis. If, however, the Commission chooses to conduct a separate analysis that models the effect of best efforts services on special access pricing, Sprint is confident that the results will match the reality of the marketplace and show that best efforts services do not provide an

⁶⁶ Schieber Decl. ¶ 13 (noting that the lack of guaranteed performance and capacity can lead to dropped calls and other customer-affecting problems).

⁶⁷ *Id.* ¶ 13 (discussing problems with latency, reliability and privacy).

⁶⁸ *Id.* ¶ 14 (discussing problems with jitter, capacity and reliability, *inter alia*); *see also* PAETEC and XO May 28, 2010 Letter at 25 (noting that the FCC has found that HFC facilities are only capable of providing “best-effort, typically asymmetrical services” and “cannot therefore offer a viable substitute for wireline DS1s and DS3s”).

⁶⁹ Schieber Decl. ¶ 5. Sprint does buy services from cable companies, particularly to provide wireless backhaul services. As Mr. Schieber explains in his declaration, however, those services are provided over dedicated fiber facilities that can meet Sprint’s requirements and not over existing HFC plant. *See* Schieber Decl. at 5 n.7 and 7 n.10; *see also* PAETEC and XO May 28, 2010 Letter at 26 (“cable companies do offer last-mile DS_n-based services over their fiber facilities” and “have been doing so for years.”); *UNE TRO* ¶ 40 (explaining that networks cable companies use to serve business customers “are generally not the historic hybrid-fiber-coaxial cable networks . . . but newly deployed facilities specifically designed to serve enterprise customers.”).

effective constraint on incumbent LEC pricing or behavior.⁷⁰ At a minimum, any analysis that includes best efforts services must recognize that such services have shortcomings that make them unsuitable as substitutes for most special access applications – including the purposes for which Sprint currently relies on incumbent LEC special access services.

III. THE COMMISSION’S ANALYTICAL FRAMEWORK SHOULD INCLUDE AN ASSESSMENT OF THE REASONABLENESS OF THE TERMS AND CONDITIONS OF INCUMBENT LEC OFFERINGS

The FNPRM also properly recognizes the importance of addressing terms and conditions as part of the Commission’s effort to repair the broken special access market. The incumbent LECs’ imposition of anticompetitive terms and conditions has had a tremendous impact on Sprint’s ability to decrease its purchases from incumbent LECs and purchase services from the few alternative providers that can serve Sprint’s special access needs.

A. Anticompetitive Terms and Conditions are Pervasive in Special Access Tariffs and Plans

The Commission asks purchasers to identify the “specific terms and conditions [they] find unjust or unreasonable, and in what contexts.”⁷¹ In Sprint’s experience, the incumbent LECs use three categories of unreasonable terms and conditions in their special access plans to undermine competition and to reinforce their dominance of the special access marketplace: (1) loyalty mandates; (2) early termination fees; and (3) circuit migration charges and limits.

1. Loyalty Mandates

Incumbent LECs frequently limit competition through unreasonable loyalty mandates in special access plans. As explained below, these loyalty provisions are anticompetitive because

⁷⁰ See PAETEC and XO May 28, 2010 Letter at 26 (explaining that the “substantial price gap” between special access and “business class” HFC-based services indicates “a continuing absence of substitutability”); see also *UNE TRRO* ¶ 193 (discussing the fact that businesses that require DS1 loops pay “significantly more” for those loops than for HFC-based services).

⁷¹ FNPRM ¶ 93.

they: (1) unreasonably lock up demand and prevent competitive entry; (2) often tie competitive and noncompetitive geographic markets; and (3) are enforced with unreasonable shortfall and overage penalties that further prevent customers from switching to competitive providers.

a. High Loyalty Commitments Unreasonably Lock Up Demand

As explained previously in this proceeding, loyalty provisions are among the incumbent LECs' most effective tools for limiting competitive entry. These provisions penalize purchasers unless they maintain a large percentage of their special access purchases with the incumbent – often equal to 90 to 100 percent of current or recent lines purchased from the incumbent – rather than shifting traffic to a competitor. Because the incumbent LECs have long dominated the special access market, customers' current special access purchases from the incumbent typically amount to the vast majority of their total special access purchases. Thus, these loyalty mandates undermine competitive entry in the special access marketplace. A potential competitor would have to offer uneconomically low prices to overcome the substantial penalties buyers would face if they were to shift even a small percentage of their purchases to alternative vendors.

Many incumbent LEC loyalty mandates lock customers into maintaining an extremely high percentage of their prior purchases not just for the term of their initial contract, *but also for all future renewals*.⁷² A purchaser generally had no choice but to buy from the incumbent when it first signed a special access purchase agreement (and in most cases this is still the case, particularly for special access services at DS3 and lower capacity). Loyalty provisions determine

⁷² While incumbent LECs might argue that a purchaser can avoid continuing its commitment by not renewing the loyalty plan, this is not an option in the real world. Incumbent LECs generally require loyalty mandates for any plan that allows portability, and generally require buyers that purchase any lines under a loyalty/portability plan to put all lines under that plan. And if a buyer refused to recommit any lines to a loyalty plan at renewal, it would face the choice of either buying a large number of circuits for a long period of time with no ability to change the location of those circuits as its customers' needs change – or paying exorbitant rack rates. Neither of these options would allow Sprint to continue to do business.

the number of lines a purchaser must renew in order to continue to receive the contract price or other benefits. This means that if the customer initially purchased essentially all of its lines from the incumbent, a mandate that it commit 90 to 100 percent of its existing incumbent LEC lines at the end of a contract term continues to lock the customer into close to 90 to 100 percent indefinitely.⁷³ If a customer wishes to reduce its commitment, it has two uneconomic options. First, it could pay an exorbitant “buy-down” fee – if such an option is even offered under the relevant plan.⁷⁴ Second, it could lower its purchases below its commitment level in order to have a lower baseline for setting the commitment in future contracts. However, lowering purchases substantially below the commitment level triggers a massive “shortfall penalty.” These fees and charges are uneconomic for buyers, and as a result, buyers typically maintain their commitments at the same high levels, even at contract renewal.

One example of how these minimum commitments lock customers into purchasing a specific percentage of their needs from the incumbent LEC can be found in AT&T’s plans in the East Region (Southern New England Telephone Company) and Southwest and West Regions (Southwestern Bell, Pacific Bell, and Nevada Bell Telephone Companies). Under these plans, the initial volume commitment is “equal to 100% of in-service DS1 Channel Terminations.”⁷⁵ Similarly, in the Midwest Region (Ameritech), Sprint has purchased service under an AT&T

⁷³ ILEC plans often impose penalties for purchasing *more* than the commitment level, so even if a customer’s demand increases significantly, this forces the customer to increase the commitment level to match new demand. Thus, new demand will generally be locked in as well.

⁷⁴ As explained *infra* at 32, a “buy down” fee is a type of early termination fee that a customer must pay if it wishes to reduce its commitment level. Buy down fees are not available in all loyalty plans.

⁷⁵ See, e.g., AT&T, FCC Special Access DS1 & DS3 Service by Region, at 6 (July 2011), attached to Letter from Linda Vandeloop, Director Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (July 15, 2011) (“AT&T, July 2011, Ex Parte Presentation”).

plan where the initial volume commitment is “equal to 90% of in-service DS1 Channel Terminations.”⁷⁶

Incumbent LECs attempt to justify these loyalty commitments by falsely equating them with volume discounts, which are “common in many industries.”⁷⁷ But the terms and conditions at issue here are *not* volume discounts. A volume discount is a discount for purchasing a higher quantity of a product. Such discounts reflect the reality that in some industries, the average per-unit cost of providing a high volume of a product to a single customer is lower than the average per-unit cost of providing a small volume of the same product.

The loyalty plans at issue here are entirely different. They do not depend on a purchaser buying a high *volume*; rather, they are based on a customer’s agreement to be loyal, *i.e.* not to substantially reduce its current or recent purchases from the incumbent LEC. And unlike the volume discounts discussed above, these loyalty discounts do not reflect a reduction in the incumbent LECs’ cost of providing service. It costs no more to provide 10 DS1s to a small but loyal customer than to provide 10 DS1s to a large but “disloyal” customer that shifts the remainder of its lines to a competitor, but under these loyalty plans, the latter customer would pay much more because of its disloyalty.

For this reason, it is irrelevant whether, as AT&T argues, volume discounts are “presumed to be legal under Section 201(b).”⁷⁸ While volume discounts are frequently procompetitive, antitrust enforcers and economists have long recognized that loyalty “discounts”

⁷⁶ *Id.*

⁷⁷ Letter from Donna Epps, Vice President of Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (Mar. 27, 2012) (“Verizon Letter”); Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 7 (Mar. 28, 2012) (“AT&T Second Letter”).

⁷⁸ AT&T Second Letter at 7.

can be used by incumbents who possess market power to inhibit competition. For example, as Professors Einer Elhauge and Abraham Wickelgren explained in their 2010 paper on the subject, studies have established that “an incumbent seller can use loyalty discount contracts to inefficiently foreclose a rival even in the absence of scale economies and even if buyers can breach these contracts while paying expectation damages.”⁷⁹ Moreover, Professors Elhauge and Wickelgren conclude that under a reasonable set of assumptions, “there exists an equilibrium in which all buyers accept the loyalty discount, resulting in no rival entry and all the buyers purchasing from the incumbent at the monopoly price.”⁸⁰

Moreover, it is also well recognized that loyalty “discounts” such as these tend to lessen price competition because they reduce an incumbent’s incentive to compete for customers that have not agreed to the loyalty commitment. As Professors Elhauge and Wickelgren have explained, loyalty discounts require the incumbent to offer committed buyers lower prices than those offered to uncommitted buyers. “This seller commitment reduces the seller’s incentive to compete for buyers free of a loyalty agreement because lowering the price to free buyers requires lowering the price to loyal buyers who have already agreed to buy from the seller.”⁸¹ As a result, when buyers agree to a loyalty condition, they impose an externality on other buyers. “The externality is that when one buyer agrees to the loyalty discount contract all buyers suffer from the higher prices that result from less aggressive competition.”⁸²

⁷⁹ Einer Elhauge and Abraham L. Wickelgren, *Robust Exclusion Through Loyalty Discounts*, at 3 (Harvard Law School, John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 662, 2010), available at: <http://www.law.harvard.edu/faculty/elhauge/pdf/Elhauge_662.pdf> (“Elhauge and Wickelgren Discussion Paper”).

⁸⁰ *Id.* at 2.

⁸¹ *Id.*

⁸² *Id.*

b. Loyalty Commitments Frequently Tie Competitive Markets with Noncompetitive Markets

Because they soften price competition and lock up demand without any countervailing efficiencies, the loyalty provisions at issue here are anticompetitive. But the loyalty provisions imposed by the ILECs are particularly insidious because many of them require customers to commit to purchase an extremely high percentage of their total special access circuits from the incumbent LEC across a region encompassing several states. For example, incumbent LECs often tie discounts for lines in rural geographic markets – where competition is least likely to develop – to a customer’s commitment to remain loyal to the incumbent LEC (*i.e.*, keep its services with the incumbent LEC) in a different geographic area where some competition may be possible. This result is anticompetitive.⁸³

Exacerbating this problem, most loyalty plans with portability provisions,⁸⁴ which are discussed below, are effectively “all-or-nothing” contracts: in order to get portability for even a

⁸³ For example, Embarq Local Operating Companies, Tariff FCC No. 1 at 7.4.16(A) (effective Mar. 1, 2011), states that “[t]he customer agrees to commit 100% of their existing and future special access services ordered from the Telephone Company on a national basis for a five year commitment period when the PTDP [loyalty volume commitment] is established.” Similarly, Verizon Telephone Companies, Tariff FCC No. 1 at 25.3.4(A)(1) (effective Jun. 9, 2007) (“Verizon Tariffs No. 1”), requires a purchaser to include all “Qualifying Service across this tariff [FCC1] and FCC11, FCC14, and FCC16, as applicable.” *See also* Comments of PAETEC Holdings Inc., *et al.*, WC Docket No. 05-25, at 82-84 (Jan. 19, 2010); 2010 Sprint Special Access Comments at 42. *See also* Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 5 (June 6, 2012) (“Verizon June 6, 2012 Ex Parte”) (“Where individually negotiated contracts do include shortfall charges, in some of those cases the shortfall charges apply to all of the subscribed circuits” – *i.e.*, if a customer fails to maintain volume in areas where pricing flexibility has been granted, Verizon may impose penalties on circuits in areas that are not subject to pricing flexibility.).

⁸⁴ Special access purchasers such as Sprint constantly need to shift circuits from one geographic location to another to meet end-user customer needs. Incumbent LECs charge exorbitant early termination fees (“ETFs”) every time a purchaser needs to disconnect a circuit in one location and establish it in another location. If, however, the purchaser commits a high volume of its purchases to the incumbent LEC through a loyalty provision, the incumbent LEC

few lines, a customer must commit to continue the vast majority of its purchases with the incumbent.⁸⁵ In practice, that means maintaining the vast majority of its *entire* special access needs with the incumbent LEC. A special access buyer therefore typically cannot enroll a small portion of its lines in a “portability plan” while buying the rest of its services outside the plan.

Verizon suggests that it imposes these all-or-nothing requirements because “Verizon’s systems are not built to support an arrangement in which only some of a customer’s volume with Verizon is enrolled in a term-and-volume plan, and one can easily envision disputes that could arise over whether a certain circuit is or is not enrolled in a plan.”⁸⁶ However, that argument is baseless. Nothing would prevent Verizon from maintaining an accurate database showing which circuits are enrolled in commitment plans and which are not. Indeed, Verizon already maintains records that indicate which individual circuits are subject to term commitments, as well as the length of those commitments. Verizon has designed its systems to require an all-or-nothing commitment because it wanted to lock-up demand – not because identifying which circuits are purchased pursuant to loyalty plans creates an administrative burden.

will waive the ETF when a purchaser moves a circuit. These provisions are generally referred to as “portability provisions.” Because it is uneconomic for a purchaser like Sprint – which routinely moves circuits – to pay the ETFs, the purchaser must agree to the loyalty commitment in exchange for portability.

⁸⁵ See, e.g., AT&T, July 2011, Ex Parte Presentation (noting that in the East, Southwest, California, and Nevada, a customer must commit to maintain 100 percent of in-service circuits); Southern New England Telephone Company, FCC Tariff No. 39 at 2.11.1.1.D(1) (“Southern New England Tariff”) (“The initial monthly CL [commitment level] is calculated by the Telephone Company and is the total of all Special Access DS1 Channel Terminations in-service for the most current month in which Telephone Company billing data is available. The initial monthly CL will consist of all Special Access DS1 Channel Terminations, including those on Month-to-Month terms and other term pricing plans”); Verizon Tariff No.1 at 25.1.1.D (“If a customer subscribes to CDP, all eligible service types must be included in the CDP with the exception of the following . . .” services that are included in a National Discount Plan); *id.* at 25.1.3(A)(5) (requiring commitment level to be 90 percent of in-service channel terminations).

⁸⁶ Verizon June 6, 2012 Ex Parte at 3.

The incumbent LECs are thus able to leverage their monopoly position to lock in essentially all of their customers' demand (usually 90 or 95 percent of a customer's lines) while maintaining average prices that are well above cost for all services under the contract.⁸⁷ When competitive providers enter an area, current special access purchasers cannot avail themselves of the new provider without exiting the discount plan (and paying the huge penalties discussed below) or paying the incumbent LEC an exorbitant "buy down" fee to reduce their loyalty commitment (also discussed below). For this reason, the incumbent LECs' "bundled discounts" would be better labeled "penalties for unbundling." Such penalties are anticompetitive because they lock out any competitor that cannot provide service across all the markets covered by the loyalty plan. Such broad-scale entry would raise a competitor's costs by requiring that the competitor enter in multiple markets simultaneously in order to offer a realistic alternative to the incumbent LEC, and is often impossible for alternative providers. For purchasers of special access, this means less competition and higher average prices.

c. Shortfall and Overage Penalties

In Sprint's experience, incumbent LECs also use shortfall penalties to enforce the anticompetitive loyalty commitments discussed above. Through these provisions, incumbent LECs impose enormous fees if a purchaser attempts to shift any significant amount of traffic to

⁸⁷ For this reason, the incumbents' arguments that any harms from its contracts would arise from below-cost predatory practices are a red herring. *See* Comments of AT&T Inc., WC Docket No. 05-25, at 76 (Jan. 19, 2010) ("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.").

an alternative provider. The penalties can be as much as *ten times* the monthly rate under the loyalty plan.⁸⁸

For example, Sprint purchases service in AT&T's West and Southwest Regions, where shortfall penalties are billed at \$900 per month per channel termination. This charge is several times greater than even the rack rates (\$195-205/month depending on zone plus additional mileage charges⁸⁹) and is ten times more than the \$90 monthly rate for the 5-year loyalty commitment plan rate in Zone 1.⁹⁰ Sprint also purchases in AT&T's East Region (Southern New England Telephone Company) under the DS1 OPP Portability Commitment Plan, where shortfall penalties are billed as the "zone 1 MTM NRC per Chan Term."⁹¹ Translated into plain English, that means a customer must pay \$574 (the "NRC" or "nonrecurring charge") per month, for each channel termination below the threshold – almost 4 times the \$150 monthly rack rate, and over 5 times the \$112.50 monthly rate in the 5-year OPP Plan.⁹² Moreover, if Sprint incurs shortfall penalties for several consecutive months, some plans allow the incumbent LEC to terminate the entire plan and assess the onerous early termination fees ("ETFs") discussed below.⁹³

Incumbent LECs impose these cost-prohibitive shortfall penalties to deter customers from switching to competitors. Indeed, one AT&T plan makes this point explicit: under this plan,

⁸⁸ These penalties may be billed as a non-recurring charge ("NRC") per channel termination below the required volume, or as the monthly rate per circuit below the minimum, depending on the region. *See generally* AT&T, July 2011, Ex Parte Presentation.

⁸⁹ Southwestern Bell Telephone Company, Tariff FCC No. 73 at 7.3.10(F)(1) (effective Jan. 31, 2013) ("Southwestern Bell Tariff").

⁹⁰ *Id.* at 7.3.10(F)(10.2)(a).

⁹¹ AT&T, July 2011, Ex Parte Presentation at 6; *see also* Southern New England Tariff at 2.11.1.1(D)(3)(b).

⁹² Southern New England Tariff at 7.16.4(A).

⁹³ *See* Letter from Jeffrey S. Lanning, Assistant Vice President for Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 4 (July 22, 2011) ("CenturyLink Ex Parte").

AT&T waives the shortfall penalty – but only when the shortfall results from the “‘general economy’ and not moving services to a competitor.”⁹⁴ AT&T does not want its shortfall penalties to drive its recession-hit customers out of business – it just wants to make sure they do not move circuits to a competitor.

The incumbent LECs argue that instead of incurring a shortfall penalty, a customer can instead choose to “buy down” its commitment level. A “buy down,” however, is not an economic option, because, as described below in the discussion of ETFs, the fee can exceed the cost of simply maintaining the commitment level.

Many incumbent LECs also charge penalties when a buyer *exceeds* a certain threshold. Penalizing a customer for buying more services may seem odd, but the impact of these “overage” charges contributes to incumbent LECs’ efforts to restrict competition. Overage penalties ensure that when a customer increases its purchases of special access, the new purchases also become locked into any existing loyalty-commitment plan. The incumbent LECs accomplish this goal by penalizing customers that do not increase their locked-in commitment levels as their needs grow, while waiving those penalties if the customer increases the number of circuits locked in by a loyalty provision to include the extra purchases, thereby foreclosing competition for the new circuits the customer is adding. The additional purchases then become part of the benchmark when the contract is renewed.

2. Excessive Early Termination Fees

In Sprint’s experience, incumbent LECs also impose various types of excessive and punitive ETFs, which can apply when a purchaser: (1) terminates an individual term contract; (2) terminates an entire loyalty commitment plan; or (3) buys down the commitment level on a

⁹⁴ AT&T, July 2011, Ex Parte Presentation at 11.

loyalty plan. All three types of ETFs lock purchasers into continuing to lease incumbent LEC-owned circuits where less expensive options are available. In fact, for certain significant special access plans, the ETF imposed on a purchaser that switches to an alternative provider is *higher than the cost of simply paying out the entire remaining contract*, because the penalty is calculated based on paying the rack rate for the balance of the term, rather than the contract rate.⁹⁵ Facing these crippling ETFs, it is easy to see why purchasers sometimes must take the extreme and inefficient path of leasing unused or unneeded circuits – “DS-1s to nowhere” – merely to avoid triggering a buy-down ETF.⁹⁶

Incumbent LECs have adopted a variety of ETF schemes. These include provisions that require purchasers to pay back the difference between a plan’s rates and supra-monopolistic rack rates,⁹⁷ provisions that set ETFs equal to 40 or 60 percent of all recurring charges over the life of the contract, and provisions that impose ETFs that are calculated based on the rack rate over the remaining life of the contract. Even an ETF equal to 50 percent of remaining recurring charges will severely hinder competition. Under such a provision, if a customer switches to an alternative special access provider with 24 months remaining in a contract, that would trigger a penalty of approximately 100 percent of one year’s charges for each affected circuit. To have

⁹⁵ AT&T, July 2011, Ex Parte Presentation at 6 (ETFs are charged “for CL decreases and complete cancellation of CL prior to expiration date,” and are “[c]alculated as decrease in CT’s [channel terminations] times MTM [rack] rate times # of months remaining in term”).

⁹⁶ Comments of the NoChokePoints Coalition, WC Docket No. 05-25, at 27 (Jan. 19, 2010) (“NCP Comments”).

⁹⁷ As explained below, monopoly providers may offer undiscounted prices that exceed even the “monopoly price” in order to induce customers to enter into exclusionary agreements in which the price is set at the monopoly price. *See infra* at 36-37.

even a hope of winning away an incumbent LEC customer, a competitor therefore would have to offer such a low rate to attract the customer that entry would be unprofitable.⁹⁸

As an example of a typical special access buy-down ETF, AT&T's East Region (Southern New England Telephone Company) tariff calculates the buy-down ETF as the "decrease in CT's [channel terminations] times MTM [rack] rate times # of months remaining in term."⁹⁹ This means that if Sprint reduces its commitment level, it must pay out the entire remaining contract at *rack rates* for the circuits it does not buy. This is far worse than a take-or-pay ETF; it is take-or-pay-*more*. The buy down option in AT&T's Southwest and West Regions (Southwestern Bell, Pacific Bell, and Nevada Bell Telephone Companies) is "[c]alculated as decrease in CT's [channel terminations] times MTM [rack] rate times # of months remaining in term."¹⁰⁰ Here, too, Sprint would have to accept a take-or-pay-more buy-down ETF. In the Southeast Region, Sprint would not be able to reduce its commitment levels without paying an overall plan ETF *and* agreeing to a new term of the loyalty commitment on the remaining circuits.¹⁰¹

Even the ETFs in AT&T circuit-specific term plans (*i.e.*, the plans that impose term commitments on specific circuits) are egregious. In the Southeast Region, the DS1 termination liability is equal to "60% of all recurring charges for the remaining months of the customer's term."¹⁰² In the Southwest and West Regions, the DS1 termination liability is equal to "40% of

⁹⁸ NCP Comments at 29.

⁹⁹ AT&T, July 2011, Ex Parte Presentation at 6. *See also* Southern New England Tariff at 2.11.1.1(D)(5).

¹⁰⁰ AT&T, July 2011, Ex Parte Presentation at 6.

¹⁰¹ *Id.* ("CL decreases allowed but require establishment of a new ACP agreement. Early termination fees apply to the old ACP.").

¹⁰² *Id.* at 8.

all recurring charges for the remaining months of the customer's term.”¹⁰³ In the East Region, the termination liability is calculated as the lower of “50% of all recurring charges for the remaining months of the customer's term” or “payback of savings” from the supra-monopoly rack rates.¹⁰⁴ These fees bear no relationship to the costs by the ILEC to serve these customers.

3. Circuit Migration Charges and Limitations

Furthermore, incumbent LECs assess very high “migration” charges on DS1s and DS3s to hinder competition for larger-capacity transport when Sprint attempts to move such a transport circuit to another special access provider. When Sprint wishes to cease purchasing transport service from the incumbent LEC and begin purchasing from an alternative access vendor (“AAV”), it frequently must still purchase the last-mile connection from the incumbent LEC. This is the case because the incumbent LEC frequently dominates this market and is the only option for the last-mile link. As a result, to switch transport vendors, Sprint must arrange for the incumbent LEC to move the last-mile circuit from the prior transport vendor (the incumbent LEC) to the new transport vendor (the AAV). In response, the incumbent LECs assess steep migration charges even if the move involves nothing more than a few keystrokes and a re-route of the circuit from one port in a central office to another port a few feet away in the very same office.

Sprint rarely, if ever, migrates a circuit that requires trenching or other such time-consuming or labor-intensive truck rolls; in almost every case involving the migration of DS1 or DS3 circuits, Sprint is simply moving one end of the last-mile circuit from the incumbent LEC to a CLEC collocated in the incumbent LEC's central office, with no change to the other termination point. In such circumstances, it is difficult to understand how charging several

¹⁰³ *Id.*

¹⁰⁴ *Id.*

hundred dollars per circuit can be just and reasonable. In fact, this charge is just another way for incumbent LECs to make it difficult for competition to emerge.

Incumbent LECs also impose restrictions on the number of circuits a customer may migrate within a given time period. The AT&T LECs, for example, limit the number of circuits a customer may migrate to ten per night, either four or five nights per week. The Verizon LECs limit the number of circuits to five per carrier account team center (“CATC”), four nights per week. Taking into account weekends, holidays, and not-on-call days, a migration project involving a hundred circuits (again, a few keystrokes and an intra-office move) could thus take up to a month to accomplish because of incumbent LEC circuit migration restrictions. This delay and unpredictability can result in Sprint’s wireline customers objecting to the migration of circuits to competitors, further undermining the possibility of competition emerging.

B. The Incumbent LECs’ Anticompetitive Terms and Conditions Present Sprint with an Intractable Dilemma

The incumbent LECs’ anticompetitive terms and conditions described above offer business broadband customers a terrible choice. Purchasers can pay unreasonably high “rack rates” that will put them out of business, or pay somewhat lower but still hugely inflated rates and accept competition-killing conditions that inhibit the customer from switching to an alternative provider. The incumbent LECs ask the Commission to ignore the anticompetitive effects of these conditions under the theory that this Hobson’s choice is somehow “voluntary.”¹⁰⁵

But participation in incumbent LEC “discount plans” is not “voluntary” in any meaningful sense of the word. The “undiscounted” prices are designed to be so high that they force most customers to select a “discount plan” under which the purchaser must accept anticompetitive terms. As a result, almost all incumbent LEC special access is purchased

¹⁰⁵ Verizon Letter at 3; AT&T Second Letter at 4.

through some form of “discount plan.”¹⁰⁶ When a monopolist sells most or all of its product at a “discount,” it has the incentive to set the “discount” price to the monopoly price, while raising the “undiscounted” price to a *supra-monopoly* price.¹⁰⁷ As Joseph Farrell explained previously in this proceeding, “when a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level).”¹⁰⁸ Put another way, the incumbent LECs are not selling special access at a “discount.” They are merely raising their “regular” prices in order to give the illusion of offering a “discount.”

Furthermore, Professors Elhauge and Wickelgren have demonstrated that even allegedly “voluntary” loyalty discounts can have an anticompetitive effect because they raise competitors’ cost of entering the market.¹⁰⁹ Thus, the FCC should prohibit these so-called “voluntary” discounts that force buyers to accept loyalty commitments, undermine rival entry, and are unjust, unreasonable, and anticompetitive.

¹⁰⁶ See Verizon Response, Competition Data Requested in Special Access NPRM, WC Docket No. 05-25 and RM 10593, at 15 (Dec. 5, 2011) (“About eighty-five percent of Verizon’s ILEC DS1 and DS3 revenues are from customers who subscribe to generally available Tariff Discount Plans.”).

¹⁰⁷ Incumbent LECs can raise prices in Phase II areas because there is no cap on rates in areas where they have Phase II pricing flexibility.

¹⁰⁸ Farrell Decl. at 2-3.

¹⁰⁹ Elhauge and Wickelgren Discussion Paper at 1.

IV. THE COMMISSION SHOULD PROHIBIT TERMS AND CONDITIONS THAT UNREASONABLY INTERFERE WITH PURCHASERS' ABILITY TO SWITCH PROVIDERS

The Commission should declare terms and conditions that interfere with a purchaser's ability to switch special access circuits from an incumbent with market power to a competitive provider to be unjust and unreasonable under Section 201 of the Communications Act. As explained above, incumbent LECs routinely include such terms and conditions in their special access tariffs and plans. It is also critical for the Commission to understand the link between remedies related to terms and conditions and remedies related to inflated rates. If the FCC only prohibits anticompetitive terms and conditions, but allows incumbent LECs to respond to this prohibition by forcing all purchasers into higher-priced plans, the Commission will have made the broken special access market even worse.

To address incumbent LECs' use of unreasonable terms and conditions, Level 3 and tw telecom have recommended that the Commission prohibit incumbent LECs from imposing: (1) loyalty mandates that lock up more than 50 percent of a customer's special access demand; and (2) ETFs that exceed the unrecovered sunk costs that an incumbent LEC incurs in serving a specific customer.¹¹⁰ While these steps would not address all of the anticompetitive effects of incumbent LEC terms and conditions, Sprint supports these recommendations as a conservative first step. For each of these remedies the FCC also must address a set of related incumbent LEC terms and conditions to ensure that incumbents cannot circumvent the FCC's prohibitions by continuing their anticompetitive practices through other mechanisms. Finally, Sprint emphasizes

¹¹⁰ See Letter from Thomas Jones, Counsel to tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (June 4, 2012) ("Jones 2012 Ex Parte"); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Feb. 22, 2012) ("Mooney 2012 Ex Parte").

that the FCC must address both rates and terms and conditions to repair the broken special access marketplace.

A. The Commission Should Prohibit Loyalty Mandates that Lock Up More than 50 Percent of a Buyer's Special Access Purchases

As discussed above, to avoid paying prohibitively expensive rack rates, special access purchasers frequently must agree to buy circuits equal to at least 90 percent of their past special access purchases from the incumbent LEC when they renew a discount plan. The incumbent LECs enforce these loyalty mandates with exceptionally high penalties.¹¹¹ As a result, purchasers are unable to switch circuits to competitive providers even when such alternatives exist. The incumbent LECs' loyalty mandates also capture any growth in purchasers' needs through overage penalties that further the anticompetitive impact of these loyalty plans. The combination of these terms and conditions effectively blocks new entry by preventing potential competitors from achieving minimum viable scale.

As Level 3 and tw telecom have suggested, the Commission should declare that loyalty mandates imposed by incumbents with market power that undermine competition are unjust and unreasonable and should prohibit any provisions that require buyers to purchase more than 50 percent of their past purchases from the incumbent when they renew a contract.¹¹² This would allow buyers to shift some portion of their special access purchases to competing providers and subject incumbent LECs to increasing competition in the future. Level 3's proposal would balance the incumbent LECs' desire to obtain an adequate measure of predictability in sales of special access with the need to provide competitors the opportunity to respond to high incumbent

¹¹¹ See Section III.A, *supra*.

¹¹² Jones 2012 Ex Parte at Attachment p. 3; Mooney 2012 Ex Parte at 28.

LEC prices through bids that can win a large enough number of lines in a geographic area to justify investment in new facilities.

For this remedy to succeed, however, the Commission must also address a set of related incumbent LEC practices that are unjust and unreasonable. First, the Commission should require incumbent LECs to maintain their current discount and benefit levels, despite changes to loyalty mandates. Even if the FCC prohibits unreasonable loyalty commitments, incumbent LECs will remain dominant and may abuse their market power by eliminating plans, raising prices, or imposing onerous new conditions when they are no longer able to force loyalty. Maintaining current discounts and benefits will prevent such anticompetitive conduct.

Second, the Commission should prohibit incumbent LECs from setting different quantity-discount thresholds for different buyers. Where economies exist, cost savings will occur at the same quantity of service provided, regardless of the buyer. Incumbent LECs, however, could apply varying discount thresholds, depending on the size of the buyer, in an effort to maximize the amount of the buyer's demand the incumbent LEC can capture. This practice, if permitted, would allow an incumbent LEC to lock up more than 50 percent of a buyer's purchases, without explicitly requiring a 50 percent loyalty commitment. If, however, the Commission requires incumbent LECs to set uniform thresholds for quantity discounts, then all buyers can benefit from any actual scale economies, and incumbent LECs cannot evade the proposed loyalty-commitment caps by setting individual purchase-level thresholds – as opposed to percentage thresholds – designed to capture any individual customer's demand. Even with uniform thresholds, however, volume discounts must comply with Section 201's reasonableness requirements as well as Section 202's non-discrimination requirements. Thus, for example,

incumbent LECs should not be permitted to set thresholds at a level that would apply only to incumbent LEC affiliates and not to other buyers.

Third, the Commission should prohibit incumbent LECs from conditioning discounts on a buyer's agreement to purchase services across a wide geographic area. Such practices tie discounts on circuits in non-competitive areas to purchases of circuits in competitive areas.¹¹³ Most areas of the country are not subject to competition today and they are unlikely to be served by competitors even after the FCC prohibits unreasonable loyalty mandates. Buyers must therefore rely on incumbent LECs for circuits in most of the country. There is no justification for these geographic requirements, other than to ensure that customers cannot switch providers if competition emerges in some but not all areas. If a large enough percentage of a buyer's demand is located in non-competitive areas, permitting the tying arrangements described above would allow incumbents to circumvent the FCC's prohibition against unreasonable loyalty mandates by ensuring that customers cannot switch providers in areas that are subject to competition without losing their discounts in areas where there are not competitive alternatives.

Finally, the FCC should require incumbent LECs to allow buyers to purchase all of their incumbent LEC special access circuits at a discount without committing all of those circuits to a loyalty plan and without being subject to unreasonable restrictions on portability. In many areas, buyers will have no choice but to buy more than 50 percent of their circuits from incumbent LECs because there are no other providers. If incumbent LECs deny portability for circuits that are not part of a loyalty commitment, buyers will have no choice but to increase their commitment levels above the 50 percent cap to avoid onerous penalties imposed by the incumbent LEC.

¹¹³ See *supra* at 28-30 (discussion of ILECs' practice of tying competitive and non-competitive geographic areas).

B. The Commission Should Prohibit Incumbent LEC Early Termination Fees that Exceed the Unrecovered Sunk Costs Required to Provide a Circuit to a Customer

As discussed above, incumbent LECs also use excessive ETFs to lock up special access demand. Incumbent LECs justify these fees on the grounds that they need these ETFs to “recover the costs associated with deploying facilities.”¹¹⁴ Incumbent LECs’ ETFs, however, rarely bear any reasonable connection to the “costs associated with deploying facilities.” Rather, incumbent LECs frequently impose unreasonable “take-or-pay-more” ETFs that equal a higher rack rate (rather than the plan rate) multiplied by the time remaining on the customer’s contract, resulting in a penalty that far exceeds the cost of serving that customer.¹¹⁵

Because buyers rarely – if ever – pay the rack rate, these ETFs substantially exceed the amount the buyer would pay if it simply continued to purchase circuits under the contract. Presumably, the rates an incumbent LEC charges over the life of a “discount” plan’s term are designed to allow the LEC to recover both the customer-specific sunk costs and recurring costs associated with providing the services being purchased. Otherwise, the incumbent LEC would not offer such a rate. A penalty that exceeds the total payments expected over the life of a contract – such as a “take-or-pay-more” provision – therefore must also exceed the customer-specific sunk costs the incumbent LEC incurred to provide the contracted-for services.

Incumbent LEC assertions that these ETFs, or other excessive fees described in the previous section, are needed to “recover the costs associated with deploying facilities”¹¹⁶ are therefore false. These excessive ETFs serve only to undermine competition by imposing a

¹¹⁴ See Reply Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, at Exhibit B: Declaration of Quintin Lew and Anthony Recine ¶ 28 (Feb. 24, 2010, re-filed Mar. 19, 2010) (“Lew/Recine Decl.”).

¹¹⁵ See *supra* at 33-34 (discussing “take or pay more” ETFs).

¹¹⁶ See Lew/Recine Decl. ¶ 28.

substantial penalty if a customer were to shift a portion of its requirements to an incumbent LEC rival. To remedy this problem, the Commission should prohibit ETFs – as well as shortfall penalties and any other type of punishment associated with shifting circuits away from the incumbent – that exceed the unrecovered sunk costs that an incumbent incurred to provide a special access circuit to a customer.¹¹⁷

Costs that are recoverable in ETFs should be limited to those sunk costs actually required to initiate a specific customer's service, and which (i) cannot be shifted to any other customer, and (ii) have not already been recovered in non-recurring charges. For example, incumbent LECs should not be permitted to recover in ETFs costs that were sunk long before a particular customer purchased access to a circuit, such as the cost of deploying facilities to a building many decades before the current special access customer took residence. Rather, the FCC should permit an incumbent to recover in ETFs only the costs needed to connect that specific customer to the incumbent LEC's network, and only to the extent that those costs have not already been recovered in non-recurring charges.

Finally, to prevent incumbent LECs from forcing customers to make additional commitments after a contract's term expires, the FCC should prohibit incumbent LECs from imposing ETFs beyond the initial term of a contract. Once a contract expires, the incumbent LEC should not be permitted to impose any ETFs as part of subsequent contracts that cover those same circuits. The Commission should prohibit incumbents from imposing an ETF if a customer decides to renew with an incumbent for a second term for the same circuit, because the incumbent almost certainly will have recovered its sunk costs by the end of the initial term.

¹¹⁷ See Mooney 2012 Ex Parte at 29.

V. CONCLUSION

Consistent with the discussion above, the Commission should use a traditional market power analysis to evaluate competition in the special access marketplace and determine where the incumbent LECs remain dominant in their provision of special access services. The Commission can refine and supplement its market power analysis through the use of its econometric model, provided that the model examines the appropriate factors, including marginal prices and the effects that terms and conditions of service have on both price and on competitive investment. Finally, the Commission should prohibit certain terms and conditions that unreasonably restrict competition for special access services. The Commission should adopt the necessary prohibitions, as well as other remedies described above, even as it works expeditiously to conclude this long-standing proceeding and reform its special access rules in a manner better designed to protect consumers and promote competition.

Respectfully submitted,

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February 11, 2013

ATTACHMENT A

**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

DECLARATION OF PAUL SCHIEBER

1. My name is Paul W. Schieber, Jr. and I am Vice President of Roaming and Access Planning for Sprint Communications Company L.P. (“Sprint”).

2. Among other duties, I have responsibility for all of Sprint’s domestic special and switched access relationships. My team determines which providers of access services Sprint will use, negotiates pricing and terms associated with those services, and verifies and pays the related bills.

3. I make this declaration to describe Sprint’s experiences with providers of “best efforts business broadband Internet access services” (“best efforts services”) – particularly those provided by cable companies – and to explain why those services do not meet Sprint’s needs either for the wireline services it sells to enterprise customers or for the links it needs to connect its cell sites to the rest of its network.

4. In Sprint’s experience, best efforts services generally consist of services that cable companies provide using hybrid fiber coaxial (“HFC”) cable.¹ Accordingly, this declaration focuses on HFC-based services that Sprint has explored as possible substitutes for the dedicated special access services it currently buys from incumbent local exchange carriers (“LECs”) and others.² While best efforts services can be used for some communications needs (such as consumer WiFi hotspots, or femtocells or other microcells that can offload data in small areas), these services cannot substitute for dedicated special access services that Sprint uses for its core wireless and wireline service offerings.

5. As explained below, there are limitations associated with the HFC network that prevent cable companies from providing guaranteed levels of service over their HFC plant and restrict those offerings to best efforts services. For example, HFC-based services do not offer the performance guarantees that Sprint needs in order to provide its customers the service quality that they demand. As a result, Sprint does not currently purchase any best efforts services from cable companies or any other suppliers that cannot guarantee certain minimum levels of performance for Sprint’s wireless macro network or its core enterprise offerings such as Multiprotocol Label Switching (MPLS) or Dedicated Internet Access (DIA) services. Instead, for these purposes Sprint continues to

¹ The FCC’s Mandatory Data Collection explicitly excludes “mobile wireless services” from its definition of “Best Efforts Business Broadband Internet Access Services.” See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25; RM-10593, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, at Appendix A, section I (rel. Dec. 18, 2012) (“FNPRM”). This definition is consistent with Sprint’s experience that “best efforts services” generally refers to HFC-based cable services.

² See, e.g., FNPRM ¶¶ 17, 22 (discussing the relationship between special access services and “best efforts broadband Internet access services”).

rely on dedicated services with guaranteed levels of service, such as incumbent LECs' special access services, to meet its needs.

Description of Sprint and Its Need for DS1 and DS3-Capacity Wireline Services

6. Sprint is a global communications company based in Kansas that, through its subsidiaries, offers a comprehensive range of wireless and wireline voice and data products and services throughout the country. Sprint is a leading provider of both wireless and wireline services, with over 50 million customers nationwide.

7. Sprint relies primarily on wireline facilities from other providers for the links between its cell sites and its mobile switching centers ("MSCs"), including the last-mile connections between its cells sites and LEC serving wire centers that it must reach in order to aggregate traffic for transport to its MSCs.³ These backhaul links can range from relatively low-capacity connections (as little as 1.5 Mbps) to higher-capacity (50 Mbps or more) connections.

8. As described in more detail below, the links Sprint uses for wireless macrocell backhaul must be able to provide:

- Low latency⁴ (8-12 milliseconds), to support reliable handoff of handsets from tower to tower;
- Consistent carrying capacity, to facilitate network traffic planning;
- High reliability, with repair intervals of less than 6 hours to support public safety (*e.g.*, calls to 9-1-1) and ubiquitous service;
- Segregation from the public Internet, to ensure security and protect the privacy of customers' traffic;⁵ and

³ In some locations, Sprint is able to use its own microwave facilities to connect its cell sites to the rest of its network.

⁴ "Latency" refers to the delay that voice or data traffic experiences as it traverses a network.

- Broad geographic coverage consistent with Sprint’s cell site deployments.

9. Sprint also relies on links from other providers as critical inputs to the retail wireline services it provides to enterprise customers. (These services generally rely on DS1 and DS3-capacity facilities, *e.g.*, connections ranging from approximately 1.5 Mbps to 45 Mbps.)

10. The services Sprint uses to serve its wireline enterprise customers must be able to provide:

- Predictable latency (*i.e.*, low jitter⁶) to facilitate VoIP and other latency-sensitive applications;
- Busy hour capacity and service repair intervals consistent with the service level agreements (“SLAs”) that the enterprise market requires Sprint to provide to its customers;
- An option to use the services to offer both dedicated Internet access and private data network services; and
- Broad wholesale availability via carrier resale agreements.

Sprint’s Experience with Cable Best Efforts Services

11. Sprint actively pursues alternative vendors capable of providing the last-mile connections to its cells sites and to its enterprise customers. Although Sprint has succeeded in finding non-ILEC providers capable of providing some of these high-

⁵ Segregation from the public Internet is not as significant a concern for certain corporate femtocell applications. In fact, best efforts services may prove to be suitable for such applications. Sprint is also considering a “bring your own backhaul” option for its corporate femtocell applications. As the name implies, that option would allow customers to provide their own backhaul connectivity. If it offers a “bring your own backhaul” option, Sprint would expect some customers to explore the feasibility of using DSL or cable modem services to provide the connectivity from their on-site femtocells to Sprint’s network.

⁶ Jitter occurs when different packets experience varying degrees of latency or delay. Jitter can compromise call quality.

capacity connections, particularly to its macrocells, all of those connections have been provided over dedicated facilities.⁷ In fact, Sprint has not found any HFC-based cable services capable of meeting its needs either for its cell site connections or for the connections it uses to serve enterprise customers of its wireline services.

12. The primary drawback with best efforts services for Sprint's needs is that, as their name indicates, these services do not include service level guarantees.⁸ In particular, due to technical limitations associated with the design of the cable HFC network, cable companies cannot guarantee that the best efforts services they provide will meet Sprint's minimum reliability requirements, making them unsuitable for Sprint's macro network.⁹

⁷ Although Sprint has been able to use cable companies to provide connections to its macrocell sites, those connections have all been provided over dedicated facilities. In fact, cable companies have agreed to deploy new fiber facilities where the demand justifies the investment. The services Sprint purchases from cable companies are not best efforts services, however, as they are provided over dedicated facilities and include guaranteed levels of performance. *See, e.g., Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 40 (2003) (explaining that although cable companies have deployed networks to serve business customers, these networks generally are “not the historic hybrid-fiber-coaxial cable networks providing service to residential customers but newly deployed facilities specifically designed to serve enterprise customers”).

⁸ In Sprint's experience, cable companies are unwilling to provide SLAs covering key performance metrics, such as latency and capacity, for the services they provide over their HFC facilities.

⁹ For example, the best efforts services the Commission has asked about are designed to provide access to the public Internet, not carry traffic over a private network. *See* FNPRM at Appendix A, section I; FNPRM ¶ 17. In addition, the cable HFC network is based on a shared network architecture in which traffic from different sources is commingled. This may provide the cable companies with certain efficiencies, but it also makes the performance of the HFC network unpredictable, as the available capacity depends in part on what other users are on the network at any given time.

13. Cable best efforts services cannot meet the following requirements Sprint needs for its wireless applications:

- **Low Latency:** Sprint's wireless network requires latency of no greater than 8-12 milliseconds for traffic to and from its cell sites in order to avoid dropped calls and other problems for its mobile wireless customers. Best efforts data services are designed almost exclusively for mass access to the public Internet, however, meaning that Sprint's backhaul traffic would need to traverse the Internet before reaching a Sprint data node. As a result, the performance of cable best efforts services can vary widely, and often result in delays of 75 milliseconds or more, which is far greater than Sprint's network equipment can tolerate.
- **Consistent Backhaul Capacity:** Sprint requires guaranteed bandwidth for its macrocell-site backhaul to ensure customer traffic is not blocked due to congestion in the backhaul network, especially for critical calls such as 911. Best efforts services are offered over networks that by design tend to be heavily oversubscribed, resulting in congestion during peak usage periods. This network congestion results in dropped or uncompleted calls, which can have serious customer impacts in emergency and other time-critical situations. Thus, best efforts services by definition cannot provide the capacity and performance guarantees Sprint needs to ensure an acceptable experience for its wireless customers. In addition, the maximum bandwidth available over HFC networks is often far below the bandwidth Sprint requires to meet its backhaul needs, particularly for connections to its macrocell sites.
- **High Reliability and Low Mean Time to Repair:** Sprint's backhaul network is critical to its ability to provide wireless service. Accordingly, any backhaul services Sprint purchases must be highly reliable and any problems must be addressed swiftly to minimize network downtime. While the reliability of, and mean time to repair for, best efforts services has improved over time, they are still not at the level needed to support mission-critical applications, such as backhaul. In fact, mean time to repair for best efforts services averages around 18-24 hours, far longer than the guaranteed levels Sprint requires to meet its customers' expectations for network performance.
- **Private Network:** Sprint routes its wireless traffic over dedicated circuits to protect customer privacy and ensure security. Cable best efforts data networks are designed primarily for Internet applications and comingle traffic from various sources at the cable head end. Although technology exists to encrypt data traversing the Internet and to protect Sprint's wireless network from intrusion, such technology is expensive and would introduce unacceptable levels of complexity and costs to Sprint's macro backhaul network.

- **Geographic Coverage:** The majority of Sprint’s cell towers are located in isolated areas that are not well-served by existing HFC plant, which is largely concentrated in residential neighborhoods and business districts. Thus, cable best efforts services are often unavailable in the areas where Sprint seeks connectivity to its cell sites.¹⁰

14. Similarly, cable best efforts services cannot meet Sprint’s requirements for its wireline applications, particularly the inputs needed to serve enterprise customers.¹¹

These requirements include:

- **Low Jitter:** Although voice applications are not as sensitive to latency issues as mobile wireless applications, they are extremely sensitive to inter-packet arrival delay (*i.e.*, jitter) which can compromise quality on voice calls. In premium voice networks, this problem is managed through the strict segregation of data and voice networks. As noted above, best efforts services generally commingle traffic from various sources. Partially for that reason, best efforts services generally do not include guarantees that jitter will be kept to acceptable levels.
- **Business Class Capacity and Repair:** Enterprise customers of wireline data services require consistent, guaranteed levels of bandwidth. As noted above, however, best efforts services cannot provide these bandwidth guarantees, particularly during peak traffic times, or “busy hours.” Best efforts services also do not include the guaranteed repair intervals that enterprise wireline customers demand and the repair times are often longer than enterprise customers are willing to tolerate.
- **Symmetrical Operation:** Enterprise customers require symmetrical bandwidth over the facilities Sprint uses to serve those customers. Best efforts data services are generally geared toward a traditional consumer

¹⁰ As noted above, cable companies almost invariably elect to build new dedicated fiber plant to serve cell sites rather than serve those sites using the companies’ best efforts data infrastructure. *See* note 7, *supra*. The fact that cable companies elect to build new plant, rather than rely on their existing HFC networks to provide wireless backhaul, is consistent with Sprint’s experience that best efforts services provided over HFC plant cannot meet Sprint’s backhaul needs for its core wireline and wireless service offerings.

¹¹ Although there might be some small retail businesses (*e.g.*, flower shops or hardware stores) that are able to use best efforts services to meet their needs, those customers do not obtain service from Sprint. The vast majority of Sprint’s enterprise customers require carrier-grade performance and cannot rely on best efforts. For example, businesses such as call centers, banks and other financial institutions demand high levels of quality of service to meet their needs and cannot be served effectively using best efforts services.

model, however, in which end users download significantly more data than they upload. Consequently, best efforts services are generally asymmetrical, devoting more capacity to downloads than uploads. Thus, best efforts networks generally do not provide the symmetrical bandwidth that Sprint needs to serve many of its enterprise customers.

- **Dedicated Networking:** Sprint’s enterprise customers generally demand secure, private networking services. To date, best efforts data networks have been restricted to public Internet applications and extensions to private corporate networks protected by encrypted tunnels (Virtual Private Networks or “VPNs”). Sprint is not aware of any best efforts data services that strictly segregate customer traffic and bypass the Internet backbone, thus providing the secure, dedicated connections Sprint requires to serve its enterprise customers.
- **Carrier Resale:** In Sprint’s experience, cable companies generally do not offer best efforts data services on a traditional wholesale basis. Instead, cable company offerings typically are restricted to agency-type agreements where the cable company, rather than Sprint, is the provider of record.

15. Given the problems described above, it is not surprising that, to date, Sprint has not been able to find cable best efforts services that can meet Sprint’s needs for its wireless macro network or its core enterprise offerings.¹² In fact, even when Sprint found a cable company willing to offer wholesale best efforts services using HFC facilities, trials showed that those facilities were unable to meet the technical requirements to provide the service level Sprint’s customers demand.

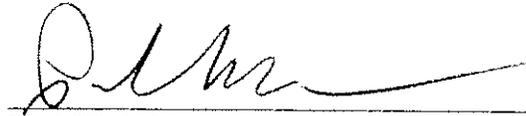
16. In sum, there is no indication that cable best efforts services can meet Sprint’s service requirements. In fact, in Sprint’s experience, there are no best efforts services available in any area where it needs connectivity that meet Sprint’s service requirements.

17. This concludes my declaration.

¹² As noted above, Sprint is exploring the possibility that best efforts services may be sufficient for at least some corporate femtocell applications. *See* note 5, *supra*.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 11, 2013

A handwritten signature in black ink, appearing to read 'P. Schieber, Jr.', written over a horizontal line.

Paul W. Schieber, Jr.
Vice President
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