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U.S. Department of Justice
Antitrust Division
Attention: Ashley Becker
City Center Building, Suite 8000
1401 H Street, NW
Washington, D.C. 20530

Re: 2007 Telecommunications Symposium – "Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers"

Dear Ms. Becker:

Sprint Nextel Corporation ("Sprint Nextel") respectfully submits its comments for consideration in the 2007 Telecommunications Symposium, which the U.S. Department of Justice's ("DOJ") Antitrust Division has convened to examine the current state of competition in the voice, video and broadband services markets, the prospects for additional competition and whether regulatory changes or other government action would promote further competition.[1]

The title of the 2007 Telecommunications Symposium – "Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers" - is instructive. The competitive landscape *has* changed significantly over the last several years, but not in a manner that has necessarily enhanced competition in all segments of the market or always benefited consumers. While the telecommunications industry, for the most part, is very competitive, it has seen significant consolidation among local exchange carriers with the recent mergers of SBC with AT&T, BellSouth with AT&T, and Verizon with MCI, which eliminated the two largest competitive providers of services that are a critical component to nearly every form of retail communications services - special access services. The cumulative result of these mega-BOC mergers is that with respect to the provision of special access services, which are essential to the deployment of broadband services, the competitive structure of the telecommunications industry is fundamentally altered and requires government oversight. It is dominated by two vertically integrated companies exercising unchecked market power. Moreover, the new competition that regulators hoped would develop has largely failed to materialize, in part due to restrictive contract provisions of the mega-BOCs that penalize customers for doing business with new entrants. Sprint Nextel's comments in Federal Communications Commission ("FCC") proceedings (and those of virtually all major users of RBOC special access) address and provide hard evidence of the market failure in special access that seriously undermines the rapid and widespread deployment of broadband networks and services. This market failure must be addressed by regulators to ensure the continued growth of a competitive market for telecommunications and information services.

[1] Press Release, "Justice Department's Antitrust Division to Host Symposium on Telecommunications Competition Issues," October 15, 2007.

A. Competition Has Failed to Develop in the Special Access Market

While the retail broadband services market includes a host of providers using various forms of technologies, including cable, wireline, powerline, satellite, and wireless, a market failure exists in the provision of special access - a critical input to the provision of all of these broadband connectivity services. Special access services are leased lines that provide the "last mile" connections and local transport links that carriers use to provide telecommunications and information services. Specifically, special access refers to dedicated circuits that connect two defined points within or on a carrier's network. Special access is used by wireless carriers to connect their cell towers to their switches; by long distance carriers, competitive local exchange carriers ("CLECs") and wireless carriers to connect their networks with the networks of the incumbent local exchange carriers ("ILECs");[2] by long distance carriers to connect office buildings to their long distance networks; and by broadband providers to connect office buildings/campuses/hotels to Internet backbone networks.[3]

Despite the fact that special access services are an essential component of broadband networks (*i.e.*, a wireless system cannot function if the cell sites are not connected to the network so traffic can be transmitted from the "air" back to the network switch) and facilitate the provision of wireline services to enterprise customers, competition in the special access market is, at best, minimal.[4] To the extent competition exists at all, it is limited to the offering of highest capacity special access circuits in portions of urban business centers.[5] In reality, the provision of

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[2] Sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251 and 252, as well as the FCC's implementing rules, require ILECs to provide interconnection facilities to CLECs and wireless carriers at cost-based rates. However, the ILECs have refused to provide cost-based interconnection to the CLECs and wireless carriers. Instead, they have required these carriers to use special access to interconnect to the ILECs' networks. Given that the rates for special access are excessive, as discussed *infra*, the ILECs' insistence that CLECs and wireless carriers use special access inflates their costs of interconnection and thereby harms their competitive position vis-à-vis their ILEC rivals. Additionally, both Verizon and Qwest have filed petitions asking the FCC to relieve them of obligations to provide competitors access to their last-mile copper loops and interoffice transport facilities at cost-based rates in certain geographic markets. Verizon has requested forbearance in six of the largest markets in its service territory – Boston, Providence, New York City, Philadelphia, Pittsburgh and Virginia Beach. Qwest has requested similar forbearance in the four largest markets in its service territory – Denver, Minneapolis-St. Paul, Phoenix and Seattle. These forbearance requests, if granted, will increase competitors' costs for these essential inputs, further curtailing competition in these markets and harming businesses and consumers by reducing competitive choice and increasing retail rates. *See Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172; *Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97.

[3] *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 3 (2005) ("*Special Access Pricing NPRM")* ("Notably, business customers, commercial mobile radio service ("CMRS") providers, interexchange carriers ("IXCs") and competitive LECs all use special access services as a key input in many of their respective service offerings.").

[4] For example, of the 3 million large office buildings/campuses nationwide that use large special access circuits (i.e., large "pipes") for transmitting traffic to and from their locations – or perhaps between multi-state locations of a large national corporation – only about 22,000 use special access services provided by someone other than the ILEC. *See "Lessons from the United States Brief Experiment in Telecommunications Competition,"* Presentation by Lee Selwyn, Economics and Technology, Inc. to the Canadian Telecommunications Review Panel, October 25, 2005.

[5] Government Accountability Office Report to the Chairman, Committee on Government Reform, House of Representatives, "*FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in*

special access services is the all but exclusive domain of the ILECs in general and of the two largest remaining Regional Bell Operating Companies ("RBOCs") – AT&T and Verizon – in particular. Special access was a $16 billion per year business for the ILECs in 2005/2006 alone, with AT&T and Verizon combined accounting for an 82 percent share of the nationwide ILEC special access market as measured by revenues.[6] The vast majority of buildings and cell sites throughout the country have access to only one provider of these essential inputs – either AT&T or Verizon.[7]

The United States Department of Defense and all other Federal Executive Agencies ("DOD/FEA"), a major enterprise customer of telecommunications services, recently confirmed the fact that very few competitive alternatives exist in the special access market. In two separate state commission proceedings that were initiated to examine whether to grant Verizon additional pricing flexibility for leasing of its facilities, the DOD/FEA stated that the telecommunications services offered today by intermodal competitors are inadequate substitutes for Verizon's services and thus fail to constrain Verizon's market dominance in special access services.[8] The Federal government's experience is consistent with that of Sprint Nextel. In 2006, for example, Sprint Nextel obtained 96% of the smaller-capacity DS1 circuits and 84% of the marginally-larger DS3 circuits for its wireline business in the top 50 metropolitan statistical areas (MSAs) from an ILEC.[9] A recent Sprint Nextel survey of alternative access vendors conducted in January 2007 confirmed that there were alternative special access facilities available at less than two percent of its cell sites.[10]

An ILEC's near-monopoly market share in the provision of special access services would not necessarily be a problem had the FCC maintained effective pricing discipline of the ILEC's special access rates where there is insufficient competitive pressure to impose that discipline. However, in what has proven to be a triumph of hope over reason, the FCC issued a decision in 1999 in which it decided to deregulate an ILEC's special access service offerings in any metropolitan statistical area ("MSA") where the ILEC could show that certain so-called competitive triggers had been met.[11] These triggers, however, were not based on the number of

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Dedicated Access Services," November 2006 at 19 ("GAO Special Access Report") (determining that less than six percent of buildings with demand for DS-1 level or higher are served by a fiber-based competitor, with competition being heaviest for those buildings with the highest levels of demand).

6 The GAO recently reported to Congress that "[d]ue to increasing data transmission needs" special access services" are a growing segment of the telecommunications market and represented about $16 billion in revenues in 2005 for the [RBOCs]." GAO Special Access Report at 1.

7 *See, e.g.,* GAO Report at 12 and comments filed the *Special Access Rulemaking,* WC Docket No. 05-25, 20 FCC Rcd 1994 (2005).

8 *Tariff Filing of Verizon New York to Implement Pricing Flexibility for Non-Basic Services,* N.Y. Pub. Serv. Comm'n, Case No. 06-C-0897, Initial Comments of the United States Department of Defense and All Other Federal Executive Agencies (filed Oct. 22, 2007) ("NY Comments"); *Application of Verizon Virginia Inc. and Verizon South Inc. for a Determination that Retail Services Are Competitive and Deregulation and Detariffing of the Same,* Virginia State Corp. Comm'n, Case No. PUC-2007-00008, Post-Hearing Brief of the United States Department of Defense and All Other Federal Executive Agencies (filed Sept. 14, 2007) ("VA Brief").

9 Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 29-30 (Aug. 8, 2007) and attached Declaration of Gary B. Lindsay, ¶ 8.

10 *Id.* at 30-32. Sprint Nextel asked 77 competitive vendors whether they had facilities located at any of over 52,000 Sprint Nextel cell sites. Sixteen of the respondents reported that they had fiber facilities located at one or more of the cell sites. But these facilities reached only 569 cell sites – just over 1% of the cell sites included in the questionnaire. *Id.* at 31-32.

11 *Access Charge Reform,* CC Docket Nos. 96-262, 94-1, 98-63, 98-157, *Fifth Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order), aff'd Worldcom v. FCC,*

competitors actually providing special access services to the buildings and cell sites in a particular MSA. Rather, they were based solely on the number of competitors that had simply collocated at some large wire centers in the MSA – whether or not those collocations had competitive facilities that could or would be used for the provision of competitive special access services. The FCC believed that this would be "a good predictor that competitors had made significant, irreversible sunk investments in facilities, and indicated the *likelihood* that a competitor *could eventually* extend its own network to reach its customers."[12] Thus, the FCC believed, "sufficient sunk investments of this sort would constrain monopoly behavior" by those ILECs whose special access services had been deregulated.[13]

Since the FCC issued this decision, the RBOCs have been granted special access deregulation in most of the major MSAs.[14] Had the FCC monitored the special access market to determine whether its "competitive triggers" were appropriate, it might have uncovered the market failure that is now plaguing the special access market. Unfortunately, the FCC has not done so. In fact, it took the FCC nearly three years to institute a rulemaking in response to a petition that legacy AT&T had filed in 2002 asking the Commission "to examine whether [special access deregulation] should remain intact or be revised."[15] Although the initial comment cycle has been completed since the summer of 2005, the FCC has not issued a decision or so much as suggested that a decision is imminent. Instead, in a continued effort to forestall the much-needed action on special access services, the FCC simply seeks more and more information. Thus, in August of this year, the FCC asked for and received further comments and data on the state of the special access market.[16] It did so even though the information is always the same – *i.e.*, wireless carriers purchase well over 90% of their special access backhaul needs from the ILEC. Given the extensive size of the evidentiary record already compiled in this proceeding, it is disingenuous for the FCC to insist that it needs additional information before it can render a decision and take action on much needed special access reform.

Given that meaningful competition in the special access market has not materialized despite the FCC's predictive judgment, there are no competitive constraints on the RBOCs' pricing behavior. Instead of being forced by the market to price their special access services at or near marginal costs as occurs in a truly competitive market, they have used their pricing

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238 F.3d 449 (D.C. Cir. 2001). Although special access services are still subject to Title II of the Communications Act, under the deregulation permitted by the FCC, the ILECs have the discretion to price their special access services as they see fit. Furthermore, the FCC has forborne from requiring AT&T, Verizon, Qwest, Embarq, Frontier and Citizens to file tariffs and cost support for their higher-capacity special access services such as Ethernet, OCns and packet-switched services. *In the Matters of Petition of AT&T Inc and BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, FCC 07-180 (rel. October 12, 2007) ("*AT&T Forbearance Order*"); *In the Matters of Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements and Petition of Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services,* WC Docket No 06-147, FCC 07-184 (rel. October 24, 2007).

[12] GAO Report at 3 (emphasis added); *Pricing Flexibility Order*, 14 FCC Rcd at 14261.

[13] *Id.*

[14] A related FCC decision to ease the price caps imposed on special access services still subject to regulation also has exacerbated the market failure by allowing inflated rates even when the rates are supposedly subject to pricing discipline.

[15] The *Special Access Rulemaking* was instituted in January 2005.

[16] *See* Public Notice, "Parties Asked to Refresh Record in the *Special Access Notice of Proposed Rulemaking*," WC Docket No. 05-25, FCC 07-123 (rel. July 9, 2007).

flexibility to extract monopoly rents from their competitors in the wireless, long distance and Internet broadband access markets.[17] Over the last several years, the RBOCs have realized excessive returns from their provision of special access that completely contradict the notion that the special access market is competitive. In 2004, immediately before the FCC began its currently stalled review of special access regulation, the then-existing three largest RBOCs – SBC (now AT&T), BellSouth, and Verizon – achieved rates of return of 73.02%, 81.90% and 31.64%, respectively. Returns of this magnitude would certainly have attracted entry in an effectively competitive market. However, such entry has evidently not occurred because these RBOCs' returns were even higher in 2005: AT&T's return was 91.73%; BellSouth's return was 98.73%; and Verizon's return was 41.97%.[18] And in 2006, AT&T and Verizon realized further astonishing rates of return – 100 percent and 51 percent, respectively.[19] Comparing these rates of return with the FCC's authorized rate for rate-of-return carriers of 11.25%, which in itself is a healthy profit, it is plain to see that there is no competition keeping AT&T's and Verizon's special access prices in check.[20]

B. Mega-BOC Consolidation has Worsened the Special Access Market Failure

The mega-BOC consolidation that has occurred in the telecommunications industry since the passage of the Telecommunications Act of 1996 ("1996 Act") has fundamentally changed the structure of competition and only exacerbated the market failure evident in the provision of special access services. Where there were once seven RBOCs operating in various regions of the country, only three now remain – AT&T (*nee* SBC), Qwest and Verizon. Moreover AT&T and Verizon, in particular, have sought to solidify their dominant positions by acquisitions that have eliminated key competitors to their retail and wholesale service offerings, including MCI and legacy AT&T.[21] In 1999, for example, the number of national carriers each independently purchasing BOC special access to compete in the long distance and wireless markets totaled six and included legacy AT&T, MCI, Sprint, AT&T Wireless, Nextel and T-Mobile. By 2007, only two unaffiliated providers remained – Sprint Nextel and T-Mobile. The pie charts reproduced below illustrate the dramatic increase in market share for long distance and wireless services provided by BOC-affiliated companies over this period.[22] Whereas high special access prices before the mega-BOC mergers inflated costs for all of the independent long distance and wireless

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[17] Even where they remain under price cap regulation, the RBOCs are able to realize monopoly rents because the FCC's current price cap formula for special access services does not require the RBOCs to reduce their price ceilings to take into account decreasing costs and increasing productivity.

[18] These returns are based on data set forth in FCC Report 43-01, Table 1 Cost and Revenue, Column (s) Special Access, Row 1915 Net Revenue divided by Row 1010 Average Net Investment.

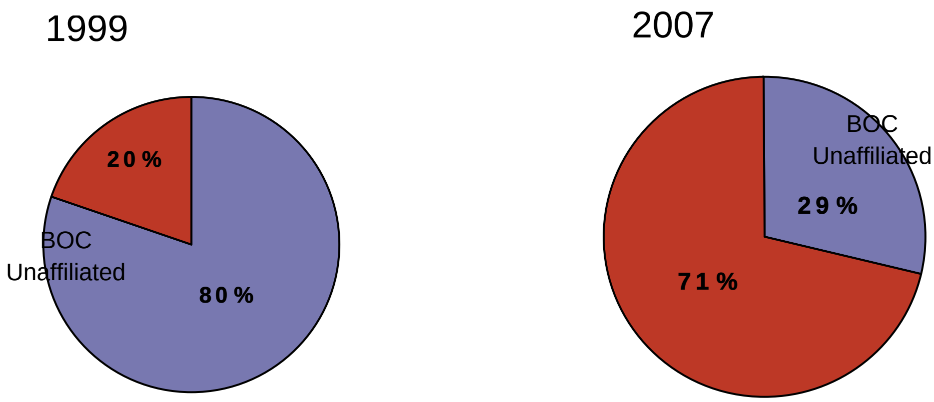
[19] ARMIS 43-01 report.

[20] *Special Access Pricing NPRM,* 20 FCC Rcd at ¶ 35 (noting that "[i]n recent years, the BOCs have earned special access accounting rates of return substantially in excess of the prescribed 11.25% rate of return LECs").

[21] SBC, formerly Southwestern Bell, was formed as one of the seven regional holding companies created in the aftermath of the breakup of AT&T's local telephone business in 1984. SBC acquired another of the seven original holding companies, Pacific Telesis, in 1996 and in 1999, it acquired a third RBOC, Ameritech. SBC acquired the independent ILEC, Southern New England Telephone Corporation, in 1998. In 2005, it acquired its former parent company, AT&T, which was at the time the nation's largest interexchange carrier ("IXC") and one of the largest CLECs. And, finally, in 2006, it further sealed its dominance by acquiring BellSouth and gaining control of its wireless affiliate and the nation's largest wireless carrier, Cingular (now AT&T Mobility). For its part, Verizon began as Bell Atlantic Corporation, one of the original seven holding companies formed after AT&T's breakup. In 1996, Bell Atlantic acquired another of its sister RBOCs, NYNEX Corporation. In 2000, Bell Atlantic acquired GTE Corporation, an independent ILEC operating in 28 states, and formed Verizon. And, in 2005, it acquired MCI, Inc., one of the nation's largest IXCs and CLECs.

[22] 1999 data based on SEC 10-K filings. 2007 data based on SEC 2Q07 10-Q filings.

competitors, today, these high special access prices give an overwhelming anti-competitive advantage to the already dominant long distance and wireless arms of AT&T and Verizon.



Wireless and Long Distance Market Share

Any degree of competition in the special access market was greatly diminished by the acquisitions of legacy AT&T by SBC and MCI by Verizon In all instances, these mergers eliminated the most significant competitors to the ILECs for special access services. The DOJ recognized the threat to competition that the SBC/AT&T and the Verizon/MCI mergers posed – it filed a complaint to enjoin the mergers with the U.S. District Court for the District of Columbia because they were "likely to substantially reduce competition for Local Private Lines [another name for special access] and telecommunications services that rely on Local Private Lines to those buildings."[23] While the DOJ entered into a consent decree with the companies and required the divestiture of certain assets in certain markets, the divestitures that the DOJ required, along with the conditions that the FCC imposed on these mergers, have proven clearly insufficient to regenerate the competition lost by these combinations. The temporary conditions that the FCC adopted in approving these mergers provide only minimal short-term relief, in the form of a temporary freeze of rates for certain special access services at the levels that existed at the time of the merger, and do not diminish the continued dominance of the BOCs in the provision of special access service.[24] Moreover, the AT&T/BellSouth merger consolidated control of Cingular (now AT&T Mobility, Inc.). AT&T and Verizon – the largest providers of special access services – are now vertically integrated ILECs providing wireline, wireless, and broadband Internet access services. As a result of their dominant position, AT&T and Verizon have both the ability and the incentive to raise the costs of their competitors in the provision of retail wireline, wireless, and broadband Internet access service. And, in Sprint Nextel's experience, AT&T and Verizon have exploited their market dominance in special access provisioning at every opportunity.

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[23] *United States of America v. SBC Communications, Inc. and AT&T Corp.*, Case Number 1:05CV02102, Complaint at 2, filed October 27, 2005; *United States of America v. Verizon Communications Inc. and MCI, Inc.*, Case Number 1:05CV02103, Complaint at 2, filed October 27, 2005 in the United States District Court for the District of Columbia.

[24] *See Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, Appendix G, Special Access Conditions 3 and 5 (2005); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18920, Appendix F, Special Access Conditions 3 and 5 (2005); *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, Appendix F, Special Access Condition 6 (2006).

C. Restrictive Contract Provisions Deter Competitive Entry and Further Entrench the Mega-BOCs' Market Power

Further exploiting their market power, both AT&T and Verizon have incorporated terms and conditions in their special access contracts and used exclusionary pricing practices that enable them to maintain their special access dominance and hinder the development of competitive access alternatives. Exclusionary pricing is used to induce customers to enter into exclusive service arrangements with the BOCs, effectively locking up the demand for those services and preventing those customers from taking services from alternative suppliers. Exclusionary pricing is an especially effective strategy in markets dominated by a single supplier, such as the special access market, because it raises competitors' costs to provide alternative services and increases the dominant firm's power over the price of those services.[25] While certain parts of the special access market may be experiencing nascent competitive growth, AT&T's and Verizon's exclusionary pricing practices effectively impede that growth by requiring customers to purchase services that have competitive alternatives solely from AT&T and Verizon in order to obtain the more favorable pricing terms for the services over which they exercise substantial market power. Thus, the customer will pay a higher price for the non-competitive service if it seeks out an alternative supplier for the competitive service, which effectively discourages the customer from pursuing the competitive option.

Both AT&T and Verizon have adopted such exclusionary pricing practices by conditioning special access discounts on the customer's commitment to obtain virtually all of its access requirements from the incumbent. The exclusivity of the arrangement is reinforced by the use of discounts that increase over time and by the imposition of significant early termination penalties.[26] Additionally, AT&T and Verizon have also used discount plans that discourage the use of alternative suppliers by requiring carrier customers to commit to continue purchasing services from them worth 90% or more of current spending levels for the term of the contract. Many of AT&T's and Verizon's "discount" provisions impose penalty payments if the customer fails to meet the required volume commitments. The magnitude of the penalties discourages competitive entry by making it uneconomic for a customer to self-provision or to subscribe to an alternative provider.[27] This brief outline of the various types of exclusionary pricing practices provides just a sampling of the many volume and term conditions that the BOCs employ to cement their market power and discourage competitive entry.

The supposed competitive safeguards that are in place have done little to deter these anticompetitive practices. The conditions imposed on the merger between AT&T and BellSouth, for instance, include a commitment that the AT&T/BellSouth ILEC will make available throughout its 22-state ILEC operating territory any effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state.[28] Sprint Nextel sought to exercise its rights under these merger commitments and advised AT&T and the respective state commissions in the legacy BellSouth states that is was adopting an existing interconnection agreement entered into between BellSouth and its Sprint affiliates for

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[25] Comments of Sprint Nextel Corporation at 25-26 filed on August 8, 2007 in the *Special Access Pricing NPRM*, WC Docket No. 05-25.

[26] *Id.* at 24-29.

[27] *Id.* at 26-27.

[28] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* WC Docket No. 06-74, Memorandum Opinion and Order, FCC 06-189 at Appendix F ("*AT&T/BellSouth Merger Order")*; March 26, 2007 Letter from Robert W. Quinn, Senior Vice President, Federal Regulatory, AT&T to Marlene H. Dortch filed in WC Docket No. 06-74.

use by its Nextel affiliates. AT&T has refused to honor Sprint Nextel's opt-in request, thereby forcing Sprint Nextel to file for arbitration in each of the nine legacy BellSouth states seeking to enforce this merger commitment. And Sprint Nextel will likely have to take similar action in the remaining 13 states in AT&T's service territory. AT&T has opposed Sprint Nextel's arbitration petitions and moved for dismissal, arguing that state commissions lack jurisdiction to interpret the FCC's merger commitments. AT&T's stance has required to Sprint Nextel to expend resources to litigate what, on its face, appears to be a straightforward merger commitment made by AT&T/BellSouth to permit carriers to opt-in to existing and approved interconnection agreements. This merger commitment was intended to streamline the interconnection negotiation process and reduce transaction costs. Instead, the opposite has occurred as a result of AT&T's conduct. Sprint Nextel believes the DOJ should be very concerned that merger commitments are not being readily followed by the merging parties and that those entitled to the benefits of those commitments are being required to spend resources to have a governmental agency require them – again – to uphold the commitments they made in exchange for merger approval.

The unfettered market power that AT&T and Verizon now possess has enabled them to engage in an increasing pattern of anticompetitive acts that in the aggregate are adversely impacting Sprint Nextel. Since AT&T merged with BellSouth, for example, it has consistently taken a more restrictive interpretation of BellSouth's tariffed access offerings to the detriment of Sprint Nextel, raising its access costs by many millions of dollars annually. BellSouth, for instance, routinely allowed Sprint Nextel to extend its participation in its Area Commitment Plan (ACP)[29] by varying term lengths, such as by one month or by six months, to accommodate Sprint Nextel's particular needs as long as it did not exceed the maximum term length of the plan. AT&T, however, recently advised that it would no longer permit Sprint Nextel to extend the ACP in monthly increments. Such actions highlight one of the adverse consequences of the Mega-BOC mergers where flexible operating practices adopted by one BOC (BellSouth) are eliminated once the acquiring BOC (AT&T) gains control.

D. Consumers are Harmed by these Inflated Prices and Anticompetitive Practices

The exploitation of market power harms consumers of telecommunications and information services because the cost of providing these services is needlessly increased as AT&T and Verizon – the two largest remaining ILECs/RBOCs – reap monopoly profits from their bottleneck facilities. Consumers pay the cost of inflated special access rates in the form of both higher retail rates for downstream services, as well as the reduced deployment of competitive network facilities, such as cell sites and other infrastructure. Additionally, AT&T's and Verizon's monopoly pricing of special access circuits adversely impacts consumers by depressing the potential of intermodal competition. By forcing wireless carriers to pay inflated prices for bottleneck facilities, AT&T's and Verizon's practices inhibit the development of intermodal competition. By overpricing production inputs needed by all CMRS providers, the RBOCs can effectively establish a price floor for independent wireless carriers who must pay cash for these bottleneck facilities. This practice makes it more difficult for independent wireless carriers to compete against the landline local exchange services that the RBOCs provide.

In summary, while the FCC has authority over both the pricing and the terms and conditions of special access services, the DOJ is principally responsible for enforcing the

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[29] The ACP allows customers to receive reduced rates for special or switched access services by committing to maintain a level of service for a specified period of time, generally between 24 and 72 months.

antitrust laws and promoting the development of competition in markets. The DOJ has a particular expertise in implementing the 1996 Act, having fulfilled its statutory role in reviewing the RBOC's applications for entry into the long distance market under § 271 of the Act.[30] Against this backdrop, the Antitrust Division's 2007 Telecommunications Symposium provides an excellent forum to highlight the problem of ILEC dominance over an essential input to the provision of broadband connectivity services. The DOJ must urge the FCC to fulfill its statutory mandate of preventing the anticompetitive exploitation of market power by the ILECs in their provision of special access services. Such actions include reducing special access rates to just and reasonable levels where the market has failed to discipline prices and eliminating term and pricing contractual provisions that penalize customers for doing business with new entrants.[31] If government regulators successfully constrain the ILECs' market power over special access services, it will provide a major impetus for the increased deployment of broadband access networks throughout the country.

Thank you for your attention to this critical issue. I have also included with this letter copies of the comments that Sprint Nextel recently filed in the FCC's *Special Access Pricing NPRM.*

Sincerely,

/s/ Robert S. Foosaner

Robert S. Foosaner
Senior Vice President – Government Affairs
and Chief Regulatory Officer

[30] 47 U.S.C. § 271.

[31] Specifically, the FCC should 1) apply its incentive regulation to all special access services, revised to reflect the BOC's cost savings, and 2) require special access rates to be based on costs or targeted to earn no more than an overall 11.25% interstate rate of return.