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

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

REPLY COMMENTS OF SPRINT NEXTEL CORPORATION

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Sprint Nextel Corporation ("Sprint") submits these reply comments in response to the 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

The comments filed in response to the *FNPRM* overwhelmingly support the use of a traditional market power analysis to determine whether and where the incumbent LECs are dominant in the provision of special access services. Unlike the discredited "sunk investment" test advocated by AT&T, a market power analysis is well-suited to the task of evaluating where there is sufficient competition to curb the incumbent LECs' ability to charge supra-competitive

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[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*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) ("*FNPRM*").

rates and to engage in other unreasonable practices. The Commission, therefore, should employ a traditional market power test in conjunction with – or instead of – the econometric modeling proposed in the *FNPRM*.

In conducting its analysis and revising its regulatory regime governing special access, the Commission should be guided by the statutory mandate to ensure that rates, terms and conditions for special access services are just, reasonable and not unreasonably discriminatory. Thus, the Commission should not "under-regulate" special access services, as some incumbent LECs suggest, in the hopes of promoting entry. Rather, the Commission should fulfill its obligation to protect consumers from the harms caused by inflated special access rates and ease regulation only in areas where competition is sufficient to bring incumbent LEC rates down to competitive levels.

In conducting its analysis, the Commission should not be swayed by the incumbent LECs' arguments that their special access prices are constrained by best efforts services or by fixed wireless services. As several parties have explained in their initial comments, best efforts services are not an adequate substitute for special access services. Indeed, as Ad Hoc has explained, in many ways best efforts services are the antithesis of special access services. Similarly, fixed wireless service is not a suitable substitute for special access services in the vast majority of situations. As explained below, fixed wireless service suffers from several limitations that prevent it from providing an effective alternative to wireline special access services on a wide-scale basis.

The initial comments also provide overwhelming evidence that the incumbent LECs impose unjust and unreasonable terms and conditions on their special access customers. Anticompetitive terms and conditions include loyalty mandates and termination penalties that restrict customers' ability to purchase services from alternative providers, even in the few places where such providers offer DS1 and/or DS3 service. These restrictions add to the already significant barriers that competitive carriers face in their efforts to enter the marketplace or expand their existing business by winning customers from the incumbent LECs. The FCC now has strong record support for immediate action to address these anticompetitive terms and conditions.

The Commission must also act expeditiously to address the harms created by the premature grants of pricing flexibility that have already occurred pursuant to the now-suspended triggers. In particular, Sprint urges the Commission to act immediately to bring pricing flexibility rates down to price cap levels except where the incumbent LEC can demonstrate that the price cap rate would be below its cost of providing service. Similarly, the Commission should act swiftly to address the incumbent LECs' anticompetitive terms and conditions. At a minimum, the Commission should immediately prohibit any provisions imposed by incumbent LECs that require buyers to purchase more than 50 percent of their past purchases from the incumbent, as well as early termination fees that exceed the unrecovered portion of the sunk cost the incumbent LEC incurred to provide service to a specific customer. The Commission can flesh out the rest of its revamped regulatory regime once it has completed its analysis of the data it collects through the mandatory data request, but it should take these initial steps as quickly as possible in order to mitigate some of the harms caused by the incumbents' decade-plus ability to exploit their market power to the detriment of special access purchasers and final consumers.

II. DISCUSSION

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

There is widespread support in the record for the Commission to conduct a traditional market power analysis to determine whether and where incumbent LECs remain dominant in the provision of special access services.[2] One of the few parties to oppose the use of a traditional market power analysis – whether in conjunction with, or in lieu of, the FCC's proposed econometric analysis – was AT&T, which argued that a traditional market power analysis is unnecessary because pricing flexibility is appropriate even where the incumbent LECs remain dominant.[3] This argument ignores the practical consequences of pricing flexibility.[4] It also ignores the fact that pricing flexibility was developed to provide incumbent LECs relief from dominant carrier pricing regulations only in areas where competition could be expected to

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[2] *See* Comments of the New Jersey Division of Rate Counsel at 9 (supporting the use of the structural market analysis the FCC employed in the *Qwest Phoenix Forbearance Order*) ("NJ Rate Counsel Comments"); Comments of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. at 64 ("[t]he established market power framework is a reliable and efficient means of identifying the relevant special access markets in which incumbent LECs currently have the ability to set and maintain supra-competitive prices") ("CLEC Comments"); Comments of the Ad Hoc Telecommunications Users Committee at 8-9 ("Ad Hoc Comments"); Comments of XO Communications, LLC at 3-5 (supporting the use of a traditional market power framework) ("XO Comments"); Comments of Sprint Nextel Corp. at 5 ("Sprint Comments"); *see also* Comments of TelePacific Communications at 6 (supporting a "rigorous market structure analysis") ("TelePacific Comments"); Comments of CenturyLink, Inc. at 12-13 (citing with approval of the traditional means of defining relevant product markets) ("CenturyLink Comments"). (Unless otherwise indicated, all comments cited herein were filed in WC Docket No. 05-25 on February 11, 2013.)

[3] *See* Comments of AT&T Inc. at 12 (arguing that pricing flexibility relief is "merely an incremental measure *within* the context of dominant carrier regulation") (emphasis in the original) ("AT&T Comments").

[4] *See* Ad Hoc Comments at 8-9 (noting that the "practical effect of the Commission's pricing flexibility rules has been the deregulation of prices for affected services").

prevent them from imposing anticompetitive prices, terms or conditions on their special access customers.[5]

A traditional market power analysis provides an effective means of determining whether sufficient competition exists to constrain incumbent LECs' prices and other commercial practices. Indeed, the key test of market power is whether a seller has the ability profitably to maintain prices above competitive levels without experiencing significant customer losses and without attracting entry by competitors.[6] This is exactly the question the Commission must answer in this proceeding: Where is there sufficient competition to curb the incumbent LECs' ability to charge special access prices that exceed competitive levels.[7] Thus, a traditional market power analysis is ideally suited to the task before the Commission.[8]

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[5] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 69 (1999), *aff'd sub nom. WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (explaining that Phase I pricing flexibility was intended to provide price cap LECs relief when they could show that there was sufficient competitive investment to discourage the incumbents from successfully pursuing exclusionary strategies and that Phase II pricing flexibility was intended to provide relief where the availability of alternative providers would ensure that the incumbents' rates were just and reasonable) ("*Pricing Flexibility Order*"); *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*, Report and Order, 27 FCC Rcd 10557, ¶¶ 24- 25 (2012) ("*Pricing Flexibility Suspension Order*").

[6] *See, e.g.*, Declaration of Bridger M. Mitchell, appended as Attachment A to Comments of Sprint Nextel Corp., WC Docket No. 05-25, ¶ 95 (citing *Horizontal Merger Guidelines*) (Jan. 19,2010) ("2010 Mitchell Decl.").

[7] Although the Commission's ultimate objective in this proceeding is to revise its pricing flexibility regime in order to ensure that special access prices are just and reasonable in all parts of the country, the FCC's priority should be to address those areas where the incumbent LECs have been granted pricing flexibility but still retain the ability to profitably raise prices above competitive levels. Thus, the Commission should begin its reform of its pricing flexibility regime by reducing rates in Phase II pricing flexibility areas to price cap levels. *See* Section II.F, *infra*.

[8] *See, e.g.*, *Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings*, Public Notice, 25 FCC Rcd

B. The Commission Should Not Rely on the Presence of Sunk Investment as a Reliable Indication of a Competitive Marketplace

In place of the well-established market power analysis that has long been used by the Commission, the Department of Justice and other government agencies to evaluate competition in various markets, AT&T offers a variation on the "sunk investment" test that has proven to be a completely unreliable indicator of the availability of alternatives to incumbent LEC-provided special access services over the nearly fifteen years since the pricing flexibility rules were originally established.[9] As the Commission has recognized, the original pricing flexibility triggers failed to "accurately reflect competition."[10]

The suspended pricing flexibility triggers were based solely on the presence of sunk investment by competitors, in the form of collocated facilities.[11] The critical flaw in the policy

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8013, at 1 (2010) (explaining that the Commission has frequently used a traditional market power analysis to determine whether there is sufficient competition to render certain regulatory protections unnecessary); *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, ¶ 2 (2010), *aff'd sub nom. Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012) ("*Qwest Order*") (using a traditional market power analysis to determine that certain dominant carrier regulations remained necessary to ensure that Qwest could not impose unjust and unreasonable rate increases, discriminate unreasonably or harm consumers).

9 *See* AT&T Comments at 11, 17, 23; *see also Pricing Flexibility Suspension Order* ¶ 11 (explaining that the suspended triggers were "designed to measure the extent to which competitors had made irreversible, sunk investment[s] in collocation and transport facilities").

10 *Pricing Flexibility Suspension Order* ¶ 1; *see also id.* ¶ 5 (concluding that the original pricing flexibility triggers were "a poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices").

11 *See Pricing Flexibility Suspension Order* ¶ 30 (explaining that the pricing flexibility triggers were "based on the extent of collocation within an MSA"); *Pricing Flexibility Order* ¶ 79 (concluding that "irreversible, or 'sunk,' investment in facilities used to provide competitive services is the appropriate standard for determining when pricing flexibility is warranted"); *id.* ¶ 81 ("collocation by competitors in incumbent LEC wire centers is a reliable indication of sunk investment by competitors"). The collocation triggers were based on the presence of competitive carriers in a certain percentage of the incumbent LEC's wire center in an MSA or in wire centers

underlying the triggers was the assumption that once collocation facilities were in place in a particular wire center, they would not become idle: The theory was that, even if the original owner of the facilities were forced to exit the market, a new competitor would purchase the facilities at a distress price and continue to place competitive pressure on the incumbent LEC.[12] As Sprint and others have explained, however, even where collocation and other facilities are in place, potential competitors still face other obstacles that undermine their ability to compete with the incumbent LECs to serve special access customers. Perhaps most significantly, existing special access customers are deterred from switching to a competing provider by onerous terms and conditions that the incumbent LECs have imposed in their service agreements.[13] These terms and conditions include lock-up provisions that require customers to obtain nearly all of their special access needs from the incumbent in order to obtain certain discounts, along with excessive fees that the incumbent LECs assess on customers that fail to meet their term or

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accounting for a certain percentage of the incumbent LEC's revenues in the MSA. *Pricing Flexibility Suspension Order* ¶ 30; *Pricing Flexibility Order* ¶¶ 77, 141.

[12] *See Pricing Flexibility Order* ¶ 80. The suspended triggers suffered from other flaws, as well. For example, they were based on the erroneous assumption that the presence of competitive facilities in one part of an MSA would constrain competition in another part of the same MSA. As Dr. Mitchell has explained, however, competition in one wire center does not constrain prices for services provided out of a different wire center, even if both wire centers are located in the same MSA. 2010 Mitchell Decl. ¶ 19; *see also Pricing Flexibility Suspension Order* ¶ 35 (noting that "MSAs have generally failed to reflect the scope of competitive entry. Rather, in many instances, the scope of competitive entry has apparently been far smaller than predicted."). Indeed, in MSAs where they have been granted Phase II pricing flexibility, incumbent LECs can engage in regulatory arbitrage and price discriminate between areas where they face competition and those where they do not. 2010 Mitchell Decl. ¶ 19; *see also Pricing Flexibility Suspension Order* ¶ 36 (noting that "demand varies significantly within any MSA . . . [and] competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry").

[13] *See, e.g., infra* at 17-18; CLEC Comments at 26, 29; Level 3 Comments at 4-5.

volume commitments.[14] Furthermore, incumbent LECs engage in other practices designed to discourage competitive entry, including restricting customers' ability to switch large numbers of circuits to a new provider in a timely manner.[15]

More than a decade of experience has clearly shown that the presence of collocation facilities in a certain percentage of wire centers is a completely unreliable indicator of a competitive marketplace. The Commission's reliance on that trigger, consequently, has led to the deregulation of the incumbent LECs' special access services in areas where marketplace forces are woefully inadequate to constrain the incumbent LECs' anticompetitive practices. The Commission, therefore, should reject AT&T's attempts to resuscitate the discredited pricing flexibility triggers in assessing the competitiveness of local marketplaces. Instead, the Commission should rely on a traditional market power analysis that has been proven over many years to be an effective and reliable method of determining whether a firm has the ability profitably to raise prices or restrain output unilaterally.

C. The Commission Must Ensure that Special Access Rates are Just and Reasonable

Some incumbent LECs make the transparently self-serving argument that the Commission should err on the side of "under-regulating" special access prices.[16] AT&T, for example, argues that if the FCC allows the incumbent LECs to charge excessively high prices, competitors will enter the market to "compete away" any "excessive profits."[17] As an initial

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[14] *See, e.g.*, CLEC Comments at 20-34; TelePacific Comments at 12-18; Sprint Comments at 23-35.

[15] *See* Sprint Comments at 36.

[16] *See* Comments of Alaska Communications Systems at 5 ("ACS Comments"); AT&T Comments at 32.

[17] AT&T Comments at 32. AT&T and ACS also argue that customers can rely on the section 208 complaint process to address unjust and unreasonable rates. *Id.*; ACS Comments at

matter, these arguments simply ignore the Commission's statutory duty to ensure that carriers charge rates that are just and reasonable.[18] The Commission cannot shirk its statutory obligation to regulate prices in the hopes that competition will materialize to discipline the incumbent LECs in areas where those incumbents remain dominant.[19]

Moreover, the arguments in favor of "under-regulation" assume that it is relatively easy for competitors to enter the market so that both the threat of entry as well as the appearance of new competitors will restrain the pricing and other practices of incumbent LECs. The record in this and other proceedings show that, in fact, there are significant barriers to entry into the special access marketplace.[20] These barriers include not only the costs of deploying new facilities, the difficulties in obtaining access to buildings and rights-of-way and the challenges of

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4-5. These arguments fail to account for the difficulties that complainants face in showing that an incumbent LEC's rates are unjust and unreasonable, particularly in the absence of any FCC standard defining what constitutes just and reasonable prices for special access services. *See, e.g.,* Letter from John J. Heitmann, Counsel to XO Communications, LLC, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (Oct. 11, 2007) (explaining that the FCC's formal complaint process is not suitable for resolving issues related to special access pricing).

[18] 47 U.S.C. § 201(b).

[19] *See* Ad Hoc Comments at 4-5 (noting that the Act does not permit the Commission to tolerate supra-competitive rates to encourage investment and does not authorize the FCC to abandon direct regulation in an effort to stimulate entry or generate revenues for the incumbent LECs). In areas where the incumbents are not dominant, the Commission should either grant pricing flexibility or forbear from price cap regulation.

[20] *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); *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 72, 154 (2005) (discussing the "substantial fixed and sunk costs" competitive providers must incur to deploy last-mile transmission facilities).

overcoming the incumbent LECs' advantages of scale and scope,[21] but also the obstacles created by the incumbent LECs' anticompetitive practices.[22] As Sprint and several others have pointed out, the incumbent LECs have taken advantage of their dominant positions to impose terms and conditions on special access customers that effectively foreclose competition.[23] As a result, the incumbents have been able to avoid competition even after years of charging inflated special access rates.[24] Thus, the incumbent LECs' suggestion that the FCC "under-regulate" special access services is not only flatly inconsistent with the Commission's statutory obligation pursuant to Section 201, but it also significantly underestimates the obstacles to competitive entry and ignores the economic costs that such "under-regulation" would impose on consumers.[25]

D. Fixed Wireless and HFC-Based Services Are Not Effective Substitutes for Special Access Services

Despite the incumbent LECs' claims to the contrary, best efforts services are not substitutes for, and therefore are not in the same product market as, special access services.[26] In the vast majority of cases, the needs for which customers purchase special access services cannot

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[21] *See, e.g.*, Letter from John Lacalamita, Verizon Canada, to John Traversy, Secretary General, Canadian Radio-television and Telecommunications Commission, MTS Allstream Part 1 Application, ¶ 13 (Jan. 21, 2013), *available at*: <https://services.crtc.gc.ca/pub/DocWebBroker/OpenDocument.aspx?DMID=1824248> (arguing that there "will always be portions of the incumbents' distribution and feeder networks that cannot be duplicated in an economically rational fashion").

[22] *See, e.g.*, TelePacific Comments at 5-6.

[23] *See* Sprint Comments at 23-38; CLEC Comments at 20-40; *see also* Section G, *infra*.

[24] *See, e.g.*, TelePacific Comments at 7 (explaining that only 12.5 percent of TelePacific's customer locations in 30 wire centers were served by alternative last mile facilities).

[25] *See* Ad Hoc Comments at 8 ("the Commission must err on the side of protecting customers of special access services from possible overpricing").

[26] *See, e.g.*, XO Comments at 6 (best efforts services should not be included in the same product market as special access services).

be met adequately by best efforts services. As Ad Hoc has explained, from the end user's perspective, best efforts services are "the antithesis of special access."[27] For example,

- Special access services are dedicated to the exclusive use of one customer; best efforts services are shared by multiple customers.[28]
- Special access services offer bandwidth and performance guarantees; best efforts services do not.[29]
- Special access services provide symmetrical bandwidth inbound and outbound; most best-efforts services are asymmetrical.[30]

As a result, business customers do not view best efforts services, such as HFC-based offerings from cable companies, as substitutes for special access services.[31]

In addition to touting cable best efforts services as a substitute for traditional special access services, Verizon also contends that fixed wireless is an effective alternative to special access.[32] Although fixed wireless can be a viable source of transport services in some rural

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[27] Ad Hoc Comments at 12. Although Verizon claims that customers "appear to be accepting" cable best efforts services as alternatives to special access services, it cites no support for this speculative contention. *See* Comments of Verizon and Verizon Wireless at 23 ("Verizon Comments"). By contrast, Ad Hoc, whose membership includes some of the country's largest companies that are significant purchasers of special access services, clearly states that its members do not find best efforts services to be a suitable substitute for special access services. Ad Hoc Comments at 11-12.

[28] Ad Hoc Comments at 11.

[29] *Id*. at 11-12.

[30] CLEC Comments at 53-54.

[31] Ad Hoc Comments at 11-12; CLEC Comments at 51-55. While cable companies may have "compete[d] away" some sales from AT&T (AT&T Comments at 1), the vast majority of those sales almost certainly came from dedicated facilities that the cable companies deployed, not from best efforts service provided over traditional HFC plant. *See, e.g.*, Sprint Comments at 22 n.69; *see also* Declaration of Paul Schieber, appended as Attachment A to Sprint Comments, at 5 n.7 and 7 n.10 (explaining that cable companies rely on dedicated fiber facilities to meet Sprint's backhaul needs) ("Schieber Decl.").

[32] *See* Verizon Comments at 23-26 (discussing cable best efforts services and fixed wireless as alternatives that supposedly constrain the prices for traditional special access).

areas,[33] that does not mean that fixed wireless can be used on a wide scale to provide the CMRS backhaul services or last-mile connections for which Sprint and others currently rely on special access services.[34] Indeed, as Sprint and others have consistently pointed out, even though fixed wireless may be a suitable alternative to special access services under certain limited circumstances, it suffers from technical limitations that prevent it from replacing traditional wireline special access services on a widespread basis.[35] These include:

- Propagation characteristics that limit the distance a fixed wireless transmission can cover;
- Line of sight requirements that render fixed wireless services ineffective in certain locations; and
- Sensitivity to adverse weather conditions, which can affect reliability.[36]

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33 Verizon Comments at 26; Petition for Reconsideration of FiberTower, *et al.*, ET Docket Nos. 04-186 & 02-380, at 3 (March 19, 2009) ("FiberTower Petition for Reconsideration").

34 *See, e.g.,* Reply Comments of Sprint Nextel Corp., WC Docket No. 05-25, at 11 (Feb. 24, 2010) (reiterating that "fixed wireless services are not suitable substitutes for landline special access services in the vast majority of cases") ("2010 Sprint Reply Comments"); *see also* Comments of Sprint Nextel Corp. – NBP Public Notice #11, GN Docket No. 09-51, at 29-46 (Nov. 4, 2009) (explaining some of the problems that prevent "intermodal" alternatives from constraining incumbent LEC special access services) ("Sprint NBP PN#11 Comments").

35 Jake MacLeod, Principal Vice President and Chief Technical Officer, Bechtel Telecommunications, at FCC Workshop on Wireless Broadband Deployment – General (Aug. 12, 2009), Transcript at 48, (stating that "if you have to use wireless microwave to get there, do it, but do it in the most expeditious manner because that's the most unstable part of your entire system. That's what causes the problems and that's what limits your bandwidth as well."), *available at*: <http://www.broadband.gov/docs/ws_03_deploy_wireless_transcript.pdf>.

36 For example, fixed wireless service can be adversely affected by changing winds and can be disrupted during snow storms, particularly if the dish fills with snow.

In addition, there are other factors that prevent the use of fixed wireless as a substitute including:

- Costs that are too high to justify use for relatively low-capacity connections;[37] and
- Limited access to buildings and rooftops.[38]

As a result of these shortcomings of fixed wireless – as well as the well-documented limitations of HFC-based best efforts services[39] – special access customers, including Sprint, are likely to continue to rely heavily on copper and fiber facilities provided by incumbent LECs for many years to come.

E. The Existence of IP-Based Services Does Not Diminish the Commission's Obligation to Protect Purchasers of TDM-Based Services

AT&T predictably claims that the Commission should simply ignore the current state of competition for special access services and focus its regulatory resources on other areas.[40] In support of this seemingly indefensible position, AT&T reiterates its well-worn arguments that (1) TDM-based telecommunications services generally are in decline and (2) the Commission's regulation of TDM-based special access services to ensure that they are provided in a just and reasonable manner somehow threatens what AT&T claims is an "inevitable transition" to IP

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37 The language Verizon quoted in its comments regarding the estimated cost of a 100-mile fixed wireless connection omits the key point: The relatively low cost estimate would only be possible if the FCC allowed providers to use White Space spectrum for the fixed wireless connection. *Compare* Verizon Comments at 26 *with* FiberTower Petition for Reconsideration at 3. Indeed, as Sprint and others pointed out in the same sentence quoted by Verizon, it costs 10-30 times more to provide the same connection using 6 GHz or 3.65 Ghz spectrum than it would to provide it using White Space spectrum. FiberTower Petition for Reconsideration at 3.

38 *See, e.g.,* Sprint NBP PN#11 Comments at 8-10.

39 *See, e.g.,* Sprint Comments at 20-23; Schieber Decl. at 5 n.7 and 7 n.10; Ad Hoc Comments at 11-12; CLEC Comments at 51-57.

40 *See* AT&T Comments at 2.

services.[41] Stripped of its rhetorical flourish, however, AT&T's position is simply that the Commission should abandon its statutory responsibilities and turn a blind eye to the long-standing and continuing harms caused by the incumbent LECs' abuse of their market power in the special access marketplace. The Commission cannot accede to such a request.

TDM-based services remain in high demand. AT&T patronizingly characterizes the Commission's investigation into the special access marketplace as "quixotic."[42] In fact, however, it would be irresponsible for the FCC to follow AT&T's advice and ignore unjust and unreasonable rates, terms and conditions for services that generate $10 to $20 billion in annual revenues.[43] In addition, although AT&T has been trumpeting the demise of traditional special access services for years now,[44] many customers, including Sprint, remain highly dependent on these vital services to meet a wide range of needs and there is no reason to believe that the need for such services will disappear anytime soon.

Moreover, even if TDM-based special access revenues are declining, that is not an excuse for the Commission to ignore its duties under section 201 and allow AT&T and other price cap LECs to continue gouging their remaining customers. Indeed, the transition to IP-based networks does not change the underlying market structure or economic forces that make

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41 *Id*. at 10.

42 *Id*. at 2.

43 *See Pricing Flexibility Suspension Order* ¶ 2 & n.2; Stephen E. Siwek, Economists Incorporated, *Economic Benefits of Special Access Price Reductions*, at 7 (March 2011), *available at*: <http://www.mediaaccess.org/uploads/EIReport.pdf > ("EI Report"); Letter from Charles McKee, Sprint, to Marlene Dortch, FCC Secretary, at 3 (Oct. 5, 2012) (noting that the incumbent LECs provide hundreds of millions of special access lines generating between ten and twenty billion dollars in annual revenues).

44 *See, e.g.,* Comments of AT&T Inc., WC Docket No. 05-25, at 13 (Jan. 19, 2010) (claiming that TDM-based special access services were "going the way of the dodo") ("2010 AT&T Comments").

regulation of the TDM-based services necessary.[45] The incumbent LECs' market power in the special access marketplace is derived from their control of last-mile facilities and will persist regardless of the technology (IP, TDM or other) that is used to transmit traffic over those facilities.[46]

Regulation of TDM-base special access services will not impede the deployment of IP-based services. AT&T's assertion that regulation of TDM-based services threatens to slow the transition to IP services is simply wrong.[47] As the New Jersey Division of Rate Counsel has noted, AT&T has long relied on the transition to IP as a way to justify deregulation and to threaten not to invest in broadband.[48] In fact, however, the transition to IP-based services has been taking place for years and there is no credible evidence that the FCC's special access rules have either delayed that transition or prolonged reliance on TDM-based services.[49]

In addition, AT&T's argument ignores the fact that the incumbent LECs currently can determine the pace of the transition to IP unilaterally in the areas where they remain dominant. Thus, the alternative to FCC regulation is to allow the incumbent LECs to continue to take advantage of their dominance over last-mile facilities and to allow customers to switch to IP-based services only when it suits the incumbents' plans. In the end, AT&T's arguments only serve to reinforce the need for the Commission to determine where the incumbent LECs no

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45 *See, e.g.*, Ad Hoc Comments at 9-10.

46 *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 (Nov. 2, 2012).

47 AT&T Comments at 10.

48 *See* NJ Rate Counsel Comments at 11 (recommending that the FCC "ignore AT&T's attempt to avoid regulation of its special access rates, terms and conditions under the guise that such regulation hampers carriers' network investment").

49 TelePacific Comments at 6-7; *see also* Ad Hoc Comments at 9-10.

longer have market power before it relieves them of price cap regulation or any other dominant carrier obligations.[50]

F. The Commission Must Act Expeditiously to Protect Special Access Customers from Unjust and Unreasonable Rates

Whether the FCC uses a traditional market power analysis, an econometric model, or some combination of the two, it is critical that it act as quickly as possible to rectify the harms that have been caused by years of misplaced deregulation that have allowed incumbent LECs to exploit their market power in areas where they remain dominant. Indeed, the Commission can begin taking action to rectify the most egregious harms caused by the suspended pricing flexibility triggers even before it has collected and analyzed all of the data covered by the mandatory data request or completed a market power analysis.

As Ad Hoc has noted, there already is sufficient evidence in the record to justify the Commission bringing pricing flexibility rates down to price cap levels.[51] Given the Commission's finding that the triggers that led to the original grants of pricing flexibility did not accurately reflect competition,[52] there is no reason for the Commission to allow the incumbent LECs to continue to exploit such pricing flexibility to the detriment of consumers while the FCC

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[50] AT&T's argument also assumes that the Commission will do a poor job in devising a new pricing flexibility regime that will create the proper incentives for market participants. If one assumes that the Commission's revised regime governing special access will target regulation to where it is needed and ensure that prices in non-competitive areas better approximate the prices that would prevail in a competitive market, then there is no reason to believe that the Commission's review of special access will create inappropriate incentives or slow the transition to broadband.

[51] *See* Ad Hoc Comments at 13; *see also id.* at 12-13 (explaining that the record contains "substantial evidence" of the incumbent LEC's exercise of market power, including "more than sufficient evidence. . . that special access rates are not just and reasonable").

[52] *Pricing Flexibility Suspension Order* ¶ 1.

develops a new regulatory regime.[53] Instead, the Commission should require incumbent LECs to reduce their special access rates to price cap levels in any area in which the incumbent LEC cannot demonstrate that the price cap rate would be below the cost of providing service.[54]

G. The Record Supports FCC Action to Address Unjust and Unreasonable Incumbent LEC Terms and Conditions

The *FNPRM* asked parties to identify unjust and unreasonable terms and conditions in special access tariffs and contracts and to suggest appropriate remedies.[55] The resulting record shows widespread agreement among special access purchasers that incumbent LEC terms and conditions include anticompetitive loyalty mandates; excessive early termination, shortfall, buy down, and overage penalties; and unreasonable circuit migration charges.[56] Commenters have shown that these provisions work together to make the cost of switching to a competitive

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[53] The incumbent LECs' abuse of their market power has led to inflated special access prices that have been estimated to cost the U.S. economy billions of dollars and tens of thousands of jobs. *See* EI Report.

[54] Ultimately, the Commission will have to reevaluate the price cap rates, as there is evidence that those rates are no longer just and reasonable. *See* Comments of Sprint Nextel Corp., WC Docket No. 05-25, at 36-37 (Jan. 19, 2010) ("2010 Sprint Comments"). They are, however, lower than the average rates incumbent LECs charge in areas where they have been granted Phase II pricing flexibility and therefore could provide special access customers with at least a modicum of rate relief while they continue to wait for the Commission to conclude this proceeding. *See, e.g.*, 2010 Sprint Comments at 29-30 (discussing the substantial record evidence that incumbent LECs' special access rates in Phase II pricing flexibility areas are, on average, higher than their price cap rates for the same services); 2010 Mitchell Decl. ¶¶ 107-110.

[55] *FNPRM* ¶¶ 91-93.

[56] *See* CLEC Comments at 22-23 (discussing long-term nature of incumbent LEC contracts); XO Comments at 10-11 (same); CLEC Comments at 24 (discussing volume commitments in exchange for portability); XO Comments at 11-12 (discussing volume commitments in exchange for discounts); *Id.* at 12-13 (discussing volume commitments in exchange for portability); Sprint Comments at 28-29 (same); CLEC Comments at 27 (discussing overage charges designed to capture demand growth); XO Comments at 11-13 (same); CLEC Comments at 26-27 (discussing excessive nature of incumbent LEC fees); XO Comments at 11-13 (same); Sprint Comments at 32-35 (same).

provider prohibitive,[57] thereby undermining competitive entry.[58] Incumbent LECs fail to justify these anticompetitive practices. Instead, they attempt to distract the Commission by asserting that their loyalty mandates are merely volume discounts and that, because terms and conditions are "voluntary," they cannot be unreasonable. This section demonstrates that both of these arguments are incorrect.

The Commission now has an extensive record on terms and conditions. It does not require any additional information to find that incumbent LECs' terms and conditions are unjust and unreasonable. The FCC should therefore immediately prohibit: (1) any provisions that require buyers to purchase more than 50 percent of their past purchases from the incumbent; and

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[57] Commenters confirm that incumbent LECs' loyalty mandates have prevented buyers from switching special access providers. *See* CLEC Comments at 26 ("once a competitor agrees to a volume commitment with the incumbent LEC, it is virtually impossible for the competitor to shift any of its committed special access demand to an alternative provider"); CLEC Comments at 29 (no competitive provider can supply all of a buyer's special access needs, and loyalty mandates make it impossible for buyers to switch a subset of demand to an alternative provider; during the course of an agreement, shortfall penalties render shifting a subset of purchases uneconomic, and the "past purchases" volume commitments, combined with the commitment increases that result from overage charges, make it impossible for a buyer to shift a subset of purchases after an agreement expires—as a result, loyalty mandates have made it impossible for buyers to switch providers); Level 3 Comments at 1-4 (discussing the ways that loyalty mandates prevent Level 3 from justifying the deployment of new facilities). TelePacific has explained that incumbent LEC terms and conditions have an anticompetitive impact when the seller faces little if any competition, which is the case in the vast majority of special access markets. TelePacific Comments at 13.

[58] Competitive providers confirm that they cannot achieve the scale necessary to justify deploying new facilities because of terms and conditions. Level 3, citing the Commission's recognition that competitive special access providers face high entry barriers, states that loyalty mandates deny potential entrants revenue opportunities needed to justify the investment required to overcome those barriers. Comments of Level 3 Communications, LLC at 4-5 ("Level 3 Comments"). As a result, Level 3 cannot justify deploying new facilities. *Id*. at 5. The CLECs and XO echo Level 3's statements, stating that loyalty mandates deny competitors scale and prevent the emergence of effective competition. CLEC Comments at 33; XO Comments at 15.

(2) early termination fees that exceed the sunk costs required to provide service to a specific customer and that have not already been recovered.

Loyalty mandates are not volume discounts. Unable to defend their imposition of special access loyalty mandates, incumbent LECs attempt to convince the Commission that these provisions are merely a type of volume discount.[59] As Sprint and other commenters have demonstrated repeatedly, however, this is simply incorrect. Volume discounts are discounts for purchasing a higher *volume* of product – independent of the customer's past purchases. They reflect real efficiencies associated with selling a larger bundle of goods to a single customer. By contrast, loyalty discounts are discounts for maintaining a high *percentage* of past purchases with the incumbent. The Commission should explicitly find that incumbent LEC loyalty mandates are not volume discounts, and that they unreasonably undermine competition.

Incumbent LEC loyalty provisions effectively require purchasers to agree to maintain large percentages of their lines with the incumbent, as high as 90 to 100 percent of their current or recent purchases from the incumbent. These provisions include penalties for shifting circuits from an incumbent to a competitor. Unlike a volume discount, these provisions do not depend on the absolute number of lines that a customer purchases. Rather, they depend on a customer's commitment not to substantially reduce its past purchases from the incumbent. No matter whether a purchaser begins by buying many or few lines, incumbent LEC plans impose penalties if the purchaser moves enough of its special access circuits to a competitor to bring its remaining purchases from the incumbent LEC below the mandated loyalty percentage. A wide variety of

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59 *See* AT&T Comments at 38; CenturyLink Comments at 41-42.

special access purchasers have confirmed that these loyalty mandates have a very different effect than traditional volume discounts.[60]

Despite the clear differences between loyalty commitments and volume discounts, the incumbent LECs blithely attempt to apply past Commission and court decisions related to *volume* discounts to the loyalty provisions that are the subject of the comments special access customers filed in this proceeding. The decisions the incumbents cite are inapposite, however, and, in some cases, actually affirm the anticompetitive consequences of loyalty mandates. For example, AT&T cites the FCC's 1995 *Transport Rate Structure Order*, which characterized volume and term discounts as "generally legitimate means of pricing special access facilities."[61] That order – which addressed the narrow question of whether a particular volume discount was anticompetitive because it resulted in below-cost pricing – did not find that loyalty commitments are reasonable, however.[62] In fact, the order cites an earlier FCC order for the proposition that "[t]he existence of certain long-term access arrangements . . . raises potential anticompetitive

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60 *See* TelePacific Comments at 13 ("BOCs have twisted the application of volume and term commitments to turn them into 'lock-ups' in many cases, and they have also loaded onto their special access purchase arrangements a number of other anticompetitive terms and conditions"); CLEC Comments at 20 (incumbent LEC "purchase arrangements (1) effectively require competitors to purchase a large proportion of their special access demand from incumbent LECs; and (2) tie the sale of services that are subject to competitive supply to the sale of services that are not subject to competitive supply. These so-called 'loyalty' and 'tying' practices further raise the barriers to competitive entry and solidify the incumbent LECs' dominance in these markets."); Level 3 Comments at 3 ("The record is replete with evidence that since pricing flexibility was granted in 1999, price cap LECs have maintained a monopolistic share of the special access market by locking up buyers with long term contracts that force them to commit to purchasing a volume of special access that is equal or close to their prior purchase volume.").

61 AT&T Comments at 37 (citing *Transport Rate Structure and Pricing,* Fourth Memorandum and Opinion and Order on Reconsideration, 10 FCC Rcd 12979, ¶ 13 (1995) ("*Transport Rate Structure Order*")).

62 *See Transport Rate Structure Order* ¶¶ 2, 14, 17.

concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment."[63] Thus, far from endorsing incumbent LEC loyalty commitments, the *Transport Rate Structure Order* recognized the anticompetitive risk that incumbent LEC special access plans would lock customers in for many years.

Similarly, *BellSouth Telecommunications, Inc. v. FCC,* also cited by AT&T, does not suggest that loyalty commitments are reasonable.[64] In that case, the D.C. Circuit vacated a Commission order holding that a BellSouth volume-commitment plan improperly discriminated in favor of a BellSouth affiliate. The D.C. Circuit did not consider whether BellSouth imposed unjust or unreasonable loyalty mandates on its customers, however, and the pricing plan at issue in the *BellSouth* case had terms that were substantially different from the loyalty commitments that are at issue here.[65]

Finally, CenturyLink claims that the "Commission has recognized the benefits of term and volume discounts for decades."[66] However, CenturyLink cites only generic references to the potential benefits of term and volume discounts. None of the authorities cited by CenturyLink

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[63] *Expanded Interconnection with Local Tel. Co. Facilities; Amendment of the Part 69 Allocation of Gen. Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 201 (1992).

[64] *See* AT&T Comments at 38 (citing *BellSouth Tel., Inc. v. FCC*, 469 F.3d 1052, 1057, 1060 (D.C. Cir. 2006) ("*BellSouth*").

[65] AT&T filed a complaint against BellSouth, alleging that because a special access volume discount included discounts that increased more rapidly at lower volumes than at higher volumes, it discriminated in favor of smaller buyers, such as BellSouth's relatively small BellSouth Long Distance affiliate. *BellSouth*, 469 F.3d at 1056-57. The case did not include any findings regarding whether loyalty aspects of the BellSouth plan were or were not reasonable. It focused only on whether the plan was discriminatory.

[66] CenturyLink Comments at 41.

address the impact of loyalty mandates. Furthermore, although CenturyLink cites Professors Areeda and Hovenkamp for the proposition that increased output is desirable, it does not provide any evidence that CenturyLink's loyalty mandates lead to increased output.[67]

On the other hand, as the CLECs have explained, courts and agencies that have addressed loyalty mandates have found them to be anticompetitive.[68] The CLECs note that: (1) the Commission has acknowledged the harmful effects of lock-up provisions that "prevent customers from obtaining the benefits of" competition;[69] (2) the FTC sued Intel for antitrust violations resulting from loyalty mandates leading to a consent decree prohibiting any future loyalty mandates;[70] and (3) the Third Circuit Court of Appeals has equated loyalty mandates to exclusive dealing contracts and found that they are unlawful if they substantially foreclose competition, as the incumbent LECs' terms and conditions do.[71]

Moreover, the incumbent LECs have not offered any reasonable argument that their loyalty mandates have any purpose other than to undermine competition.[72] Loyalty provisions cannot be justified by cost savings to the incumbent LECs because loyalty discounts do not depend on the absolute *number* of circuits purchased, but instead on the *percentage* of a buyer's

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67 *Id*. at 42.

68 *See* CLEC Comments at 36-40.

69 *See supra*, note 63 (discussing the Commission's finding that lock-up contracts are anticompetitive).

70 CLEC Comments at 37-38 (citing *Intel Corporation*, Administrative Complaint, FTC Docket No. 9341 (Dec. 16, 2009), *available at*: <http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf>; *Intel Corporation*, Decision and Order, FTC Docket No. 9341, § IV.A.5 (Oct. 29, 2010), *available at*: <http://www.ftc.gov/os/adjpro/d9341/100804inteldo.pdf>.

71 CLEC Comments at 38 (citing *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 265 (3d Cir. 2012)).

72 *See* CLEC Comments at 34-36 (discussing the lack of justification for incumbent LEC loyalty plans).

previous purchases that remain with the incumbent.[73] Nor can loyalty mandates be justified by claims that they substantially reduce the administrative burden on the incumbent LECs.[74] Eliminating loyalty mandates will not result in incumbents having to "constantly renegotiate" contracts.[75] Incumbent LECs can rely on their tariffed terms and conditions, which will apply regardless of whether a customer opts for the discount or portability provisions.[76]

The record makes clear that incumbent LECs' loyalty mandates are not voluntary in any meaningful sense of the word. The incumbent LECs also seek to justify their unreasonable loyalty mandates by arguing that they are "optional" or "voluntary."[77] The record makes clear, however, that the incumbents' special access plans are "voluntary" only in the sense that they present customers with a Hobson's choice.

As commenters have explained, a contract term that forces a purchaser to choose between going out of business or undermining competition is no choice at all. For example, TelePacific notes that where the incumbent LEC is "the only game in town," as is the case in many markets, buyers have no choice but to accept the incumbents' loyalty mandates.[78] Furthermore, the CLEC commenters have shown that incumbent LECs capitalize on buyers' need for circuit portability

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73 *See supra* at 18-19; CLEC Comments at 34-35.

74 *See* CLEC Comments at 35-36.

75 *See* Declaration of Quinn Lew and Anthony Recine on Behalf of Verizon, ¶ 28 (dated Feb. 24, 2010) (attached as Attachment B to Reply Comments of Verizon, WC Docket No. 05-25 (filed Mar. 19, 2010)).

76 *Id*. Even if the absence of loyalty mandates would result in some additional customer churn, the benefits to competition far outweigh any administrative cost to incumbents.

77 *See* AT&T Comments at 41; Verizon Comments at 29; CenturyLink Comments at 40.

78 TelePacific Comments at 15.

to make their loyalty mandates effectively involuntary.[79] As the CLECs have noted, it is essential for many buyers, like Sprint, to move circuits to different locations within a geographic area, based on consumer demand.[80] Without a portability plan, however, buyers must pay exorbitant termination fees every time they move a circuit, which renders plans without portability unfeasible. Because buyers depend on portability, incumbent LECs can offer to waive early termination penalties only if the buyer accepts a loyalty mandate and makes a purchase commitment equal to all, or nearly all, of its prior purchases from the incumbent LECs, thus undermining the ability of rival special access providers to compete.[81]

Finally, despite the assertions of AT&T and CenturyLink,[82] the sophistication of special access buyers does not render loyalty mandates reasonable. To the contrary, the fact that even buyers as large as Sprint cannot escape these anticompetitive terms only serves to emphasize the extent of the incumbents' market power. Sprint and other special access buyers are indeed large, sophisticated entities, and yet they must agree to one-sided loyalty provisions with huge penalties that combine to foreclose any realistic possibility of switching to alternative providers. If rejecting loyalty mandates were a viable option, Sprint and other special access buyers would do so.

The Commission should act now to address terms and conditions. Sprint agrees with the CLEC commenters that the Commission does not need to complete its analysis of the upcoming

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79 *See* CLEC Comments at 25.

80 *Id*.

81 *See id.* (stating that buyer's face a Hobson's choice: either make a substantial volume commitment, or incur an early termination fee every time a customer needs to move a circuit to a different location).

82 *See* AT&T Comments at 38; CenturyLink Comments at 38.

mandatory data request before finding that the incumbent LECs' terms and conditions are unjust and unreasonable. Responses to this *FNPRM*, extensive filings on terms and conditions previously submitted in this proceeding, and publically-available special access tariffs combine to provide the FCC with a solid record on incumbent LEC terms and conditions. The Commission therefore needs no additional information to find that the terms and conditions described in Sprint's initial comments are unjust and unreasonable where an incumbent LEC has persistently high market share and the special access market has high barriers to entry.[83]

As Drs. Besen and Mitchell have explained,

> ILECs have large market shares and are much larger than their competitors. Moreover, potential entrants into the market for special access services face substantial barriers to entry. This almost certainly means that ILECs are the types of dominant firms for which the use of loyalty contracts are likely to be anticompetitive.[84]

Indeed, as the CLECs and Level 3 point out, the Commission has, in the past, addressed terms and conditions without any market-power finding.[85] Sprint agrees that incumbent LECs' persistently high market shares – combined with the barriers to entry in most special access markets – should provide the Commission ample basis to act with dispatch to prohibit the incumbent LECs from imposing unjust and unreasonable terms and conditions in order to facilitate the development of much-needed competition in special access markets.

H. Sprint's "Network Vision" Plan Does Not Provide Evidence of Adequate Special Access Competition

Sprint is consolidating its current macrocell backhaul network, which includes multiple network technologies, into one new, seamless network based on high-capacity Ethernet services.

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[83] *See* CLEC Comments at 5.

[84] CLEC Comments, App. A at 8 ¶ 13.

[85] CLEC Comments at 12; Level 3 Comments at 7-8.

This plan is called "Network Vision." In past filings, and again in response to the *FNPRM*, incumbent LECs have claimed that Sprint's purchase of 100-200 Mbps circuits for Network Vision from non-incumbents is evidence that special access markets are competitive.[86] The incumbents' argument is based on mischaracterizations of Sprint's plan, misstatements, and attempts to improperly conflate different product and geographic markets.[87]

First, incumbent LECs fail to recognize that the Network Vision Request for Quotes ("RFQs") sought quotes only for high-capacity circuits, not the DS1 and DS3 circuits that are the subject of the *FNPRM*. As several commenters have explained, the Commission must assess competition separately by circuit capacity.[88] The incumbent LECs have gone even farther, arguing that Ethernet and DSn services are not in the same product market.[89] At a minimum, the FCC should find that competition for 100-200 Mbps circuits is not evidence of competition for

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86 *See* AT&T Comments at 39; Verizon Comments at 30.

87 *See generally* Letter from Paul Margie & Rachel Petty, Counsel to Sprint Nextel Corp., to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25 (Sept. 27, 2012).

88 TelePacific Comments at 9; XO Comments at 6. *See also* 2010 Mitchell Decl. at ¶¶ 51-54 (explaining that product-market definition must distinguish circuits by capacity).

89 *See, e.g.*, AT&T's Statement on FCC's Special Access Order (Aug. 23, 2012), *available at*: <http://attpublicpolicy.com/special-access/att-statement-on-fcc%E2%80%99s-special-access-order/> (claiming that Ethernet is crucial for "creating greater network capacity and broadband speeds" while DSn is "a relatively low-speed business service that does not even meet the National Broadband Plan's definition of broadband in the consumer market"); 2010 AT&T Comments at 13-14 ("Indeed, the Commission must seriously ask itself whether it makes sense to mount a major agency effort to impose new regulations on the ILECs' legacy DSn-level special access services, when all of the available evidence indicates that those services are going the way of the dodo and that mandated rate reductions on those services would affirmatively thwart the Commission's goal in its parallel National Broadband Plan proceeding to encourage investment in higher-capacity broadband alternatives. The explosion in demand for wireless data services, for example, has produced corresponding extraordinary increases in demand for very high capacity backhaul facilities, and the industry is virtually unanimous that these increases in wireless traffic cannot be handled by the legacy TDM-based DS1s and DS3s, which were the impetus for this proceeding and the predominant focus of CLEC arguments.").

DS1 and DS3 level TDM-based services. The existence of a company willing to provide Sprint with a high-capacity circuit does not mean that the same provider would be willing or able to provide Sprint with a stand-alone DS1 or DS3 capacity circuit – even at another nearby location. Moreover, a provider's willingness to build a high-capacity facility to a location does not mean that it or any other provider would have been willing to build a lower-capacity facility to that same location.

Second, the incumbent LECs' argument appears to assume that competitive responses to the Network Vision RFQ for macrocells in specific geographic markets mean that alternative vendors are present at every location in the country. In fact, a provider's willingness to serve a particular location does not mean that it or any other provider would be willing or able to serve other locations.[90]

A vendor will serve a particular location only if it is economically feasible to do so, meaning that the expected revenue must cover the costs of building the necessary facilities and providing the service, including a reasonable return on investment. Thus, for example, the Department of Justice has found that it is fundamentally uneconomic for competitive providers to offer DS1 channel terminations, or a single DS3 channel termination, even if the competitors have existing facilities as close as 1/10th of a mile away.[91]

Third, the incumbent LECs fail to acknowledge the specific focus of Network Vision. Network Vision was a targeted initiative limited to obtaining new high-capacity backhaul

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[90] *See* 2010 Mitchell Decl. at ¶ 77 ("A complete analysis of competitive supply would examine the availability of each special access product building-by-building.").

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

services for Sprint's network of wireless macrocells. Network Vision notwithstanding, Sprint remains heavily dependent on DS1 and DS3 facilities. Sprint still purchases tens of thousands of TDM-based special access lines to serve its wireline business customers. None of these business customer lines were part of Network Vision.

Furthermore, Network Vision did not include backhaul for microcells, which require substantially lower capacity circuits. Like wireless carriers across the country, Sprint is working hard to increase the capacity of its wireless network in urban areas by deploying microcells. This investment allows Sprint to use spectrum more efficiently and increase data throughput in high-traffic areas. Sprint expects that it will soon have more microcells than macrocells in its network and that in coming years the number of circuits to microcells will dwarf the number of 100 to 200 Mbps circuits used at macrocells. Simply put, it is meritless to assert that Sprint's successful effort to deploy Ethernet to its macrocell sites equates to broader special access competition, particularly for the DS1 and DS3 level circuits that are the current focus of this proceeding. The Commission's finding that "[c]ompetitive carriers rely heavily on special access to reach customers," and "[e]nterprise customers across the country rely on special access – directly or indirectly – to conduct their business"[92] continues to be correct even after Network Vision.

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92 *Pricing Flexibility Suspension Order* ¶ 2. Sprint's inability to find viable alternatives to the incumbent LECs for the provision of DS1 and DS3 backhaul facilities is well-documented. *See, e.g*., Comments of Sprint Nextel Corp., WC Docket No. 05-25 (Aug. 8, 2007); Reply Comments of Sprint Nextel Corp., WC Docket No. 05-25 (Aug. 15, 2007); Letter from Sprint Nextel Corp. attached to Letter from Gil M. Strobel, Counsel to Sprint Nextel Corp., to Marlene Dortch, FCC Secretary, WC Docket No. 05-25 (Oct. 5, 2007); 2010 Sprint Comments; 2010 Sprint Reply Comments; *see also* Comments of Sprint Nextel Corp., GN Docket No. 09-51 (June 8, 2009); Sprint NBP PN#11 Comments.

Fourth, the incumbent LECs ignore the unique circumstances of the Network Vision procurement that render it an inappropriate predictor of future competitive conduct. Network Vision was based on a complete reconstruction of Sprint's macrocell network. As a result, it required Sprint, as the third largest wireless carrier in the country, to purchase huge numbers of lines. Furthermore, Sprint worked to induce bids from alternative vendors by including tens of thousands of lucrative high-capacity lines in multi-year contracts. It should come as no surprise that some competitors were able to place winning bids for this once-in-a-generation RFQ that covered only high-capacity services. It would be virtually impossible for almost any other special access purchaser in the country to create such an attractive opportunity for competitive entry. Indeed, even Sprint is unlikely to be able to re-create such an attractive opportunity in the near future.

Therefore, Sprint's experience with Network Vision is not a reliable indicator that Sprint, or any other purchaser, could attract viable offers for service from alternative providers when making more typical DS1 or DS3 capacity special access purchases. Indeed, most special access purchases are for one or a few lines at a time and for shorter terms than the Network Vision commitments. In these circumstances, Sprint's experience is that alternative vendors will not undertake special builds to reach a new customer, or will demand huge special build charges that make purchasing from those vendors uneconomic. The FCC should focus its inquiry on these more typical types of purchases rather than improperly extrapolating from an extraordinary event like Network Vision.

Network Vision does, however, demonstrate many of the deep flaws in the special access marketplace. Because of incumbent LECs' early termination fees, shortfall penalties, and buy-down charges, Sprint's costs for Network Vision will be significantly higher than they otherwise would have been. As a result, Sprint will be forced to pay money to the incumbent LECs that it otherwise could have used to support deployment of broadband services. In addition, the increase in upfront costs made it more difficult for Sprint to initiate Network Vision, which delayed Sprint's transition to upgraded technologies that provide significant consumer benefits. If competitive special access choices had been readily available, Sprint would not have had to employ such a massive request for proposals and to make its investment all at once to induce competitive bids. With this additional flexibility, Sprint could have deployed Network Vision more efficiently, leaving itself more resources to support broadband deployment. As it stands, however, the incumbent LECs' ability to exploit their market dominance and impose unreasonable loyalty mandates have slowed the advancement of new technologies and sapped resources from broadband deployment.

III. CONCLUSION

As discussed above, the Commission should use a traditional market power analysis to determine where the incumbent LECs remain dominant in their provision of special access services. Even before it concludes its market power analysis, however, the FCC should begin rectifying the most egregious harms caused by the now-suspended pricing flexibility triggers. In particular, the Commission should act now to constrain special access rates in areas where the incumbent LECs were granted pricing flexibility under the suspended triggers and to prohibit certain terms and conditions that unreasonably restrict competition for special access services.

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