

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

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In the Matter of)	
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Special Access Rates for Price Cap Local)	WC Docket No. 05-25
Exchange Carriers)	
)	RM-10593
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)	

COMMENTS OF T-MOBILE USA, INC.

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I. SUMMARY AND INTRODUCTION.

T-Mobile USA, Inc. (“T-Mobile”)¹ appreciates the opportunity to refresh the record in this important proceeding,² which has been pending since early 2005.³ The passage of time since the Commission last requested public comment in this docket has made the need for Commission intervention in the uncompetitive special access marketplace even more crucial.

Because of the ongoing lack of competition in the marketplace for special access services, T-Mobile urges the Commission to strengthen its regulation of the special access services provided by price cap incumbent local exchange carriers (“ILECs”). Special access

¹ T-Mobile is one of the major national wireless carriers in the United States, with licenses covering 46 of the top 50 U.S. markets and serving over 25 million customers with a network reaching over 275 million people (including roaming and other agreements).

² See FCC Public Notice, *Parties Asked To Refresh Record in the Special Access Notice Of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, FCC 07-123 (rel. Jul. 9, 2007).

³ See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (the “2005 Notice”). T-Mobile filed comments and reply comments in response to the 2005 Notice. See Comments of T-Mobile, WC Docket No. 05-25 (filed Jun. 13, 2005) (“T-Mobile 2005 Comments”); Reply Comments of T-Mobile, WC Docket No. 05-25 (filed Jul. 29, 2005) (“T-Mobile 2005 Replies”). These comments supplement all of T-Mobile’s previous filings in this docket.

services are a critical input to T-Mobile's wireless offerings, and the ILECs are the principal providers of special access to T-Mobile. The unregulated, supra-competitive prices that T-Mobile must pay for these services harm consumers as well as T-Mobile. As T-Mobile seeks to deploy its own broadband offerings in the form of UMTS, the special access issue takes on an even more important competitive impact. Both the rules under which price cap carriers can obtain pricing flexibility throughout Metropolitan Service Areas ("MSAs") based on certain regulatory criteria or triggers⁴ and the rules regarding price caps for special access rates⁵ need reform.

T-Mobile competes vigorously in the national wireless marketplace, where T-Mobile's competitors include wireless carriers that are affiliates of the same price cap ILECs that supply T-Mobile with special access circuits. Also, as a nationwide wireless service provider, T-Mobile purchases special access in virtually all of the MSAs where the ILECs have obtained pricing flexibility under the Commission's rules. In these MSAs, price cap regulation does not effectively control the rates for special access circuits. Although T-Mobile is a strong proponent of allowing the marketplace to "regulate" relationships among carriers, in the case of special access, the current marketplace is failing.

⁴ See 47 C.F.R. §§ 69.701 *et seq.*; *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁵ See *Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand, Access Charge Reform*, Order on Remand, 18 FCC Rcd 14976 (2003). See also *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, 17 FCC Rcd 10868 (2002), *aff'd, Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 372 F.3d 454 (D.C. Cir. 2004).

Since the Commission last requested public comment in this proceeding in 2005, the marketplace for special access services has further deteriorated for two fundamental reasons – increased consolidation in the telecommunications industry and expanded forbearance from ILEC regulation.

Industry Consolidation: The largest ILECs have undertaken a massive consolidation of the wireline industry. In late 2005, SBC merged with the interexchange carrier AT&T, and Verizon merged with MCI, eliminating the largest competitive providers of special access services. In fact, the ILECs likely met their pricing flexibility triggers in many areas based, at least in part, on the market being “competitive” due to the services provided by AT&T and MCI. Although those competitors no longer exist, ILECs have retained pricing flexibility in those markets. Whatever discipline an independent MCI and AT&T might once have exerted in the special access marketplace disappeared when these mergers were completed. In addition, the subsequent merger of AT&T (renamed from SBC) and BellSouth in 2006 increased AT&T’s geographic reach and consolidated its control of Cingular (now AT&T Wireless), a direct competitor of T-Mobile.

In approving these mergers, the Commission imposed some limited conditions on AT&T and Verizon, but these company-specific conditions do not adequately address the shortcomings of existing industry-wide special access regulation. For example, Special Access Condition 6 in the AT&T-BellSouth merger requires, for a period of 39 months, that in areas where the merged company (now AT&T) has obtained Phase II pricing flexibility, it must offer a variety of special access services at rates no higher than the tariffed rates for such services in areas where it has not obtained Phase II pricing flexibility.⁶ The savings that T-Mobile and others have gained from

⁶ See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Order on Reconsideration, 22 FCC Rcd 6285 (2007).

this merger condition is a strong indication that the price flexibility policy was not working, as the special access rates in the AT&T-BellSouth Phase II MSAs (which are supposedly subject to greater levels of competition) were higher before the imposition of the merger conditions than the “price cap” rates. And, although Special Access Condition 6 has resulted in some savings for T-Mobile, the savings are marginal in proportion to T-Mobile’s total special access costs, partially because price cap rates are artificially high as well. Moreover, the merger-specific conditions are time-limited. They provide only limited relief from anticompetitive activities and do not address the underlying problems of the existing regulatory framework or special access marketplace failure.

Further Deregulation of ILECs: The ILECs have used forbearance proceedings to decrease substantially their regulatory obligations. For instance, in early 2006, Verizon gained forbearance from Title II regulation of many of its broadband services. When the Commission did not rule on Verizon’s forbearance petition regarding such services, the petition was deemed granted by operation law under section 10(c) of the Communications Act.⁷ Although such forbearance apparently does not extend to certain legacy forms of Verizon’s special access services, it does apply to a wide variety of broadband special access services, including some purchased by T-Mobile. Other ILECs have requested similar forbearance relief for their broadband services, which would result in even less regulation of special access than at present.⁸

⁷ See FCC News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440, (rel. Mar. 20, 2006), *pet. for review pending sub nom. Sprint Nextel Corp. v. FCC*, No. 06-1111 (D.C. Cir. filed Mar. 29, 2006).

⁸ See, e.g., Reply Comments of T-Mobile, *Qwest, AT&T, and BellSouth Petitions for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Broadband Services; Embarq Local Operating Companies’ Petition for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, WC Docket Nos. 06-125, 06-147 (filed Aug. 31, 2006).

The Commission must consider many similar forbearance petitions in the coming months.⁹

Thus, it is crucial that the Commission take swift and certain action in this docket, which provides a more appropriate forum for reform than piecemeal petitions that fail to consider the larger issues at hand.

Industry consolidation and ever-decreasing regulatory safeguards make the need for effective special access regulation especially pressing. Increased oversight is particularly important for those suppliers of special access, including AT&T and Verizon, that compete with T-Mobile and other independent wireless carriers through their wireless affiliates. Because of their dominance in the special access marketplace, these ILECs have both the ability and the incentive to discriminate against competitors in favor of their wireless affiliates.¹⁰

As T-Mobile argued in 2005, the Commission should reform the pricing flexibility and price cap rules for special access services. Improved special access regulation – with respect to

⁹ The deadlines for acting on various pending ILEC petitions for forbearance begin in August 2007 and run through 2008. *See, e.g., Petition of ACS of Anchorage, Inc.*, 22 FCC Rcd 7403 (WCB, 2007) (extending the original action date by 90 days until August 20, 2007); *Petition of AT&T Inc.*, 22 FCC Rcd 9960 (WCB 2007) (extending the original action date by 90 days until August 31, 2007); *Qwest Petition for Forbearance*, 22 FCC Rcd 10317 (WCB 2007) (extending the original action date by 90 days until September 11, 2007); *Petition of AT&T Inc.*, WC Docket No. 06-125, DA No. 07-3048 (WCB, rel. July 6, 2007) (extending the original action date by 90 days until October 11, 2007); *Petition of BellSouth*, WC Docket No. 06-125, DA No. 07-3049 (WCB, rel. July 6, 2007) (extending the original action date by 90 days until October 18, 2007); FCC Public Notice, *Pleading Cycle Established for Comments on Verizon's Petitions for Forbearance in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, 21 FCC Rcd 10174 (WCB 2006) (noting that the petition was filed September 6, 2006, thus establishing an action date of September 5, 2007); FCC Public Notice, *Pleading Cycle Established for Comments on Cablevision Lightpath, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c) From Title II and Applicable Computer Inquiry Rules with Respect to its Broadband Services*, 22 FCC Rcd 2016 (WCB 2007) (noting that the petition was filed January 16, 2007, thus establishing an action date of January 15, 2008); FCC Public Notice, *Pleading Cycle Established for Comments on Qwest's Petitions for Forbearance in the Denver, Minneapolis - St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, 22 FCC Rcd 10126 (WCB 2007) (noting that the petition was filed April 27, 2007, thus establishing an action date of April 26, 2008).

¹⁰ In addition to the possibility that ILECs could underprice special access services to their wireless affiliates, it is also possible that they could overprice to their wireless affiliates (which would have no “bottom line” impact to the consolidated entity) in order to support a supposedly “non-discriminatory” inflated price to non-affiliated wireless competitors such as T-Mobile.

both pricing flexibility and price caps – is needed to control the ILECs’ market power over these inputs. The Commission also immediately should subject to the closest scrutiny any ILEC petitions requesting forbearance from regulation of, or additional pricing flexibility for, special access services.

T-Mobile urges the Commission to use this opportunity to reexamine whether its special access policies have accurately identified the areas where effective competition in special access services exists. The Commission’s regulations based pricing flexibility on triggers thought to *be predictive* of competition (in lieu of finding actual competition).¹¹ As this record shows, those triggers have not proven to be indicators of a healthy, competitive marketplace. Once the Commission conducts an examination based on this refreshed record, it will find that it has granted competitive freedoms to ILECs in areas where those companies continue to exercise substantial market power.

II. T-MOBILE CONTINUES TO DEPEND ON THE ILECS FOR SPECIAL ACCESS SERVICES THROUGHOUT THE UNITED STATES.

T-Mobile relies on wireline special access services to connect its cellular base stations (or cell sites) to its mobile switching centers (“MSCs”).¹² As T-Mobile demonstrated in 2005, price cap ILECs were virtually the sole source in most of their service areas for the special access services that T-Mobile needs for the critical initial link from its base stations to ILEC central offices as well as for the interoffice transport links that T-Mobile requires for backhaul.¹³ This situation remains largely the same today.

¹¹ See *generally Pricing Flexibility Order*, 14 FCC Rcd at 14257-302.

¹² Attachment A is a schematic diagram of T-Mobile’s network using these links.

¹³ See T-Mobile 2005 Comments, Attachment C, Declaration of Chris Sykes, ¶¶ 5-6.

Especially for those initial links connecting its base stations to wire centers, T-Mobile has few alternatives to the ILECs' special access services. T-Mobile has always attempted to use, and will continue to seek out, the very limited number of alternative suppliers of special access that exist in a small number of urban areas.¹⁴ But, overall, ILECs face little or no competition for their special access offerings. As T-Mobile noted in 2005, although ILECs enjoy significant scale economies in providing special access services, T-Mobile has seen no indication that the benefits of these scale economies have flowed through to special access customers, as would occur in a competitive market.

Since the record that was developed in 2005, the Government Accountability Office ("GAO") has provided further evidence of the limited degree of competition in the special access marketplace. In November 2006, GAO issued a report that examined 16 major metropolitan areas and the competitive alternatives to special access (which the GAO called "dedicated access") in those areas.¹⁵ Among other findings, the GAO concluded that competitive alternatives to ILEC special access services are not widely available.¹⁶ Looking at special access pricing, the GAO Report found that Phase II areas with full pricing flexibility had list prices and average revenues generally higher than or equal to those in Phase I areas still subject to some regulation.¹⁷

¹⁴ For example, T-Mobile is exploring the use of microwave services rather than ILEC special access services in some areas, but microwave services would only satisfy a small fraction of T-Mobile's needs.

¹⁵ United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (Nov. 2006) ("GAO Report").

¹⁶ *Id.* at 12, 19.

¹⁷ *Id.* at 13, 27-29.

T-Mobile also notes that the measure of competition used in the GAO Report and often relied on by the Commission – the number of buildings connected with alternative facilities owned by competitive carriers – does not accurately measure the alternatives available to wireless providers such as T-Mobile, as cellular base stations frequently cannot be located in large, telecom-intensive buildings. Indeed, the GAO acknowledged that its data “may *overstate* the availability of facilities-based competition to some extent” because “cellular phone sites [or base stations] are significantly underrepresented in the number of buildings with demand for dedicated access.”¹⁸ At the commercial building level, which may be more competitive than for base stations, the GAO found only the following competition:

- In buildings with demand for at least DS-1 level special access, 6% of buildings had competitive alternatives;
- In buildings with demand for at least DS-3 level special access, 15% of buildings had competitive alternatives; and
- In buildings with demand for two DS-3s, 25% of buildings had competitive alternatives.¹⁹

Consumers ultimately suffer from the high cost of special access as companies like T-Mobile must expend their limited resources on exorbitant fees in lieu of investing in improved services, including wireless broadband, and expanded coverage areas. If more competitive special access rates existed, T-Mobile and other service providers could invest a much higher percentage of their resources in network expansion, new and improved wireless broadband services, and other customer-focused improvements. This is increasingly important as wireless providers deploy 3G and more advanced services, which require substantially more backhaul than earlier generations of wireless services.

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 12, 19.

III. SPECIAL ACCESS REGULATION MUST BE REFORMED IN ORDER TO CONTROL RATES AND PRACTICES IN THE ABSENCE OF COMPETITION.

As T-Mobile, the GAO report, and many others have established in the record in this proceeding as well as the merger and forbearance proceedings,²⁰ competition for special access services is very limited in most MSAs. Additionally, the GAO Report confirmed the evidence presented by many parties that rates have generally risen in Phase II price flexibility areas, not declined as one would expect in a competitive marketplace.²¹

The lack of effective competition and operation of powerful LEC monopolies has led to a market failure in the special access marketplace, and T-Mobile urges the Commission to reform the pricing flexibility and price cap rules that currently are ineffective in ensuring the provision of special access services on reasonable rates, terms, and conditions.

A. The Present Rules for Granting Special Access Pricing Flexibility Are Fundamentally Flawed.

In reforming the special access regulatory structure for pricing flexibility, the Commission should address two major flaws. First, the geographic areas – MSAs – to which pricing flexibility applies are too large to reflect the competitive conditions that would warrant such flexibility.²² As the Commission itself has noted, an MSA is so large that competitive

²⁰ See, e.g., T-Mobile 2005 Comments at 7-12; Comments of T-Mobile, WC Docket No. 06-74 at 3-4 (filed Oct. 24, 2006); Response of T-Mobile, WC Docket No. 06-74 at 4-8 (filed June 20, 2006); Letter from Thomas J. Sugrue, T-Mobile, to Marlene Dortch, FCC, WC Docket No. 04-440 (filed Mar. 10, 2006).

²¹ See Section II, *supra*.

²² See also GAO Report at 19 (looking at the building level, and noting that “the FCC’s competitive triggers – which look at competition at the wire center level – may not adequately predict competition at the building level throughout an MSA”). As noted above, examining competition at the building level is not a good measure of competition for special access services provided to wireless carriers, whose base stations are distributed even more broadly.

conditions are not uniform throughout.²³ Thus, virtually all MSAs contain areas where there is no competition and where there is little likelihood that such competition will ever emerge. Even if the current pricing flexibility triggers²⁴ accurately measure competition for a special access service in some portion of an MSA (which is highly unlikely), the resulting pricing flexibility rates for that service will apply throughout the entire MSA, even in those areas in which little or no competition exists. This is particularly harmful to wireless providers such as T-Mobile, which seek to compete and provide seamless coverage throughout entire MSAs.²⁵

²³ See *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533, 2583-84 (2005) (citations omitted) (“*Triennial Review Remand Order*”) (“The Commission previously determined that a geographic area as large as a [sic] MSA is so large and varied that such a grouping is prone to significantly overbroad impairment determinations.... Due to the wide variability of market characteristics within an MSA, MSA-wide conclusions would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy”).

²⁴ The *Pricing Flexibility Order* adopted the following triggers: To obtain Phase I pricing flexibility for interstate special access services other than channel terminations between a LEC end office and an end user’s customer premises, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC’s wire centers within an MSA or have collocated in wire centers accounting for 30 percent of the LEC’s revenues from these services within the MSA. To obtain Phase I pricing flexibility for channel terminations between a LEC end office and a customer premises, the LEC must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC’s wire centers within an MSA or collocated in wire centers accounting for 65 percent of the LEC’s revenues from these services within the MSA. To obtain Phase II pricing flexibility for special access services other than channel terminations to end users, a price cap LEC must demonstrate unaffiliated collocation in 50 percent of the LEC’s wire centers or in wire centers accounting for 65 percent of the LEC’s revenues from these services within the MSA. For Phase II flexibility for channel terminations to end users, the price cap LEC must demonstrate unaffiliated collocation in 65 percent of the LEC’s wire centers or in wire centers accounting for 85 percent of the LEC’s revenues for these services. 2005 Notice, 20 FCC Rcd at 2001-02 nn.56, 58 (citations omitted). Throughout the remainder of these Comments, T-Mobile refers to the first of each of these triggers as the “total collocators trigger” and the second of each of these triggers as the “revenue trigger.”

²⁵ Because of the lack of competition in areas where ILECs have been granted pricing flexibility, T-Mobile and other special access customers have little alternative to purchasing special access from the ILECs. In this regard, a recent paper released by the Progress & Freedom Foundation (“PFF”) concludes that:

[T]he share of a state’s population living in regions that have been given Phase 1 or Phase 2 pricing flexibility for dedicated transport / special access is positively and significantly correlated with the number of special access lines. The result suggests that granting pricing flexibility is associated with increased investment in special access facilities by the ILECs.

In addition to the general geographic overbreadth of the current pricing flexibility rules, geographic areas of little or no competition can vary by type of service. For example, little competition exists for base-station-to-central office links, but those services are eligible to receive pricing flexibility throughout an MSA because the pricing flexibility rules make no attempt to distinguish the degrees of competition among different types of special access services.

Second, experience indicates that the metrics or measures in the rules that are used to trigger pricing flexibility are not reasonable predictors of competition. The Commission intended the triggers adopted in the *Pricing Flexibility Order* to be proxies for irreversible market entry, but unfortunately the triggers have not led to the results the Commission intended. Almost every petition for special access pricing flexibility has relied on the “revenue trigger” that, in a given MSA, measures the percentage of revenue associated with wire center collocation (rather than the “total collocators trigger” that would measure the percentage of wire centers with collocation).²⁶ By definition, this “revenue trigger” requires collocation in fewer wire centers than the “total collocators trigger” and is far too permissive based on the resulting lack of competition.

Accordingly, the Commission should adopt more granular definitions of both the geographic areas to which pricing flexibility applies and the triggers for permitting such

See Scott Wallsten, *Has Deregulation Affected Investment in Special Access?* PFF, Progress on Point, Release 14.16 (Jul. 2007) at 12, available at <http://www.pff.org/issues-pubs/pops/pop14.16specialaccessempiricalanalysis.pdf> (“*Wallsten Paper*”). T-Mobile believes that a far more plausible explanation is that T-Mobile and other customers are purchasing special access predominantly from ILECs and not from alternative providers in these areas. The *Wallsten Paper* concedes that its conclusions cannot be considered definitive, due to data limitations and the need to aggregate information to the state level. *Id.* at 2.

²⁶ See 2005 Notice, 20 FCC Rcd at 2024.

flexibility in the first place. Specifically, as T-Mobile urged in 2005, the Commission should take the following actions:

- Significantly limit the size of the geographic area eligible for pricing flexibility. One analytic approach would be to adopt the geographic approach used in the *Triennial Review Remand Order* to analyze impairment for transport and loops. This approach uses a per-wire center approach (for loops) and pairs of wire centers (for transport).²⁷ This alone would result in a more tailored and granular analysis that would better assess the true state of competition in a market.²⁸
- As suggested in the 2005 Notice,²⁹ define the following categories of special access services to which pricing flexibility triggers should apply separately in the more granular service areas: (1) customer premises-to-central office links (channel terminations); (2) interoffice transport links (channel mileage); and (3) other forms of special access, including links between ILEC wire centers and MSCs and ILEC OCn services. These service categories should be analyzed separately because the competition in these three markets varies significantly even within a particular geographic area.
- After narrowing the geographic and product markets as discussed above, adopt more stringent triggers for price cap LECs to satisfy before obtaining pricing flexibility of these newly defined markets. One possibility for new triggers would be to adopt the *Triennial Review Remand Order* triggers for the unbundled network elements (“UNEs”) that are functionally equivalent to special access services, *i.e.*, high-capacity loops and transport.³⁰ These triggers are both more granular and more current than the old triggers adopted in 1999 in the *Pricing Flexibility Order*, and thus would serve as a much better predictor of the type of competitive pressures that will discipline interstate special access rates.

The Commission also should bar price cap ILECs from all forms of anti-competitive exclusionary behavior regarding the terms and conditions of their special access services, which has become even more important in the past few years due to the consolidation that has occurred.

²⁷ *Triennial Review Remand Order*, 20 FCC Rcd at 2619-20 (adopting a wire center approach for loop market analysis) and 2581-82 (adopting a route-by-route approach for transport market analysis).

²⁸ Another reasonable alternative would be to use a zone definition based upon line densities, as suggested in the 2005 Notice. *See 2005 Notice*, 20 FCC Rcd at 2024.

²⁹ *See id.* at 2021-22.

³⁰ *Triennial Review Remand Order*, 20 FCC Rcd at 2597-2604 (setting forth transport triggers) and 2629-2633 (setting forth loop triggers).

Although T-Mobile recognizes that term and volume discounts can be efficient market mechanisms, conditions attached to those term and volume discounts tend to restrict competition unduly.

As the Commission acknowledged in the 2005 Notice,³¹ market power can be exercised not only through price increases, but also through exclusionary conduct that can be contained in tariffed terms and conditions or in “discounts.” This conduct could include anti-competitive restrictions against purchases from other competitors, loss of discounts or imposition of additional costs in the event of purchases from other competitors, or anticompetitive early termination penalties. The GAO Report gave examples of such contract terms and conditions that can limit customers’ ability to choose another provider, even if the competitor is less expensive.³²

Finally, as the Commission tentatively concluded in the 2005 Notice,³³ it should apply any new pricing flexibility rules to *all* areas and services, including those for which the price cap ILECs have obtained pricing flexibility under existing rules. Due to the numerous deficiencies described above in the current pricing flexibility rules, a failure to apply the new rules to all areas and services would only entrench the price cap ILECs’ market power in those MSAs where they have previously obtained pricing flexibility. For services currently subject to pricing flexibility

³¹ See 2005 Notice, 20 FCC Rcd at 2031-32.

³² See GAO Report at 30-31. Essentially, T-Mobile and other carriers can be faced with the choice of either paying artificially high list prices that result from pricing flexibility or entering into an ILEC “discount” plan. In T-Mobile’s experience, many discount plans require it purchase most or all of its special access services from the applicable ILEC to receive the lower rates. Even if a competitive provider is available or later enters the market, T-Mobile cannot shift some of its special access needs to that competitor without losing the benefits of the discount plan. Accordingly, higher prices, loss of economic efficiency, and inefficient supplier decisions often result from the regime of artificially high prices coupled with so-called “voluntary” discount plans.

³³ See 2005 Notice, 20 FCC Rcd at 2034.

that will lose this eligibility under the new rules, the Commission should set the rates for these services to be the same as the rates under the new rules for services that have never been eligible for pricing flexibility.

B. The Commission Should Reform Price Cap Regulation of Special Access Services.

The Commission should also reform its price cap regime for special access to foster a competitive special access marketplace. When the Commission adopts, as it should, more realistic pricing flexibility rules that better reflect the very limited competition that exists for special access, price cap regulation will become much more important because it will apply more broadly. The Commission should therefore improve price cap regulation to account for both firm-wide productivity growth as well as increases in scale economies for special access services, through mechanisms such as a productivity factor, to ensure that the benefits of such efficiencies are passed on to special access customers (as would occur in a competitive marketplace).

In addition, the price cap rate structure should be revised to recognize that different types of special access service face different degrees of competition; thus, such services should be in separate service categories to prevent anticompetitive price manipulation. T-Mobile suggests that the Commission consider one category for channel termination/channel mileage services (which face little or no competition) and a separate category for links between ILEC wire centers and MSCs, and other services, including ILEC OCn services (which face some, albeit limited, competition).

Additionally, the Commission should reinitialize rates for special access services subject to price caps based on forward-looking economic costs. Reinitializing the rates the most certain means, in the absence of competition, of ensuring that special access rates are at competitive

levels. Forward-looking costs (rather than embedded costs) are a much more efficient basis for setting prices in a competitive market and would correspond to the Commission's goals that UNE costs and interstate access charges reflect the forward-looking costs of providing such services.³⁴

Because the current regulation of price cap ILECs' interstate special access offerings is flawed, the Commission should give this rulemaking priority consideration and adopt new rules as quickly as possible. In light of the evidence already in the record in this proceeding, plus the evidence set forth in the GAO Report and the various merger proceedings since 2005, as at least an interim measure until this rulemaking is completed, the Commission immediately should impose a 5.3% X-Factor on special access services consistent with its proposal in the 2005 Notice.³⁵ In addition, the Commission should extend the existing merger conditions as interim nationwide rules until reform is complete.

C. The Commission Should Subject any Pending Petitions Regarding Special Access Services to the Closest Scrutiny.

The Commission also should closely and carefully examine any pending forbearance or pricing flexibility petitions that seek to remove regulation from special access services. The overwhelming evidence in the record for *increasing* regulatory oversight of these services is itself a strong reason to subject any such petitions to searching scrutiny. T-Mobile believes that the Commission should conduct a detailed review of each such petition to determine whether the petition satisfies the applicable statutory or regulatory criteria.

³⁴ See 2005 Notice, 20 FCC Rcd at 2016-17.

³⁵ See *id.* at 2036.

IV. CONCLUSION.

The prospects for viable special access competition in the United States have continued to dwindle since the first pleading cycle in this proceeding ended in mid-2005. Where the marketplace fails, regulators must act. T-Mobile urges the Commission to tighten the geographic areas to which any pricing flexibility would apply and to adopt more stringent triggers for permitting pricing flexibility. T-Mobile further urges the Commission to regulate special access rates by reinvigorating the price cap regime as applied to interstate special access services consistent with our prior filings and as supplemented by these comments.

Respectfully submitted,

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ATTACHMENT A

Schematic View of CMRS Network

