TABLE 1—GENERAL SUPERFUND SECTION—Continued

State	Site name	City/county	Notes (a)
* * * * * * *			
FL	Fairfax St. Wood Treaters	Jacksonville.	
* * * * * * *			
IL	Bautsch-Gray Mine	Galena.	
* * * * * * *			
LA	EVR-Wood Treating/Evangeline Refining Company	Jennings.	
* * * * * * *			
ME	Leeds Metal	Leeds.	
* * * * * * *			
NC	Holcomb Creosote Co	Yadkinville.	
* * * * * * *			
NJ	Orange Valley Regional Ground Water Contamination	West Orange/Orange.	
* * * * * * *			
OH	Peters Cartridge Factory	Kings Mills.	
* * * * * * *			
OH	West Troy Contaminated Aquifer	Troy.	
* * * * * * *			
TX	Circle Court Ground Water Plume	Willow Park.	
* * * * * * *			
TX	US Oil Recovery	Pasadena.	

(a) A = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be ≤ 28.50).
S = State top priority (included among the 100 top priority sites regardless of score).
P = Sites with partial deletion(s).

* * * * *

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 05–25; RM–10593; FCC 12–92]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this Report and Order, the Commission suspends, on an interim basis, the Commission's rules allowing for automatic pricing flexibility grants for special access services, pending adoption of new rules. The Commission suspends its pricing flexibility rules in light of evidence that the proxies for measuring actual and potential special access market competition, which are based on collocation by competitive carriers within a Metropolitan Statistical Area (MSA), do not accurately predict whether competition is sufficient to constrain special access prices and deter anticompetitive practices by price cap local exchange carriers. In the Report and Order, the Commission also initiates a process to obtain data needed to conduct a special access market analysis. Based on this forthcoming data collection, the Commission will undertake a robust special access market analysis to determine the extent to which the special access market is competitive and develop special access pricing flexibility rules to replace the collocation-based competitive showings.

DATES: Effective October 18, 2012,

FOR FURTHER INFORMATION CONTACT: Jamie Susskind, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1520 or (202) 418–0484 (TTY), or via email at *Jamie.Susskind@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order in WC Docket No. 05–25, RM–10593, FCC 12–92, adopted on August 15, 2012 and released on August 22, 2012. The summary is based on the public redacted version of the document, the full text of which is available electronically via the Electronic Comment Filing System at *http://fjallfoss.fcc.gov/ecfs/* or may be downloaded at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0823/FCC-12-92A1.pdf.* The full text of this document is also available for public inspection during regular business hours in the Commission's Reference Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text may be purchased from Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request alternate formats for persons with disabilities (*e.g.* Braille, large print, electronic files, audio format, etc.) or reasonable accommodations for filing comments (*e.g.* accessible format documents, sign language interpreters, CARTS, etc.), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

I. Introduction

1. In this Report and Order, we suspend, on an interim basis, our rules

allowing for automatic grants of pricing flexibility for special access services in light of significant evidence that these rules, adopted in 1999, are not working as predicted, and widespread agreement across industry sectors that these rules fail to accurately reflect competition in today's special access markets. We set forth a path to update our rules to better target regulatory relief to competitive areas, including extending relief to areas that are likely competitive but have been denied regulatory relief under our existing framework. We provide for targeted relief in the interim through the forbearance process set forth in sec. 10 of the 1996 Act, and will soon issue a comprehensive data collection order that will help craft permanent replacement rules.

2. Special access continues to play a critical role in our economy. Four of the largest incumbent LECs recently reported that their combined 2010 revenues from sales of DS1s and DS3s exceeded $12 billion. Competitive carriers rely heavily on special access to reach customers; a large competitive local exchange carrier (LEC) that offers enterprise services to businesses using special access services as a critical input has reported that it purchases [REDACTED] times as many special access as Ethernet circuits. Enterprise customers across the country rely on special access—directly or indirectly—to conduct their business. Schools, libraries, and other institutions of state and local government depend on special access to provide services to their constituents.

3. We continue to strongly believe, consistent with the goals set forth in the *Pricing Flexibility Order,* that regulation should be reduced wherever evidence demonstrates that actual or potential competition is acting as a constraint to ensure just and reasonable rates, terms and conditions for special access services. In the record of this proceeding, however, there is compelling evidence that our current pricing flexibility rules are not properly matching relief to such areas, combined with allegations that this mismatch is causing real harm to American consumers and businesses and hindering investment and innovation. Price cap carriers argue that they are still subject to burdensome regulation in areas where it is apparent that competition is thriving. The United States Small Business Administration asserts that ''promoting competition in the business broadband market is essential in order to provide small businesses with affordable access and choice regarding the services they need to grow and create new jobs.'' The American Petroleum Institute expresses concern that, because its member companies' facilities are frequently located in isolated locations where facilities-based competition is scarce, they are highly sensitive to incumbent LECs extracting supra-competitive profits. Competitive carriers argue that the terms and conditions of special access contract tariffs ''lock up'' demand, preventing competitors from entering markets and investing in new facilities. Wireless providers argue that high special access prices hinder their ability to hire employees, invest in their networks, and conduct research and development. While we cannot yet evaluate these claims of competitive harm based on the evidence to date in the record, our finding that the competitive showings the Commission adopted as a proxy for competition are not working as predicted leads us to suspend the triggers and further evaluate the marketplace.

4. The approach we take is based on our evaluation of our 1999 rules, the predictive judgments upon which they were based, and market developments since their adoption. As discussed in greater detail below, the Commission decided in 1999 to use an administratively simple proxy for the presence of actual or potential competition in special access markets—the extent of collocation within broad geographic regions. The Commission predicted that certain levels of collocation within a Metropolitan Statistical Area (MSA) would serve as an accurate indicator of competitive pressure sufficient to constrain prices throughout that area.

5. Based on the evidence in the record and thirteen years of experience with this regime, we now conclude that the Commission's existing collocation triggers are a poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices throughout an MSA. We therefore suspend, on an interim basis, the operation of those rules pending adoption of a new framework that will allow us to ensure that special access prices are fair and competitive in all areas of the country.

6. Although we currently lack the necessary data to identify a permanent reliable replacement approach to measure the presence of competition for special access services, we emphasize that the forbearance process set forth by Congress in the 1996 Act provides an avenue for targeted relief based on a complete analysis of competitive conditions in a geographic area.

7. Going forward, in the absence at this time of clear evidence to establish reasonable and reliable proxies to determine where regulatory relief is appropriate, we will collect necessary data and undertake a robust competition analysis that may identify reliable proxies for competition in the market for special access services going forward. We will issue a comprehensive data collection order within 60 days to facilitate this market analysis. We anticipate that during the pendency of the data request, we will continue to analyze the information submitted in the record, and may issue further decisions as warranted by the evidence. Nonetheless, the record in this proceeding demonstrates that a comprehensive evaluation of competition in the market for special access services is necessary, and that further data to assist us in that evaluation is needed with respect to establishing a new framework for pricing flexibility.

II. Background

A. History of Price Cap Regulation

8. Through the end of 1990, interstate access charges were governed by ''rate-of-return'' regulation, under which incumbent LECs calculated their access rates using projected costs and projected demand for access services. An incumbent LEC was limited to recovering its costs plus a prescribed return on investment. It also was potentially obligated to provide refunds if its interstate rate of return exceeded the authorized level. However, a rate of return regulatory structure bases a firm's allowable rates directly on the firm's reported costs and was thus subject to criticisms that it removed the incentive to reduce costs and improve productive efficiency.

9. Consequently, in 1991 the Commission implemented a system of price cap regulation that altered the manner in which the largest incumbent LECs (often referred to today as price cap LECs) established their interstate access charges. The Commission's price cap plan for LECs was intended to avoid the perverse incentives of rate-of-return regulation in part by divorcing the annual rate adjustments from the cost performance of each individual LEC, and provide for sharing efficiency gains with customers in part by adjusting the cap based on industry productivity experience.

10. In contrast to rate-of-return regulation, which focuses on an incumbent LEC's costs and fixes the profits an incumbent LEC may earn based on those costs, price cap regulation focuses primarily on the prices that an incumbent LEC may

charge. The access charges of price cap LECs originally were set at levels based on the rates that existed at the time the LECs entered the price cap regime. Increases in their rates have, however, been limited over the course of price cap regulation by price indices that are adjusted annually pursuant to formulae set forth in Part 61 of our rules. Price cap regulation is a form of incentive regulation that seeks to ''harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.'' A core component of our price cap regulation is the Price Cap Index (PCI). As the Commission has explained previously, the PCI is designed to limit the prices LECs charge for service. The PCI provides a benchmark of LEC cost changes that encourages price cap LECs to become more productive and innovative by permitting them to retain reasonably higher earnings. The PCI has three basic components: (1) A measure of inflation, i.e., the Gross Domestic Product (chain weighted) Price Index (GDP–PI); (2) a productivity factor or ''X-Factor,'' that represents the amount by which LECs can be expected to outperform economy-wide productivity gains; and (3) adjustments to account for ''exogenous'' cost changes that are outside the LEC's control and not otherwise reflected in the PCI.

B. Pricing Flexibility

11. Pursuant to the pro-competitive, deregulatory mandates of the 1996 Act, the Commission in 1996 began exploring whether and how to remove price cap LECs' access services from price cap and tariff regulation once they are subject to substantial competition. Three years later, in 1999, the Commission adopted the *Pricing Flexibility Order* in an effort to ensure that the Commission's interstate access charge regulations did not unduly interfere with the operation of interstate access markets as competition developed in those markets. The Commission developed competitive showings (also referred to as ''triggers'') designed to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities. Price cap carriers that demonstrated the competitive showings were met in their serving areas could obtain so-called ''pricing flexibility,'' namely the ability to offer special access services at unregulated rates through generally available and individually negotiated tariffs (*i.e.,* contract tariffs). The operation of the pricing flexibility rules is discussed in greater detail in section 0 below.

C. The CALLS Order

12. In 2000, after a comprehensive examination of the interstate access charge and universal service regulatory regimes for price cap carriers, the Commission adopted the industry-proposed CALLS plan. This plan represented a five-year interim regime designed to phase down implicit subsidies and (as it pertained to switched and special access charges) to move towards a more market-based approach to rate setting. In adopting the CALLS plan, the Commission offered price cap carriers the choice of completing the forward-looking cost studies required by the *Access Charge Reform Order* or voluntarily making the rate reductions required under the five-year CALLS plan. The Commission permitted carriers to defer the planned forward-looking cost studies in favor of the CALLS plan because it found the plan to be ''a transitional plan that move[d] the marketplace closer to economically rational competition, and it [would] enable [the Commission], once such competition develops, to adjust our rules in light of relevant marketplace developments.'' All price cap carriers opted for the CALLS plan.

13. The CALLS plan separated special access services into their own basket and applied a separate X-factor to the special access basket. The X-factor under the CALLS plan, unlike under prior price cap regimes, is not a productivity factor. Rather, it represents ''a transitional mechanism * * * to lower rates for a specified period of time for special access.'' The special access X-factor was 3.0 percent in 2000 and 6.5 percent in 2001, 2002, and 2003. In addition to the X-factor, access charges under CALLS are adjusted for inflation as measured by the GDP–PI. For the final year of the CALLS plan (July 1, 2004–June 30, 2005), the special access X-factor was set equal to inflation, thereby freezing rate levels. Thus, in the absence of a new price cap regime post-CALLS, price cap LECs' special access rates have remained frozen at 2003 levels (excluding any necessary exogenous cost adjustments). The Commission hoped that, by the end of the five-year CALLS plan, competition would exist to such a degree that deregulation of access charges (switched and special) for price cap LECs would be the next logical step.

D. AT&T's Petition for Rulemaking and 2005 Special Access NPRM

14. On October 15, 2002, AT&T Corp. filed a petition for rulemaking requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan as it pertains to the rates that price cap LECs, and the BOCs in particular, charge for special access services. AT&T claimed that the competitive showings required to obtain pricing flexibility failed to predict price-constraining competitive entry and, rather, that significant competitive entry had not occurred. It further contended that, based on Automated Reporting Management Information System (ARMIS) data, the BOCs' interstate special access revenues had more than tripled, from $3.4 billion to $12.0 billion, between 1996 and 2001 and that the BOCs' returns on special access services were between 21 and 49 percent in 2001. Further, AT&T stated that, in every MSA for which pricing flexibility was granted, BOC special access rates either remained flat or increased. Thus, AT&T contended both that the predictive judgment at the core of the *Pricing Flexibility Order* had not been confirmed by marketplace developments, and that BOC special access rates exceeded competitive levels and hence were unjust and unreasonable in violation of § 201 of the Communications Act. Because the predictive judgment had proven wrong, AT&T asserted, the Commission was compelled to revisit its pricing flexibility rules in a rulemaking proceeding.

15. Price cap LECs generally opposed the *AT&T Petition for Rulemaking.* They claimed that their special access rates were reasonable and therefore lawful, that there was robust competition for special access services, that the collocation-based competitive showings were an accurate metric for competition, and that the data relied upon by AT&T were unreliable in the context used by AT&T. SBC noted that AT&T only provided (and could only provide) data from a single year (2001) that post-dated the initial implementation of Phase II pricing flexibility in 2001, and SBC and Verizon claimed that ARMIS data were not designed to evaluate the reasonableness of rates. The BOCs contended, moreover, that special access revenues per line declined between 1996 and 2001.

16. On January 31, 2005, the Commission released the *Special Access NPRM.* The *Special Access NPRM* initiated a broad examination of what regulatory framework to apply to price cap LECs' interstate special access

services following the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules for special access services. As part of our review of the pricing flexibility rules, which were adopted, in part, based on the Commission's predictive judgment, the Commission sought to examine whether the available marketplace data supported maintaining, modifying, or repealing these rules. The Commission noted its commitment to re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments. Accordingly, the Commission sought data and comments on whether actual marketplace developments supported the predictive judgments used to support the special access pricing flexibility rules.

17. The *Special Access NPRM* also responded to AT&T's request for interim relief. AT&T asked, in addition to initiating a rulemaking, that the Commission reinitialize Phase II pricing flexibility special access rates at an 11.25 percent rate of return, and impose a temporary moratorium on further pricing flexibility applications. These requests were denied; however, the Commission sought comment on whether to adopt any interim requirements in the event that the Commission was unable to conclude the NPRM in time for any adopted rule changes to be implemented in the 2005 annual tariff filings.

E. Recent Actions in the Proceeding

1. Refresh Record

18. In July 2007, the Commission invited interested parties to update the record in the special access rulemaking in light of a number of recent developments in the industry, including several ''significant mergers and other industry consolidation,'' ''the continued expansion of intermodal competition in the market for telecommunications services,'' and ''the release by GAO [the Government Accountability Office] of a report summarizing its review of certain aspects of the market for special access services.'' While the special access rulemaking was pending, the Commission also addressed special access regulation for price cap carriers in several other proceedings. A petition for forbearance from dominant carrier regulation of enterprise broadband special access services (i.e., packet-based switched, high-speed telecommunications services for businesses) filed by Verizon was deemed granted in 2006. In orders issued in October 2007 and August 2008, the agency granted petitions filed by AT&T, Embarq, Frontier, and Qwest under 47 U.S.C. § 160 seeking similar forbearance relief, and, in August 2008, granted Qwest's petition for similar relief from regulation of enterprise broadband special access.

2. Analytical Framework

19. In November 2009, the Commission sought comment on the appropriate analytical framework for examining the issues that the *Special Access NPRM* raised. In July 2010, the Commission's Wireline Competition Bureau (Bureau) held a staff workshop on the economics of special access to gather further input from interested parties on the analytical framework the Commission should use—and the data it should collect—to evaluate whether the current special access rules are working as intended.

3. Voluntary Data Requests

20. In October 2010, the Bureau issued a public notice inviting the public to submit data on the presence of competitive special access facilities to assist the Commission in evaluating the issues that the *Special Access NPRM* raised. Explaining that data ''would need to be reviewed'' before the Commission could address the issues raised by the proceeding, the Bureau asked that the requested data be submitted by January 27, 2011. The Bureau also noted that while it continued to develop an analytical framework, it would ''ask for additional voluntary submissions of data in a second public notice.''

21. On September 19, 2011, the Bureau issued a second public notice requesting the submission of special access data. In this request, the Bureau sought detailed data on special access prices, revenues, and expenditures, as well as the nature of terms and conditions for special access services. The Bureau requested that the data be submitted to the Commission by December 5, 2011.

III. The ''Competitive Showings'' Adopted in 1999 Have Not Worked as Expected

22. In the *Pricing Flexibility Order,* the Commission adopted rules intended to allow price cap LECs to show, in an administratively workable way, that certain parts of the country were sufficiently competitive to warrant pricing flexibility for special access services. As discussed in greater detail below, we find that the record indicates that the administratively simple competitive showings we adopted in 1999 have not worked as intended, likely resulting in both over- and under-regulation of special access in parts of the country. We therefore suspend the pricing flexibility competitive showings, on an interim basis, until we obtain the requisite data and conduct the market analysis required to craft replacement rules.

A. Background

1. Rationale for Competitive Showings

23. In the *Pricing Flexibility Order,* the Commission adopted rules that allow price cap LECs to obtain relief from pricing regulations as competition for special access services increased. The Commission concluded that relief should be granted in two phases. Phase I relief permits price cap LECs the ability to lower their rates through contract tariffs and volume and term discounts, but requires that they maintain their generally available price cap-constrained tariff rates to ''protect those customers that lack competitive alternatives.'' Phase II relief permits price cap LECs to raise or lower their rates throughout an area, unconstrained by the Commission's part 61 and part 69 rules.

24. The Commission found that different levels of collocation in an area would justify different levels of relief. Specifically, the Commission held that Phase I deregulatory relief would be appropriate in areas where the price cap LEC was able to show that competitors had made irreversible, sunk investment sufficient to ''discourage[e] incumbent LECs from successfully pursuing exclusionary strategies,'' such as '' 'locking up' large customers by offering them volume and term discounts.''

25. The Commission held that Phase II deregulatory relief would be appropriate only in areas where a price cap LEC could show there was a higher level of collocation—specifically, that ''competitors have established a significant market presence, *i.e.,* that competition for a particular service within the [area] is sufficient to preclude the incumbent from exploiting any monopoly power over a sustained period.'' That is, competitors would have ''sufficient market presence to constrain prices throughout the'' area because ''almost all special access customers have a competitive alternative'' and ''[i]f an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rate will induce competitive entry, and that entry will in turn drive rates down.''

2. How the Competitive Showings Work

26. *Geographic Area of Relief.* The Commission chose to grant pricing flexibility relief on an MSA basis, finding that, among the proposed alternatives ''MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition'' and avoiding the ''increased expenses and administrative burdens associated with'' proposals to grant relief in smaller geographic areas, such as wire centers. The Office of Management and Budget (OMB) defines MSAs as geographic entities that contain a core urban area of 50,000 or more population, and often includes adjacent counties that have a high degree of social and economic integration with the urban core, as measured by commuting to work. MSAs were developed not for the purposes of competition policy, but to meet the Federal Government's need to have ''nationally consistent definitions for collecting, tabulating and publishing Federal statistics for a set of geographic areas.'' OMB may add counties or principal cities to an MSA, remove them, or even create new MSAs if census and population estimates indicate changes in social and economic integration between outlying areas and the urban core.

27. In the *Pricing Flexibility Order,* the Commission adopted a list of 306 MSAs based largely on data compiled from the 1980 census, and froze that list for use in all pricing flexibility petitions. Therefore, even if OMB subsequently expanded the geographic area of an MSA, a price cap LEC's grant of pricing flexibility remains within the borders of the applied-for MSA. The Commission also recognized that some price cap LEC study areas fall outside of MSA boundaries, and held that it would ''grant price cap LECs pricing flexibility within the non-MSA parts of a study area if'' they were able to make the required showings ''throughout that area.''

28. MSAs can be geographically extensive and, in many cases, may encompass areas with vastly different business density within their borders. Some illustrative examples include the Pensacola, Florida MSA and the Atlanta, Georgia MSA.

29. *Proxies for Competitive Showings.* For the sake of administrative convenience, the Commission adopted proxies for competition designed to allow price cap LECs to make the required showings, ''with a minimum of administrative burden for the industry and the Commission.'' Specifically, the Commission chose to ''rely on collocation as a proxy for irreversible, sunk investment'' in special access facilities and services. Collocation—as used in the competitive showing rules—is an offering by an incumbent LEC whereby a requesting telecommunications carrier's transmission equipment is located, for a tariffed charge, at the incumbent LEC's central office. The Commission predicted that collocation by competitors in incumbent LEC wire centers would be a reliable indicator of competition because collocation typically represented a financial investment by a competitor to establish facilities within a wire center. The Commission predicted that the collocation-based competitive showings would ''provide a bright-line rule to guide the industry'' and ''an administratively simple and readily verifiable mechanism for determining whether competitive conditions warrant the grant of pricing flexibility.''

30. The Commission established bright line ''triggers'' based on the extent of collocation within an MSA that it expected would allow a price cap LEC to demonstrate that market conditions in a given MSA would warrant relief. Specifically, the Commission held that price cap LECs would need to demonstrate

> either that (1) competitors unaffiliated with the incumbent LEC have established operational collocation arrangements in a certain percentage of the incumbent LEC's wire centers in an MSA, or (2) unaffiliated competitors have established operational collocation arrangements in wire centers accounting for a certain percentage of the incumbent LEC's revenues from the services in question in that MSA. In both cases, the incumbent also must show, with respect to each wire center, that at least one collocator is relying on transport facilities provided by a transport provider other than the incumbent LEC.

The specific level of collocation required varies depending on whether a price cap LEC is seeking Phase I or Phase II relief and whether it is seeking relief for channel terminations or other special access services.

31. On February 2, 2001, the U.S. Court of Appeals for the DC Circuit upheld the *Pricing Flexibility Order,* finding that the Commission made a reasonable policy determination and sufficiently explained its basis for adopting the competitive showing requirements.

B. Subsequent Evidence Undermines the Commission's Previous Decision To Measure Competitive Showings and Grant Relief on an MSA-Wide Basis and Justifies Suspension of Rules

1. Original Rationale for Granting Pricing Flexibility in MSAs and Non-MSA Portions of Study Areas

32. The Commission's 1999 *Pricing Flexibility Order* chose MSAs as the basis for competitive analysis because the record at the time indicated ''that MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition.'' The Commission rejected larger geographic areas such as states and LATAs ''[b]ecause competitive LECs generally do not enter new markets on a statewide basis.'' Accordingly, ''granting pricing flexibility over such a large geographic area would increase the likelihood of exclusionary behavior by incumbent LECs, by granting them flexibility in areas where competitors have not yet made irreversible investment in facilities.''

33. The Commission rejected concerns from some parties that ''competition may exist in only a small part of an MSA,'' finding that ''[t]he triggers we establish * * * are sufficient to ensure that competitors have made sufficient sunk investment within an MSA.'' The Commission therefore rejected smaller geographies, such as wire centers, concluding that ''the record does not suggest that this level of detail justifies the increased expenses and administrative burdens associated with these proposals.''

34. The Commission received little guidance from commenters on how to establish an appropriate geographic area for grants of pricing flexibility in areas that fall outside of MSAs. In the absence of such guidance, the Commission allowed price cap LECs to make a competitive showing for the entirety of the non-MSA portions of a study area for which they sought relief. It decided against requiring competitive showings at a more granular level—such as on a rural service area (RSA) basis, stating that

> * * * we expect competitors to enter MSA markets first and then to extend their networks into less densely populated areas. Because rural areas by definition do not have large concentrations of population comparable to urban areas, we expect that competitive entry into rural areas will be less concentrated than in urban areas. Therefore, we do not expect that pricing flexibility will enable an incumbent to engage successfully in exclusionary pricing behavior with respect to one RSA because competitive entry is limited to another RSA.

The Commission therefore placed more weight on administrative ease, and chose to allow price cap LECs to apply for pricing flexibility for the entirety of the non-MSA components of a study area.

2. The Record Now Suggests That Entry Occurs in Smaller Areas

35. The record in this proceeding suggests that, contrary to the Commission's prediction in 1999, 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.

36. In the sections that follow, we evaluate whether record evidence supports the Commission's prediction that MSAs and non-MSA sections of incumbent LEC study areas best reflect the scope of competitive entry. Entry is one of the many elements the Commission and antitrust agencies analyze when evaluating competition. As a general principle, firms are likely to enter a geographic area to compete ''if the entrant generates sufficient revenue to cover all costs apart from the sunk costs of entry. Such entry succeeds in the sense that the entrant becomes and remains a viable competitor in the market.'' In order to gauge whether entry would be profitable, firms are more likely to focus on areas with high demand for their services, relative to the cost of providing those services. Our review of the evidence suggests that demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA. This leads us to conclude that 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. This conclusion is confirmed by the available data, including the record of pricing flexibility grants since the Commission's 1999 Order, and data on subsequent competitive developments in these areas.

a. Business Demand Varies Significantly Within MSAs

37. The Commission sought to define the geographic areas for which pricing flexibility requests would be considered ''narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable.'' Our analysis of business establishment density indicates that business demand can vary significantly across an MSA. This suggests that competitive conditions within an MSA are also likely to vary significantly, since areas with higher demand tend to be more capable of supporting competition and are more attractive to potential entrants than low demand areas. These data provide context for our analysis of evidence about grants of pricing flexibility petitions and how competitive entry has occurred since adoption of the *Pricing Flexibility Order.*

38. The plots in Figures 1 and 2 below illustrate that business demand varies significantly within MSAs. They show the distribution of business establishment density by ZIP code in 12 of the sample of 24 MSAs for which we sought data in our voluntary data requests. Figure 1 shows the six MSAs with the least variance in business establishment density across ZIP codes—Fayetteville, North Carolina; Johnstown, Pennsylvania; Phoenix, Arizona; Ocala, Florida; Greenville-Spartanburg, South Carolina; and Lima, Ohio. The distributions show that, even within these relatively homogeneous MSAs, dense pockets of business establishments exist, as well as areas in which business establishments are few and far between. Johnstown, Pennsylvania is an extremely concentrated example. In Johnstown, seventy-five percent of the ZIP codes (from the minimum observation, represented by an upside-down ''T'' shape, to the top of the box) are clustered near the bottom of the scale with densities close to zero, while the remaining twenty-five percent (from the top of the box to the maximum observation, represented by a ''T'' shape) are scattered along the vertical axis between about five establishments per square mile and 230 establishments per square mile. The most dense ZIP code (15901), which covers the central business district of Johnstown, is 23 times more dense than the average zip code in the area. Phoenix is much larger and somewhat more uniform than Johnstown, but is nonetheless characterized by a few very dense ZIP codes amid a majority of less dense ZIP codes: while the Phoenix MSA has three ZIP codes with over 300 establishments per square mile, over half of the ZIP codes in the MSA have fewer than 40 establishments per square mile. Overall, these MSAs are similar in that a small number of ZIP codes are far more dense than the rest.

39. The distributions shown in Figure 2 demonstrate more extreme examples of intra-MSA variance of competitive conditions. Figure 2 depicts business establishment density variation for the six MSAs with the most business establishment density variation across ZIP codes: Chicago, Illinois; New Orleans, Louisiana; New York, New York; Seattle-Everett, Washington; Washington, DC; and Los Angeles, California. Except for New York, half of the ZIP codes in each MSA contain fewer than 100 establishments per square mile, whereas other areas within each MSA have upwards of 1,000 establishments per square mile.

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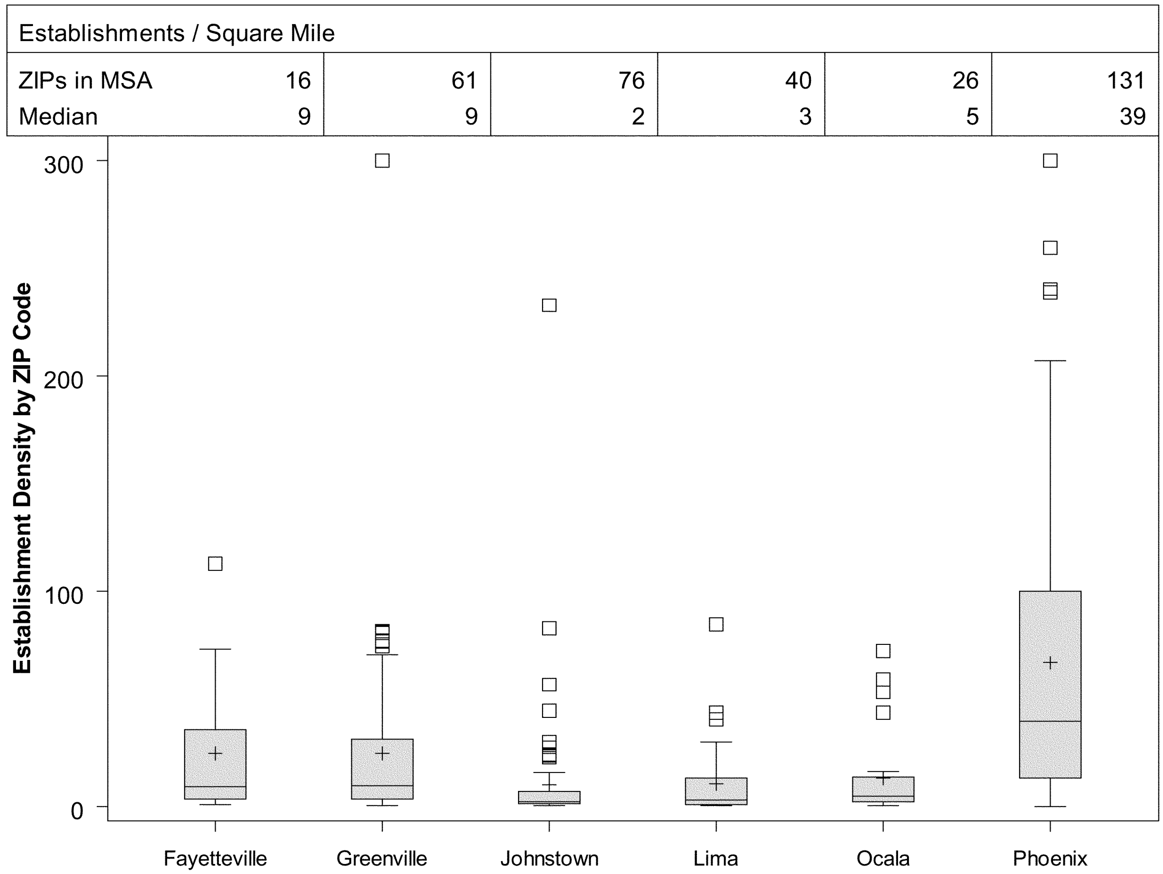
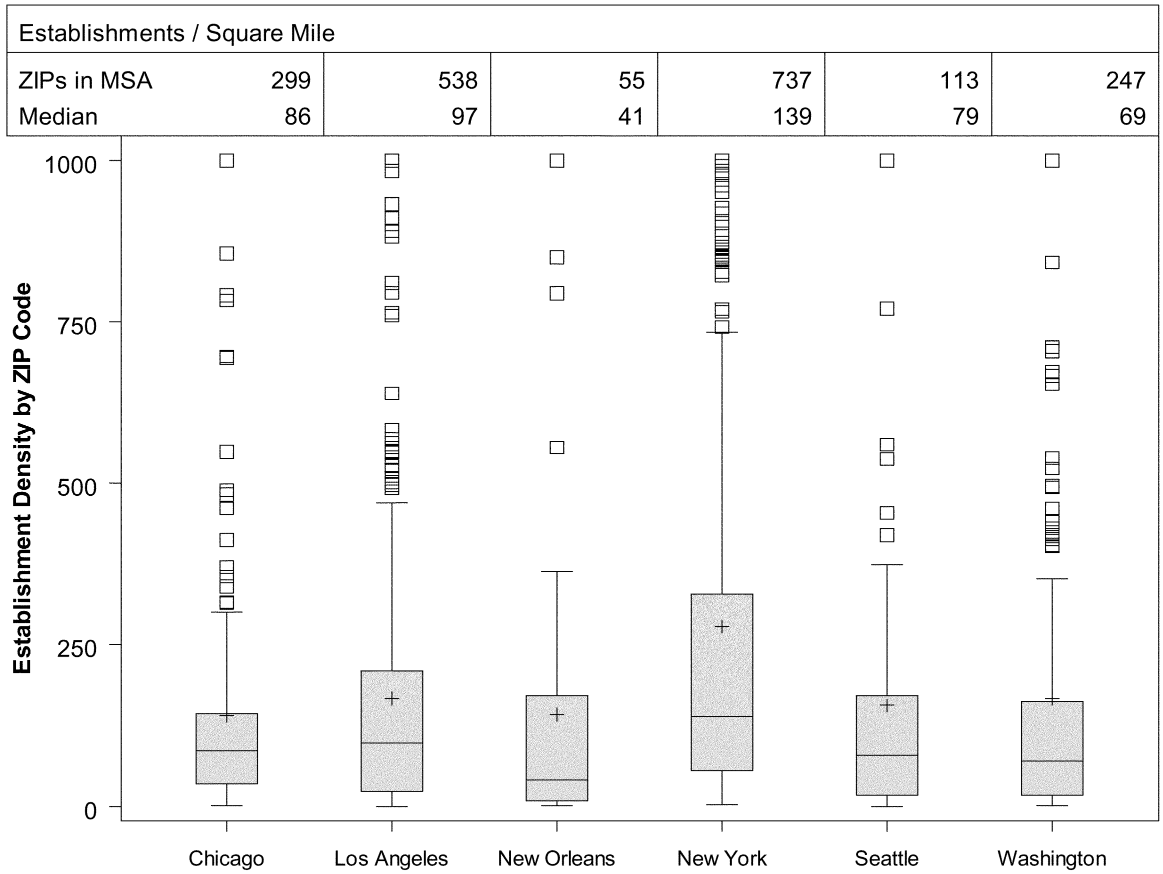
Figure 1
Distribution of Business Establishment Densities by MSA and ZIP Code
Sample Small Metropolitan Areas



Note: Each box plot shows the distribution of establishment densities in ZIP codes within each Metropolitan Area. The + denotes the average establishment density taken across all ZIP codes in the MSA; ⊥ is the minimum observation above Q1-1.5(Q3-Q1); T is the maximum observation below Q3+1.5(Q3-Q1); and □ is a data point beyond Q1-1.5(Q3-Q1) or Q3+1.5(Q3-Q1). Densities above 300 establishments per square mile were topcoded to 300
Sources: U.S. Census Bureau, ZIP-Code Business Patterns: 2009; U.S. Census Bureau, ZIP Code Tabulation Areas, 2010.

Figure 2
Distribution of Business Establishment Densities by MSA and ZIP Code
Sample Large Metropolitan Areas

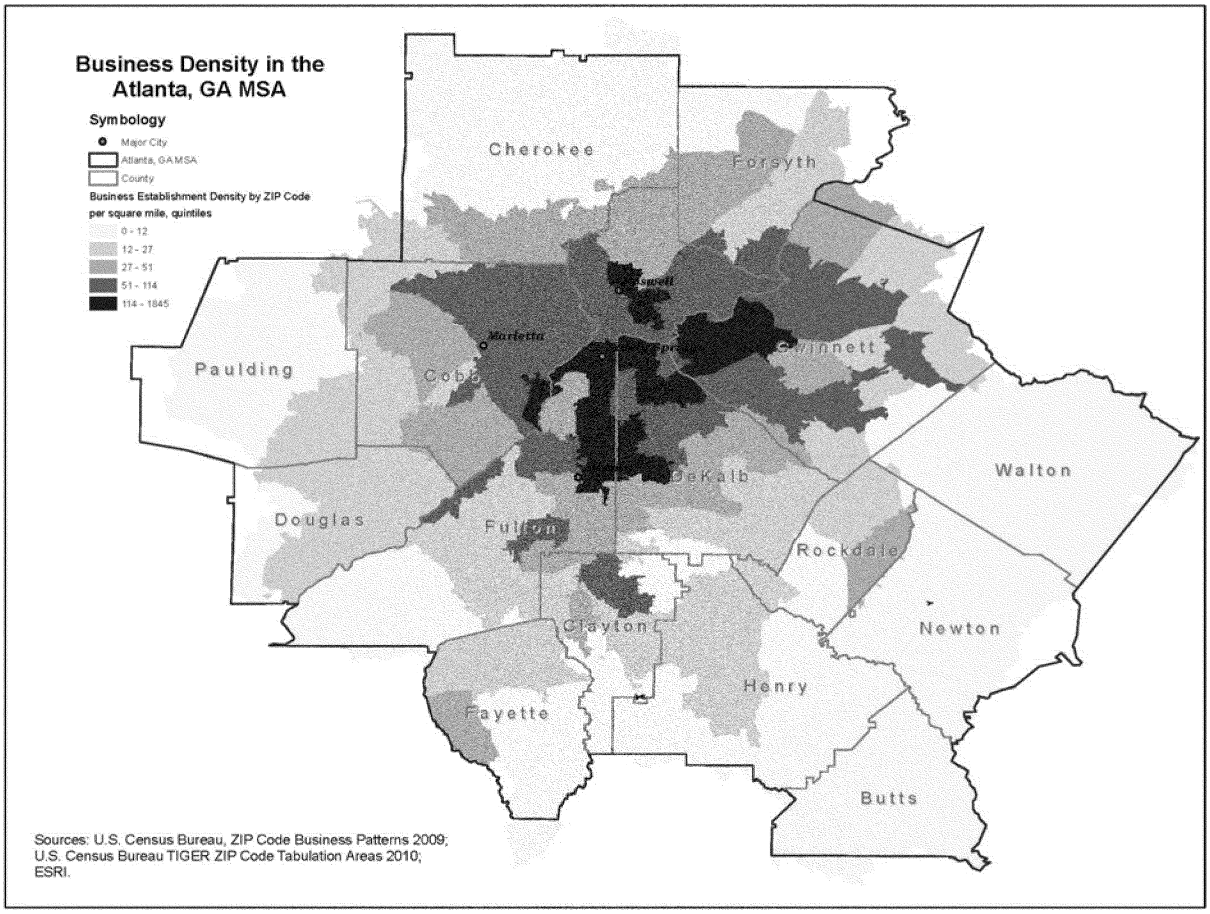


Note: Each box plot shows the distribution of establishment densities in ZIP codes within each Metropolitan Area. The + denotes the average establishment density taken across all ZIP codes in the MSA; ⊥ is the minimum observation above Q1-1.5(Q3-Q1); T is the maximum observation below Q3+1.5(Q3-Q1); and ☐ is a data point beyond Q1-1.5(Q3-Q1) or Q3+1.5(Q3-Q1). Densities above 1,000 establishments per square mile were topcoded to 1,000
Sources: U.S. Census Bureau, ZIP-Code Business Patterns: 2009; U.S. Census Bureau, ZIP Code Tabulation Areas, 2010.

Billing Code 6712–01–C

40. This variance of competitive conditions within an MSA is an artifact of the way MSAs are defined. The resulting statistical entity can be large, including the entirety of distant counties if those counties contain exurban areas linked to the core by commuting behavior. The Atlanta, Georgia MSA, for example, includes Butts County, Georgia (see Figure 3 below). Of the three ZIP codes within that county, the densest (Jackson, Georgia 30233) has on average about 2.3 business establishments per square mile. This contrasts to the density level of the central business district of Atlanta's MSA, which contains thousands of business establishments per square mile. This kind of variation is common across the 12 MSAs we have examined for these purposes.

Figure 3
Business Density in the Atlanta, GA MSA



41. Given the foregoing evidence that MSAs do not have ''reasonably similar'' competitive conditions across their geographic areas, and as discussed fully below, when such competitive conditions are considered together with the evidence of how relief has been granted and how some competitive entry has occurred, we can no longer conclude that MSAs ''best reflect the scope of competitive entry'' by LECs.

b. Prior Grants of Relief Suggest That Competitive LEC Entry Occurred at a Smaller Geographic Level Than the MSA

42. Though the Commission acknowledged that demand for special access services might be concentrated in certain areas, it designed the competitive showings with the intent of ensuring that price cap LECs could not obtain pricing flexibility throughout an MSA in instances of extremely concentrated demand. While recognizing that ''a few wire centers may account for a disproportionate share of revenues for a particular service,'' the Commission attempted to set its revenue based collocation triggers at levels designed to ''ensure that competitors have extended their networks beyond a few revenue-intensive wire centers.'' Our analysis indicates that the 1999 rules have not effectively fulfilled this intent. This provides further evidence that MSAs likely do not reflect the actual scope of competitive entry.

43. As noted above, the Commission adopted two types of rules by which price cap LECs could make the competitive showings required to obtain relief. The first type of rule permitted price cap LECs to obtain relief by showing the presence of collocators in a certain percentage of its wire centers within an MSA. The second type, the revenue-based rule described above, reflected the Commission's concession that demand for special access services is often concentrated. Despite this concession, however, the Commission cautioned that the revenue-based threshold for dedicated transport services would need to be set high enough ''to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers.'' With respect to channel terminations to end users, which the Commission noted were less competitive than dedicated transport, it doubled the revenue requirement for limited pricing flexibility and increased by almost a third the requirement for full relief. In short, the Commission made the revenue-based rule more difficult to meet specifically to protect against grants of pricing flexibility based on extremely concentrated demand.

44. We have analyzed the 217 incumbent LEC areas for which pricing flexibility relief for channel terminations to end users was granted by order of the Bureau, representing all such grants associated with pricing flexibility petitions available in the Commission's Electronic Tariff Filing System. These grants cover 199 MSAs and five non-MSAs. The majority of those grants were based exclusively on the revenue-based rule. Because the revenue-based rule has different revenue thresholds for each type of special access service, the Commission restricted its analysis to one type,

channel terminations to end users, to keep the analysis consistent.

45. This analysis shows that our rules permitted MSA-wide relief on the basis of extremely concentrated demand in many instances. For example, as detailed in the chart below, 72 of the 212 grants for MSAs were based on revenues of no more than a quarter of the relevant wire centers within the MSA. For example, AT&T obtained Phase II pricing flexibility in the Pensacola MSA based on the revenues of three out of 12 wire centers. Further, 30 of those 72 grants were based on the revenues of only one wire center, 12 were based on the revenues of only two, and 5 were based on the revenues of only three.

TABLE 4—MSA-WIDE GRANTS BASED ON EXTREMELY CONCENTRATED DEMAND

MSA	Carrier name		Competitive Showing		
	Current	At time of grant	WCs with collocation	Total WCs	Percent of wire centers with collocation
Alexandria, LA	AT&T	Bell South	1	10	10
Anderson, IN	AT&T	Ameritech	1	5	20
Anderson, SC	AT&T	Bell South	1	5	20
Asheville, NC	AT&T	Bell South	1	9	11
Bangor, ME	Fairpoint	Verizon	1	14	7
Burlington, NC	AT&T	Bell South	1	5	20
Columbus, GA-AL	AT&T	Bell South	1	7	14
Evansville, IN-KY	AT&T	Bell South	1	4	25
Evansville-Henderson, IN-KY	AT&T	Ameritech	1	13	8
Gainesville, FL	AT&T	Bell South	1	6	17
Harrisburg, PA	CenturyLink	Sprint	1	14	7
Jackson, MI	AT&T	Ameritech	1	6	17
Joplin, MO	AT&T	SWBT	1	6	17
Kalamazoo, MI	AT&T	Ameritech	1	8	13
Lawton, OK	AT&T	SWBT	1	4	25
Lima, OH	CenturyLink	Embarq	1	16	6
Medford, OR	CenturyLink	Qwest	1	7	14
Memphis, TN-AR-MS	AT&T	SWBT	1	5	20
Muncie, IN	AT&T	Ameritech	1	5	20
Ocala, FL	CenturyLink	Sprint	1	10	10
Owensboro, KY	AT&T	Bell South	1	9	11
Panama City, FL	AT&T	Bell South	1	5	20
Pittsburgh, PA	CenturyLink	Sprint	1	14	7
Pueblo, CO	CenturyLink	Qwest	1	5	20
Salem, OR	CenturyLink	Qwest	1	7	14
Sioux City, IA-NE	CenturyLink	Qwest	1	8	13
St. Cloud, MN	CenturyLink	Qwest	1	8	13
St. Joseph, MO	AT&T	SWBT	1	5	20
Waco, TX	AT&T	SWBT	1	14	7
Waterloo-Cedar Falls, IA	CenturyLink	Qwest	1	6	17
Battle Creek, MI	AT&T	Ameritech	2	8	25
Boise City, ID	CenturyLink	Qwest	2	8	25
Clarksville-Hopkinsville, TN/KY	AT&T	Bell South	2	12	17
Eugene-Springfield, OR	CenturyLink	Qwest	2	13	15
Fargo-Moorehead, ND-MN	CenturyLink	Qwest	2	8	25
Fort Smith, AR-OK	AT&T	SWBT	2	11	18
Manchester, NH	Frontier	Verizon	2	13	15
Oxnard-Simi Valley-Ventura, CA	AT&T	Pac Bell	2	9	22
Provo-Orem, UT	CenturyLink	Qwest	2	10	20
Springfield, IL	AT&T	Ameritech	2	11	18
Springfield, MO	AT&T	SWBT	2	12	17
Wilmington, NC	AT&T	Bell South	2	8	25
Augusta, GA	AT&T	Bell South	3	13	23
Bloomington-Normal, IL	Frontier	Verizon	3	20	15
Chattanooga, TN-GA	AT&T	Bell South	3	13	23
Pensacola, FL	AT&T	Bell South	3	12	25
Portland, ME	Fairpoint	Verizon	3	22	14

46. In sum, more than a third of the cases in which pricing flexibility was granted were premised on the existence of collocations where 65 percent or more of the special access revenue generated within the MSA came from 25 percent or fewer of the wire centers in the MSA. This is consistent with extreme variations in business density. Qualitatively, this suggests that MSA-wide grants of pricing flexibility have encompassed areas in which little or no competitive entry would be expected.

47. Even with more relaxed standards for what constitutes extremely concentrated demand, the data shows that 97 grants were based on revenues from less than a third of the wire centers, and 144 were based on revenues from less than half of the wire centers. Conversely, only 28 grants were based on revenues of two-thirds or more of the wire centers within the applied-for MSA.

c. Data Indicates That Competitive LEC Entry Occurs Only in Areas of High Business Demand

48. Whereas our bright-line competitive showings suggested that some MSAs would soon be, or already were, competitive more than a decade ago, recent data indicates that competitors have a strong tendency to enter in concentrated areas of high business demand, and have not expanded beyond those areas despite the passage of more than a decade since the grant of Phase II relief. This provides further evidence that an MSA is probably a much larger area than a competitor would typically choose to enter.

49. For example, data about the Atlanta MSA, where BellSouth was granted Phase II relief in 2000, demonstrates the importance of geographic business establishment density as a driver of competitive entry. In 2011, staff collected data, on a voluntary basis, about the presence of competitive special access facilities for channel terminations to end users in 24 MSAs. The following providers submitted data indicating that they provide facilities-based competition in parts of the Atlanta MSA: [REDACTED]. The first of these carriers is [REDACTED], another is the [REDACTED], and three are among the nation's [REDACTED]. According to those data, only 40 percent of the ZIP codes in the Atlanta MSA had competitive access facilities supplied by even one of the [REDACTED] reporting competitors.

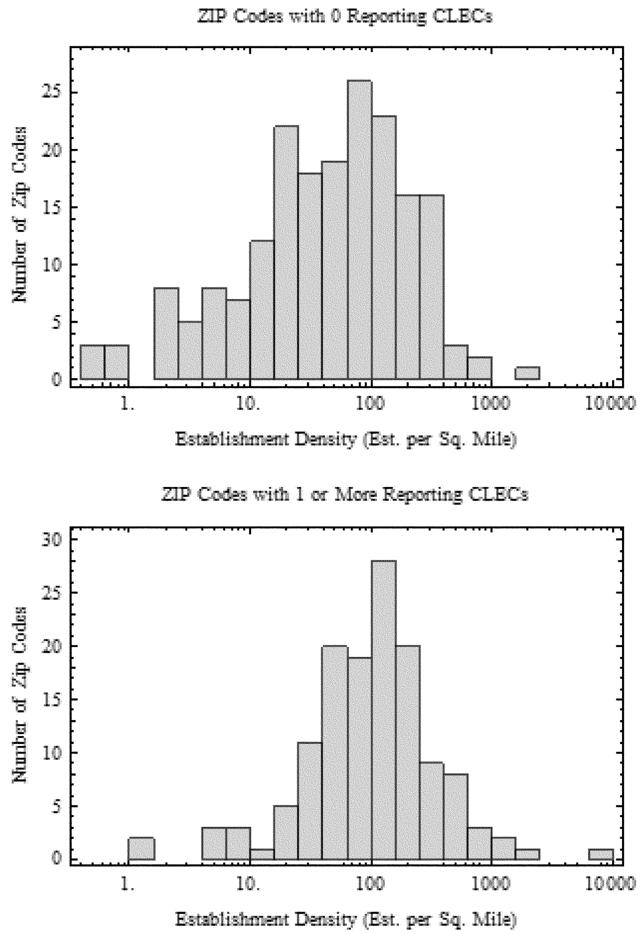
50. The ZIP codes in which the reporting carriers in Atlanta offered facilities-based competition were those with the highest average business establishment densities. This is reflected in Table 5, which compares average business establishment density between ZIP code areas in which reporting carriers compete and ZIP codes areas in which they do not (and includes similar data for the Miami and Norfolk MSAs). Because the data submissions that serve as the basis for Table 5 were voluntary, the reporting competitors do not necessarily represent all competition in the three MSAs discussed above, and it is possible that competitors have higher market shares than our data show. However, Table 5 does not show market shares, but rather the geographic breadth of coverage by competitors within the MSA. Further analysis of these data indicates that the reporting carriers had a tendency to enter the same areas within the MSA. We have no reason to believe that the competitors' focus on high business establishment density indicated by these data would change if we were able to obtain data from any other competitive providers with access facilities in the Atlanta, Miami and Norfolk MSAs. Thus, despite the fact that our competitive showings rules were designed to predict competitive entry across an MSA, these data suggest a strong tendency for competitive LECs to deploy channel termination facilities to end users only in ZIP codes with the highest density of business establishments.

TABLE 5—AVERAGE BUSINESS ESTABLISHMENT DENSITY IN MSAS BY ZIP CODES WITH VS. WITHOUT FACILITIES-BASED COMPETITION FROM REPORTING CARRIERS

MSA and status of incumbent provider	Number of ZIP codes in MSA with reported facilities-based competition	Percent of ZIP codes in MSA with reported facilities-based competition	Average establishment density in ZIP codes with reported facilities-based competition (units: estab. per square mile)	Average of establishment density in ZIP codes without reported facilities-based competition (units: estab. per square mile)
Atlanta, GA (2000 AT&T/BellSouth Phase II Pricing Flexibility)	59	40	175	41
Miami, FL (2000 AT&T/BellSouth Phase II)	41	31	390	181
Norfolk, VA (2001 Verizon Phase II)	36	78	106	59

51. Chart 6 displays the distribution of establishment density for ZIP codes in the three MSAs of Table 5. The distribution at the top of Chart 6 is for ZIP codes in which no reporting carrier offered facilities-based competition for end-user channel terminations and the distribution at the bottom is for ZIP codes in which one or more reporting carriers did offer facilities-based competition for end-user channel terminations. The chart indicates that the reporting carriers had a greater tendency to offer competition in ZIP codes with business establishment density greater than 100 establishments per square mile than they did in ZIP codes with lower establishment densities. Based on an analysis of the individual ZIP code areas, the probability that the carriers' location decisions in these metropolitan areas were not tied to business establishment density is exceedingly small. The findings from this analysis are consistent with other evidence in the record.

Chart 6: Distributions of Zip Code Business Establishment Densities By Competitive LEC Entry for Atlanta, Miami, and Norfolk MSAs



52. The fact that there may be other competitors in these MSAs that are not reflected in our data, that more competitors may enter in the future, or that current competitors may build out to other parts of the MSA with high business density does not diminish our finding that competitors typically enter in areas of high business establishment density. Commenters rightly point out that we do not have comprehensive facilities data for the MSAs above. We recognize the limitations of our existing data set and, as described below, we intend to collect additional data in the coming months that will help inform our analysis. However, even this partial data provides insight into where competitors choose to enter within an MSA, and reinforces evidence we have received in this record.

53. Incumbent LECs generally concede that competitors have focused on areas in which demand for special access services is very concentrated. As SBC noted:

Demand for special access services is highly concentrated in a relatively small number of dense urban wire centers and ex-urban wire centers containing office parks and other campus environments. Indeed, more than **[REDACTED]** percent of SBC's special access demand in Phase II MSAs is concentrated in **[REDACTED]** percent of its wire centers. To meet this demand, competitors have deployed myriad competitive facilities—including fiber connected directly to end-user premises—in markets across SBC's territory, particularly in dense, metropolitan areas and large campus environments.

Verizon states that more than 80 percent of demand is generated in 8 percent of its wire centers, ''enabling competitors to address a large portion of demand through targeted investments.'' This is consistent with the Commission's earlier finding that communities within an MSA share a center of commerce, but not necessarily common economic characteristics relating to telecommunications deployment. This record also demonstrates that demand exists for special access services outside of these areas and it raises concerns regarding the availability of competitive alternatives to meet such demand.

54. Some commenters also allege that extending new facilities is sufficiently easy that competitors could reach all parts of an MSA if warranted even if they only have facilities in part of an MSA today. SBC, for example, states that a large percentage of its demand for DS1 and DS3 services runs within 1,000 feet, or about three city blocks, of existing alternative fiber. Thus, incumbent LECs argue that potential competition exists throughout an MSA even if competitive facilities are only present in a small area. In contrast, competitive carriers assert that entry is far more difficult than incumbents describe in the record. Such commenters state that, as compared to incumbent providers who have achieved economies of scope and scale in the provision of telecommunications services, it is not economical for competitors to deploy their own facilities to serve all special access demand. Competitive carriers note that construction costs, the costs of fiber and electronics, backhaul costs, transaction costs involved in negotiating with

suppliers, and other recurring costs such as rent, utilities, and maintenance are typically too large to justify provisioning a building with relatively low levels of demand. Covad and XO, for example, estimate the costs of deploying a building lateral to be **[REDACTED]**, and tw telecom estimates that **[REDACTED]**. Commenters, including Covad, XO, BT Americas, and tw telecom, also point to important barriers to entry, including the delays in or impossibility of securing municipal franchise agreements, rights-of-way agreements, building access agreements, and building and zoning permits.

55. We need not resolve this controversy here, however, for data provided by incumbent LECs demonstrate that, even if competitors could easily deploy fiber to serve customer demand within 1,000 feet of incumbents' facilities, many parts of an MSA would still not be served by competitive fiber. For instance, a 2007 AT&T map depicting competitive fiber deployment in the Austin, Texas MSA appears to indicate that, out of the 24 AT&T wire centers in the MSA, competitive fiber does not extend to **[REDACTED]**. Maps submitted by SBC in 2005 provide similar data. For instance, SBC estimates that in the San Diego MSA, **[REDACTED]**. This cuts against assertions that the majority of special access demand could be easily and quickly served by proximate competitive alternatives.

d. Analysis of Multi-Incumbent LEC MSAs Also Suggests That MSAs Do Not Correspond to the Scope of Entry

56. As discussed above, the Commission selected the MSA because it decided the MSA best reflected the scope of competitive entry. If our rules operated in a manner consistent with our predictions, it should follow that uniform relief would generally be granted when two or more price cap LECs operate in the same MSA. That has not proven to be the case. For example, in the Evansville, Indiana MSA, BellSouth has 4 wire centers and Ameritech has 13. In 2001, Ameritech qualified for Phase I pricing flexibility. In contrast, BellSouth met the higher competitive showings requirements for Phase II pricing flexibility one year later. Likewise, in 2002, Verizon satisfied the requirements for Phase II pricing flexibility for its 2 wire centers in the Bridgeport-Stamford-Norwalk, Connecticut MSA. Two years later, SNET was only able to get Phase I pricing flexibility, based on revenue of 9 out of its 22 wire centers in the same MSA. In the total of 12 MSAs in which we granted pricing flexibility to more than one provider within the MSA, our data shows instances of inconsistent grants of pricing flexibility in nine. These data reinforce our conclusion that competitive conditions can vary significantly across an MSA.

e. Billing Practices May Not Be Indicative of Competitive Entry

57. It is not clear, based on our existing record, that incumbent LEC billing practices lead to consistent pricing across an MSA. Commenters, in particular incumbent LECs, argue that special access pricing is generally not tied to a small geographic market, but rather pricing is uniform throughout an MSA or larger geographic region. Thus, because tariffs typically encompass an MSA or larger geographic region, incumbents assert that prices are constrained across that whole area, regardless of the presence of competition in any individual location. Such commenters also argue that it is administratively burdensome for the Commission to assess whether competition exists for granular geographic markets, and that it would be onerous for carriers to implement pricing flexibility for individual buildings or wire centers. Thus, AT&T, for example, states that the current pricing flexibility rules strike ''a reasonable balance between the costs and benefits of identifying with greater granularity those geographic areas where LECs face competition from rivals with sunk investments and the administrative manageability of pricing flexibility rules.''

58. There also is evidence, however, that incumbent LEC billing practices may not be uniform across MSAs. Price cap LECs have the authority to set prices in zones within an MSA or the non-MSA portions of a study area. In the *Pricing Flexibility Order,* the Commission amended § 69.123 of its rules to permit incumbent price cap LECs to deaverage geographically their rates for access services in the trunking basket, and to allow price cap incumbent LECs to define the scope and number of density zones. The Commission noted that ''averaging across large geographic areas distorts the operation of markets in high-cost areas because it requires incumbent LECs to offer services in those areas at prices substantially lower than their costs of providing those services.'' However, by granting incumbent LECs the flexibility to ''choose the number of zones and the criteria for establishing zone boundaries, they are more likely to establish reasonable and efficient pricing zones.'' The record indicates that price cap LECs do, in at least some cases, take advantage of § 69.123's geographic deaveraging provisions. It is therefore possible for price cap LECs to charge different prices in, for example, rural and urban areas within an MSA or non-MSA portion of a study area, and the record indicates that carriers may engage in this practice.

59. Moreover, in Phase I and Phase II pricing flexibility areas, carriers can and do offer contract tariffs to special access customers on an individualized basis. The record indicates that such contract terms are rarely, if ever, adopted by other special access purchasers. Thus, whether special access pricing is, in fact, disciplined across a broad geographic area as claimed by incumbent LECs remains an open question.

f. Changes to MSAs Impact Non-MSA Rules

60. Price cap LECs seeking pricing flexibility under our rules in a non-MSA area must make competitive showings throughout the entire non-MSA portion of a study area, rather than a Rural Service Area or smaller geography. The Commission justified its adoption of the non-MSA as the appropriate geographic area because it predicted that ''competitive entry into rural areas [would] be less concentrated than in urban areas.'' Embarq contends that our decision to use the non-MSA parts of a study area, instead of an RSA, has made it impossible for Embarq to obtain relief in Missouri despite the presence of competition. Though Embarq's situation may be indicative of a problem specific to our choice of adopting the non-MSA, any changes we find to be warranted with respect to the MSA, as discussed above, must be reflected by corresponding changes to non-MSA areas.

61. Moreover, the record in this proceeding suggests that the *Pricing Flexibility Order's* prediction that competition in rural areas would not be concentrated was incorrect. A review of our grants of pricing flexibility for channel terminations to end users in non-MSA areas highlights problems similar to what we found in MSA areas. Specifically, out of five of these types of grants, three were based on high concentrations of demand. Verizon's grant in non-MSA Idaho was based on the revenues of 3 out of 26 wire centers, and its grant for non-MSA West Virginia was based on revenues from 8 out of 97 wire centers. A third grant, from ACS, was based on revenues from only half of the wire centers in non-MSA Juneau, Alaska. This suggests that, at the time the grant of pricing flexibility was made, competitive conditions varied greatly

within the non-MSA areas. Even if new competitors subsequently entered the non-MSA, for the reasons discussed above with respect to MSAs, they are likely to locate only in areas of high demand. Thus, the evidence in this proceeding suggests highly concentrated competitive conditions at the time pricing flexibility was granted. This indicates that the *Pricing Flexibility Order's* prediction that competition in non-MSA areas would be less concentrated than in urban areas may have been incorrect.

3. The Competitive Showings Are Not as Administratively Simple as Expected

62. In addition to the issues identified above, our experience shows that our rules, which were intended first and foremost to be straightforward and simple to administer, are not. Specifically, in adopting the *Pricing Flexibility Order,* the Commission concluded that using MSA-based rules would be simpler and less expensive to administer than rules based on other geographies or regimes that might create a ''more finely-tuned picture of competitive conditions.'' However, the rules have not been as administratively simple or easy to verify as the Commission anticipated, nor does it appear that they have provided bright-line guidance to industry. We therefore choose to redirect our efforts to conducting a more complete market analysis, as discussed in greater detail in Section 0 below.

63. Previous pricing flexibility petitions demonstrate that our rules have failed to provide a clear-cut guide to industry. For example, § 22.909(a) of our rules define MSAs for pricing flexibility, as ''* * * 306 areas * * * defined by the Office of Management and Budget, as modified by the FCC.'' Because OMB changes the list of MSAs and component counties, as discussed above, § 22.909 of the Commission's rules refers to a static list, based on data from the 1980 Census. Nonetheless, the fact that our rules refer to areas in which to make a competitive showing as ''MSAs'' has apparently created some confusion among petitioners, resulting in petitions containing data calculated over different MSA definitions. For example, Pacific Bell submitted a petition for pricing flexibility in the San Diego and Sacramento MSAs based on the list referenced in § 22.909 of our rules. In contrast, Embarq and Cincinnati Bell based their 2007 pricing flexibility petitions on MSAs drawn in accordance with a ''Metropolitan Areas (1993)'' map, located on the Commission's Web site, that provides a detailed description of how the map includes MSAs as defined by OMB. However, because the 1993 MSAs were more recently constructed and based on 1990 Census data, the component counties that make up each MSA are often different from those in the MSA list referenced in § 22.909 of our rules. Thus, our supposedly bright-line rules have failed to provide guidance to sophisticated firms such as Embarq and Cincinnati Bell.

64. Moreover, our competitive showings are ambiguous and require time-intensive review and policy decisions by Commission staff. In order to fulfill the requirements of the revenue-based competitive showings, a petitioner must: (a) Provide a list of wire centers within that MSA; and (b) calculate revenues based on that number. However, our rules do not specify how to determine whether a wire center belongs to a specific MSA, nor do they provide enough specifics as to what revenues should be included. Therefore, as applied, petitioners are making these determinations using different methodologies. For example, Southwestern Bell determined which wire centers belonged to the Amarillo and St. Louis MSAs based on ''the Collocation Implementation, Collocation Point of Contact and Tracking Database,'' which includes wire center information for all MSAs. It excluded from its revenue calculations those revenues derived from Individual Case Basis (ICB) arrangements, i.e., ''the carrier practice of providing a particular service in response to a specific request from a customer under individualized rates, terms, and conditions.'' An ICB arrangement may involve services directly related to the provision of special access services, such as special conditioning of a line. In contrast, in a 2008 petition, Windstream acknowledged that some of its wire centers located outside the applied-for MSA may serve locations inside the MSA boundary. Therefore, based on its own engineering maps, ''Windstream calculated the exchange area that fell within the MSA. If the area calculated exceeded 50 percent of the total area of the wire center, the wire center was assigned to the MSA.'' In contrast to Southwestern Bell's system of calculating revenues, Windstream included ICB revenues in its revenue calculations. Thus, in order to properly evaluate whether these petitioners have fulfilled the requirements of our rules, which are silent on these issues, Commission staff would have to do a thorough review of the company's internal records, exercise an extensive amount of independent judgment, and make some significant policy decisions as to whether each company's interpretation of our rules are consistent with the terms of the *Pricing Flexibility Order.*

C. Shortcomings of Competitive Showings Based Exclusively on Collocation

65. Significant questions also exist about the reliability of collocation as a proxy for facilities-based competition in end user channel terminations. Charges for special access generally are divided into channel termination charges and channel mileage charges. Channel termination charges recover the costs of facilities between the customer's premises and the LEC end office and the costs of facilities between the IXC POP and the LEC serving wire center. Channel mileage charges recover the costs of facilities (also known as interoffice facilities) between the serving wire center and the LEC end office serving the end user. In the *Pricing Flexibility Order,* the Commission found that pricing flexibility for channel terminations between a LEC end office and a customer premises required a higher threshold showing than pricing flexibility for other dedicated transport and special access services. In reaching this determination, the Commission acknowledged that the economics of channel terminations between the LEC office and the customer premises make it more costly for new entrants to compete in that product market.

1. Rationale for Adopting Collocation as the Sole Indicator of Competition

66. The competitive showings require price cap LECs to offer evidence of collocation by ''competitors that use transport provided by a transport provider other than the incumbent LEC'' for granting pricing flexibility for special access and dedicated transport. The Commission considered that the competitive showings reasonably balanced two goals: ''(1) Having a clear picture of competitive conditions in the MSA, so that we can be certain that there is irreversible investment sufficient to discourage exclusionary pricing behavior; and (2) adopting an easily verifiable, bright-line test to avoid excessive administrative burdens.'' The Commission found that collocation was a ''reliable indicator of sunk investment by competitors'' in dedicated transport and special access services other than channel terminations because it demonstrated a financial investment by the competitor in establishing facilities in that wire center.

67. With respect to channel terminations, the Commission acknowledged that ''collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises.'' Indeed, the Commission recognized that ''a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC.'' The Commission predicted, however, that ''that a new market entrant would provide channel terminations through collocation and leased LEC facilities only on a transitional basis and [would] eventually extend its own facilities to reach its customers.'' It thus concluded that despite ''the shortcomings of using collocation to measure competition for channel terminations, * * * it appears to be the best option available to us at this time.''

2. More Recent Evidence Suggests That Collocation May Produce an Unreliable Picture of Competitive Conditions

68. Evidence submitted to the Commission since 1999 calls into question the Commission's prediction that collocators would eventually build their own channel terminations to end users. By the end of 2005, six years after the adoption of the *Pricing Flexibility Order,* SBC Communications, Inc. (SBC) had obtained pricing flexibility for channel terminations to end users in 67 MSAs. That same year, it acquired AT&T Corporation. Both the Commission and the Antitrust Division of the U.S. Department of Justice (''the Division'') approved the transaction, subject to several concessions, including divestitures. Despite SBC's success in obtaining pricing flexibility in many MSAs, the Division's antitrust investigation concluded that ''for the vast majority of commercial buildings in its territory, SBC is the only carrier that owns a last-mile connection to the building.'' That same year, the Commission's review of Qwest's petition for forbearance in Omaha, Nebraska showed that some buildout to end users had occurred, but only in 9 out of 24 of Qwest's wire centers in the Omaha MSA. This was three years after Qwest had obtained Phase II pricing flexibility in the Omaha MSA, based on the revenues of 11 wire centers (8 of which overlapped with the 9 wire centers with buildout to end users). In 2006, the U.S. Government Accountability Office (''GAO'') analyzed 16 metropolitan areas in which the Commission had granted pricing flexibility and found that facilities-based competitors served fewer than 6 percent of buildings with at least a DS1-level of demand. In 2010, Qwest noted in its transfer of control application with CenturyLink that ''it is Qwest's practice generally to use the facilities of other carriers when it sells services to enterprise customers in locations outside of its service territory.''

69. Commenters' pleadings also suggest that collocation has not always developed into facilities-based competition. As evidence to support its assertion that our predictions about collocation were inaccurate, TW Telecom relied on data supplied by Verizon to assert that between 1996 and 2004, non-incumbent LEC channel termination buildout to commercial buildings increased from 24,000 buildings to approximately 31,467 buildings (a change of 7,467), in contrast to the ''millions of buildings served by incumbent LEC fiber.'' In 2005, WilTel estimated that competitors had deployed to 25,000 buildings, whereas Sprint asserted in 2007 that only 22,000 buildings had competing connections. Moreover, TW Telecom states that, as of a 2003 Commission finding, competitors serve only three to five percent of commercial buildings nationwide. It also submitted evidence that it contends shows that, four years after Verizon had obtained Phase I pricing flexibility in the New York MSA for channel terminations to end users, competitors served fewer than **[REDACTED]** of 220,000 buildings in New York City. Its evidence also showed that, in Chicago, where Ameritech had obtained pricing flexibility for channel terminations in 2003, competitors connected to only 429 out of 241,000 commercial buildings.

70. Commenters also argue that the mere installation of third party facilities within wire centers does not equate to competition by collocators because in some cases they are not being used to provide competitive service. For example, in its oppositions to two incumbent LEC petitions for pricing flexibility, AT&T argued that it never used the facilities it had installed in some of the wire centers listed in the petitions, and it was therefore erroneously identified as a competitive collocator. However, the competitive showing rules do not require incumbent LECs to show that collocation facilities are being used, but only that they exist in the wire center. Moreover, Sprint argues that collocation ''is indicative not that the competitor has placed its own facilities into buildings but rather that it has dependence upon the incumbent's facility.''

71. We acknowledge that this evidence is limited. The Commission's recent attempts to obtain more robust facilities data through voluntary production have provided useful, but incomplete, data. Nonetheless, the evidence we do have suggests our predictions were inaccurate and that the accuracy of the use of collocations as a proxy for actual or potential competition warrants further investigation. We therefore intend to issue a data request that will require carriers to submit the data we need to test the accuracy of the predictions we made about collocation in the *Pricing Flexibility Order.*

3. Existence of Non-Collocation Based Competition Does Not Undercut the Need To Suspend Grants of New Pricing Flexibility Petitions

72. Several commenters argue that relying exclusively on collocation is flawed because it undercounts entry by non-collocating firms who have built their own facilities. We agree, but because we lack reliable data on the extent or location of this competition, it does not change our conclusion that new pricing flexibility petitions should be suspended at this time.

73. Several commenters discuss growing competition from non-collocating competitors, such as cable. For example, Verizon claims that the competitive showings preclude it from obtaining pricing flexibility commensurate to the level of competition they claim exists in Los Angeles, Boston, New York, Philadelphia, and Washington, DC, because our rules do not account for several non-collocating firms that Verizon's research indicates have operations in those areas. AT&T has similar complaints for its operations in Chicago, Dallas, Houston, Detroit, San Diego and St. Louis, contending that it has lost special access business to cable firms in many instances. Embarq asserts that it too has lost business to a competitive LEC, Cox Cable, that does not collocate in Las Vegas, Nevada, and Fort Walton Beach and Ocala, Florida. Price cap LECs also criticize the rules for excluding competitors that collocate at ''collocation hotels,'' as opposed to price cap LEC wire centers. Thus, the record indicates that at times the rules may prevent price cap LECs from obtaining partial or full pricing flexibility because they do not account for competition sufficient to discipline rates from facilities-based competitors.

74. We agree. As the Commission stated when it adopted its competitive

showings rules, it has ''long recognized that it should allow incumbent LECs progressively greater pricing flexibility as they face increasing competition'' and wanted to ensure that its ''regulations do not unduly interfere with the development and operation of these markets as competition develops.'' It would be inconsistent with this approach if we inappropriately subjected price cap LECs to unnecessary regulations, despite the emergence of competition that bright-line rules are unable to detect. We therefore agree to undertake a robust competition analysis that takes these factors into account, as described below.

75. Moreover, there is currently no evidence in the record addressing the relationship, if any, between collocation levels and the presence of non-collocated competitors. Such data would assist in testing incumbents' claims that they have lost business to non-collocating competitors with their own fiber. We intend to obtain evidence on this point in order to conduct the robust competition analysis described below.

IV. Grants of Pricing Flexibility Are Suspended

76. As set forth in sections 0 and III.C above, there is compelling evidence that the competitive showings adopted in 1999 have not worked as intended, and that our pricing flexibility rules are simultaneously preventing grants of pricing flexibility in areas that likely are competitive and allowing grants of pricing flexibility in areas where it is not appropriate to do so. While we today initiate the process of developing a better way to identify areas where special access regulatory relief is appropriate, it would not serve the public interest to allow continued grants of pricing flexibility under our old rules. We therefore act in this section to temporarily suspend the operation of our competitive showing rules pending completion of our inquiry.

A. Suspension of Competitive Showing Rules for Channel Terminations

77. Based on the evidence in the record as discussed in subsections 0 and III.0 above, we suspend further grants of pricing flexibility on the basis of our existing pricing flexibility rules. Generally, the Commission's rules may be suspended for good cause shown. In light of the significant problems identified with grants of regulatory relief at the MSA level, continuing to grant relief under the current framework would run precisely the risk that the Commission sought to avoid in the *Pricing Flexibility Order:* ''Granting pricing flexibility over such a large geographic area would increase the likelihood of exclusionary behavior by incumbent LECs by giving them flexibility in areas where competitors have not yet made irreversible investment in facilities.'' Given our finding that the special access pricing flexibility triggers are not operating as predicted by the Commission, our action here suspending the application of those rules while we consider possible new regulatory approaches is necessary in the public interest. In addition, it is consistent with our ''continuing obligation to practice reasoned decision making'' under the APA. Indeed, this continuing obligation to practice reasoned decision making and revisit our rules is especially relevant where our predictive judgments do not materialize. The record indicates that the 1999 competitive showing rules are both over-inclusive and under-inclusive, thereby resulting in grants of pricing flexibility to broad geographic areas (*i.e.,* MSAs) based on small pockets of concentrated demand, or denials of pricing flexibility where competitive alternatives are not recognized by the existing rules. Moreover, there is evidence that collocations—while perhaps ''the best option available'' to the Commission at the time—are not a reliable indicator of the presence of actual or potential competition in the provision of channel terminations.

78. The Commission's rules provide that petitions for pricing flexibility for special access services that are not denied within 90 days after the close of the pleading cycle are deemed granted. Given the significant problems identified with our existing pricing flexibility rules discussed above, we find that it would be inappropriate to allow new grants of flexibility under those rules. Thus, pursuant to rule § 1.3, we find good cause to suspend the 90 day deadline in rule § 1.774(f)(1) and do so on our own motion. We therefore amend our rules as set forth in Appendix A.

B. Suspension of Competitive Showing Rules for Non-Channel Termination Special Access

79. As noted above, the staff analysis of specific data highlighting problems with the MSA was restricted to channel terminations to end users. Nonetheless, the record also indicates a lack of ''reasonably similar'' competitive conditions within an MSA for dedicated transport. As discussed above, both Verizon and SBC concede that special access demand—for all categories of special access services—is extremely concentrated. Fiber maps that they submitted throughout this proceeding, which include both dedicated transport and channel terminations, highlight that fact. In 2007, AT&T submitted detailed maps showing competitive deployment for Atlanta, Georgia; Miami, Florida; Columbus, Ohio; Austin, Texas and San Jose, California. In 2012, it submitted competitive deployment maps for three of those same MSAs (Atlanta, Miami and San Jose), as well as several other MSAs. Though each of those maps—whether they were produced in 2007 or 2012—display competitive fiber in the central portion of each MSA, none of those maps show that those competitive fibers reach throughout the MSAs. In addition, as discussed above with respect to our review of pricing flexibility grants for channel terminations for end users, in a significant number of the MSAs where price cap carriers have been granted relief, a large proportion of wire centers have either no collocations, no competitive transport, or both. This calls into question whether our transport bright-line tests, which if met lead to pricing flexibility being applied to the entire MSA, appropriately distinguish where competition exists and where it does not. Further, though the *Pricing Flexibility Order* noted competitive differences among special access services, it did not make any distinctions as to the appropriate geographic area of relief based on the type of service at issue. Instead, the Commission adopted bright-line competitive showings, with a uniform geographic area, for all categories of special access service. For these reasons, we find it appropriate to temporarily suspend our competitive showing rules for dedicated transport.

C. Arguments Against Suspension of Rules

80. *Broad Assertions Regarding Competition.* Commenters assert that the deregulatory approach of pricing flexibility, as well as the current competitive showing rules, has been sufficient to constrain exclusionary or predatory conduct by LECs to date. For example, Verizon, Qwest, AT&T, and CenturyLink assert that special access prices have fallen since the adoption of pricing flexibility, and that special access outputs have increased. CenturyLink states that special access must be considered in the broader context, as incumbent LECs have been facing substantial business challenges. Thus, absent evidence of a fundamental failure in the current pricing flexibility rules—which commenters believe has not been shown in the record—the

Commission should not substantially revise or eliminate those rules.

81. There is insufficient evidence in the record upon which to base general or categorical conclusions regarding the competitiveness of the special access market. As an initial matter, it is not clear how the Commission should consider arguments that market definitions are not relevant because the undefined market is highly competitive. Such arguments would have us presume the outcome at the heart of our inquiry prior to conducting any analysis of market conditions. Categorical assertions about competitiveness are not an adequate basis upon which we can base grants of pricing flexibility, particularly in light of the problems with the current competitive showing requirements, as well as the potentially conflicting evidence in the record about the changes in special access prices in Phase I and Phase II pricing flexibility areas. While incumbent LECs assert that special access prices have fallen in pricing flexibility areas, competitors state that prices, particularly in areas granted Phase II relief, have increased. This evidence is inconclusive; thus, we do not pass judgment on these assertions in this Report and Order. However, given the problems associated with the 1999 competitive showing rules, we do believe that the record contains sufficient disputed evidence to warrant further scrutiny by the Commission. The current competitive showing rules provide only a limited inquiry into the state of competition in a given market, a fact that commenters, including incumbent LECs, concede.

82. Moreover, we do not agree that *WorldCom* or the *Pricing Flexibility Order* compel us to maintain the collocation-based competitive showing rules or a similar standard. In *WorldCom,* the court explicitly affirmed the Commission's discretion to adopt new policy positions, provided that it provides a reasoned analysis to support its decisions. Further, the *WorldCom* court noted that, unless they are statutorily precluded from doing so, agencies have the discretion to make adjustments to their regulations in light of changed circumstances. The court also held that the Commission did not err in basing its policymaking on ''predictive forecasts,'' because the Commission's adoption of the competitive showing rules was a reasonable prediction of how competition for special access might develop in the future. Throughout this Report and Order, we identify the problems associated with the current pricing flexibility rules and explain why suspending the current competitive showings while we conduct a market analysis will enable us to identify a replacement for the competitive showing rules that will allow us to more effectively evaluate requests for pricing flexibility. Thus, we disagree with commenters who assert that precedent requires a different result.

83. *Data Collection Necessary.* We do not agree with commenters that it is necessary to collect additional data prior to suspending our rules. As discussed in section 0, above, the existing record contains sufficient evidence to call the continued viability of the collocation-based competitive showing rules into question. We therefore will not allow the inefficiencies resulting from those rules to go unaddressed until we are able to obtain a more extensive data set. In our view, it is appropriate to suspend the competitive showing rules adopted in the *Pricing Flexibility Order* while we undertake a competition analysis to assist us in determining how to assess the presence of actual and potential competition sufficient to discipline special access prices.

D. Changes in Regulatory Relief During Development of New Rules

84. We note that parties may still take steps to alter the regulatory status of special access services during the pendency of this proceeding. As commenters have noted, the Commission has the power to resolve allegations of unjust or unreasonable rates, terms and conditions through the complaint process in the Act, rather than through a rulemaking proceeding. Parties also may petition for forbearance from any regulation or provision of the Act pursuant to sec. 10 thereof, or seek a waiver of our rules. The availability of these forms of recourse provides additional support for suspension of our competitive showing rules pending development of an improved method for providing regulatory relief.

V. Undertaking a Market Analysis for Special Access Regulatory Relief

A. Future Steps to Analyze Competition for Special Access

85. In this section, we commence a process that will enable us to more effectively determine where regulatory relief is appropriate. In the coming months, we will undertake a robust market analysis to assist us in determining how best to assess the presence of actual and potential competition for special access that is sufficient to discipline prices. Our analysis will follow the collection of additional data and an opportunity for public comment. As described below, there is widespread accord in the record on the appropriateness of collecting additional data to inform our future actions.

86. The market analysis we will undertake in the coming months may identify reliable proxies for competition for special access services, which we could adopt in lieu of the 1999 competitive showings. Our analysis may also provide evidence that changes in our regulatory approach are warranted in particular geographic areas. At this time, we do not exhaustively specify the factors that will comprise our market analysis: these will be subject to comment by interested parties in an upcoming notice. We anticipate that the analysis will be a one-time assessment of the competitive conditions in the special access market; however, we do not foreclose the possibility that further analyses may be needed in the future. In any event, we will issue a comprehensive data collection order within 60 days to facilitate this market analysis.

B. Benefits of a More Complete Market Analysis

1. A Market Analysis is Consistent With Agency and Court Precedent

87. We concur with commenters who point out that use of market analysis in the special access context is consistent with Commission precedent. The Commission historically has conducted an examination of market conditions in several instances to assess competition for telecommunications services. In a series of orders in the *Competitive Carrier* proceedings, the Commission established a framework to evaluate competition in telecommunications markets and determine whether deregulatory treatment of certain carriers is warranted. In those orders, the Commission performed a structural market analysis to distinguish between ''dominant carriers,'' which ''possess market power (*i.e.,* the power to control price),'' and ''non-dominant carriers,'' which ''do not possess power over price.'' The Commission focused its inquiry on certain ''clearly identifiable market features,'' including a carrier's market share, number and size distribution of competing firms, the nature of competitors' barriers to entry, the availability of reasonably substitutable services, the level of demand elasticity, and whether the firm controlled bottleneck facilities. This analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or

unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner. The Commission subsequently applied the same framework to reclassify AT&T as non-dominant in the interstate interexchange service market, finding that AT&T no longer possessed individual market power with respect to those services.

88. In the 1997 *LEC Classification Order,* the Commission modified its framework for dominance/non-dominance analyses to bring the framework into accord with the antitrust analysis laid out in the 1992 Merger Guidelines, a precursor to the 2010 Horizontal Merger Guidelines that are in use today. In that order, the Commission stated that the assessment of competitive conditions requires a thorough analysis which begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.

89. More recently, the Commission has undertaken market analysis to assess the extent of competition in both merger proceedings and in the evaluation of forbearance petitions. For instance, in its analysis of the proposed AT&T/BellSouth and Verizon/MCI mergers, the Commission considered whether the mergers would reduce existing competition, as well as their likely effects on the market power of dominant firms in the relevant communications markets and the mergers' effects on future competition. Similarly, in the *Qwest Phoenix Forbearance Order* the Commission employed a structural market analysis akin to that of the *Competitive Carrier* cases to evaluate Qwest's petition for forbearance from certain wholesale and retail regulations in the Phoenix, Arizona, MSA. Additionally, a market analysis is consistent with the investigation performed by the DOJ and FTC to assess whether a horizontal merger could adversely impact competition in relevant markets.

90. In the *Pricing Flexibility Order,* the Commission declined to require incumbent LECs to perform a complete market analysis as part of the carrier's application for pricing flexibility and instead, without the benefit of a fulsome market analysis, adopted proxies for competition that were intended to measure whether actual or potential competition was sufficient to ensure just and reasonable rates, terms and conditions for special access services. As discussed above and based on the record in this proceeding, we have suspended grants of pricing flexibility on the basis of these proxies because we find that the geographic market over which relief is granted, MSAs, do not correspond to the scope of competitive entry and serious question have been raised concerning whether the presence of collocation and competitive transport are reliable indicators of the presence of competitive channel termination services. The process we begin today may well assist in developing new proxies for special access competition, which could be employed going forward to evaluate petitions for pricing flexibility. Once we have had the opportunity to collect and analyze additional data, we will be better positioned to determine what specific showings price cap carriers must make in their petitions for pricing flexibility and what information they could submit to satisfy those showings.

2. A Market Analysis Will Provide Analytical Precision

91. Several commenters recommend that, prior to adopting a new analytical framework, we collect competitive data to assess whether the current competitive showing rules are a reasonably accurate proxy for the presence of competition. Undertaking a market analysis will allow the Commission to more precisely determine where competition exists, or could potentially exist, and to develop better tests for regulatory relief to replace the current collocation-based approach. For example, as described above, some commenters observe that the collocation-based competitive showings do not account for sources of intermodal and/or intramodal competition that do not collocate in incumbent LEC facilities. Other commenters raise concerns that the 1999 competitive showing rules overlook competitors who could potentially enter the market in the near term or in the more distant future. In contrast to our current approach, a market analysis would seek to identify significant current and potential market participants, and consider their impact when assessing the level of competition in a market.

92. Several commenters state that a single market characteristic (e.g., high special access rates or carrier revenues, large market share) is generally not sufficient on its own to signify whether a given market is competitive. For example, AT&T and Verizon both assert that the Commission should not rely on market share as the basis for concluding that a given market lacks competition, because market share is a static measure that can understate the impact of competitive alternatives in dynamic markets. We agree that the Commission must conduct a more comprehensive analysis of the state of competition prior to adopting replacement competitive proxies or making other changes to the ways that incumbent LECs may obtain regulatory relief in the provision of special access services. A market analysis will enable us to make a multi-faceted assessment of competition that considers a variety of factors, including both price and non-price effects. Additionally, this type of fact-specific analysis is in line with current approaches to competition policy.

3. A Market Analysis Will Foster Broadband Deployment and Competition

93. Finally, a comprehensive market analysis will help us to take future steps to support broadband deployment and competition. In the *Qwest Phoenix Forbearance Order,* the Commission found that, ''by using the more comprehensive antitrust-based analysis that the Commission frequently has used in past proceedings, and that the [FTC and DOJ] regularly use to measure competition, we ensure that competition in downstream markets is not negatively affected by premature forbearance from regulatory obligations in upstream markets.'' Citing the National Broadband Plan, the Commission noted that ''regulatory policies for wholesale access affect the competitiveness of markets for retail broadband services provided to small businesses, mobile customers and enterprise customers.''

94. Special access circuits are a particularly important input for carriers' broadband service offerings. As the National Broadband Plan found, the costs associated with purchasing special access circuits can be a significant expense that impacts a carrier's ability to provide affordable broadband service, particularly to smaller, rural communities.

95. A market analysis will enable us to ensure that appropriate regulatory relief is granted in those markets where competitive conditions justify it. For example, we expect that our analysis will aid in determining whether purchasers can obtain special access circuits at just and reasonable prices. This inquiry could provide insight into challenges that carriers may face in deploying broadband and what actions, if any, are needed to respond to those challenges.

4. Factors to be Considered in Market Analysis

96. Some commenters, in particular incumbent LECs, recommend specific factors or considerations they believe the Commission should include in a market analysis. We address several of these recommendations below.

a. Analysis Must Be Forward-Looking and Consider Various Sources of Competition

97. As detailed below, commenters state that any market analysis we conduct must be forward-looking and account for significant competitors in a market. We agree.

98. In our view, a comprehensive market analysis will best facilitate a complete inquiry into the existence of competition in a given market, including sources of intermodal and intramodal competition, potential market entrants, uncommitted entrants, carriers that self-supply their own special access, and non-facilities-based competitors. This analysis also will consider the impact of competitors that do not collocate in an incumbent's wire center.

99. For instance, the 2010 Horizontal Merger Guidelines contain a detailed process employed to identify participants in the relevant market. Pursuant to the 2010 Horizontal Merger Guidelines, an identification of market participants includes all firms that currently earn revenues in the relevant market. A firm may be considered to be a market participant even if it does not currently earn revenues, but it is ''committed to entering the market in the near future,'' or if the firm is not a current producer in the relevant market, but ''would very likely provide rapid supply responses with direct competitive impact in the event of a [small but significant and non-transitory increase in price (SSNIP)], without incurring significant sunk costs.'' Thus, in those instances where a competitor, such as a cable or fixed wireless provider, can quickly enter the market and respond to customer demand, a market analysis would enable us to consider the likely impact of that entry on competition.

100. Moreover, a market analysis allows for specific, economically rigorous, and factually specific inquiries regarding potential competition, a factor that price cap LECs such as Verizon and AT&T contend should be included in any framework we adopt. A market analysis of potential competition assesses whether a firm is perceived to be a potential competitor, exerting a price-constraining effect on firms currently participating in the market, even though it is not currently participating in the market. We agree with commenters that our analysis of competitive conditions should incorporate an assessment of potential competition. We also agree that barriers to market entry should be considered. Entry is an important consideration in a structural analysis, as the exercise of market power is unlikely where entry barriers are low and incumbents cannot profitably raise price or otherwise reduce competition to a level below that of a competitive market. In the past, the Commission has considered potential competition and barriers to entry as part of its market analysis.

101. Further, we concur with commenters that the multi-faceted and forward-looking analysis of competition we will undertake would be inadequate if it focused solely on market share or building counts. By examining factors such as the potential for competitive effects, market entry, and potential competition, a market analysis is a forward-looking alternative to the current competitive showing rules or any like standard. That being said, we must carefully balance the benefits of relying on solid, if historical data, against the risks associated with placing too much weight on speculative data sources. We will continue to consider our future data collection needs with these points in mind.

b. Approach That Enhances Consumer Welfare

102. We agree with commenters who assert that the Commission must conduct its market analysis in light of its broader objectives for the telecommunications industry. For example, Verizon notes that pricing flexibility was among several deregulatory actions taken by the Commission in the 1990s with the goal of encouraging innovation, cost savings, and efficiencies.

103. The major purpose of the 1996 Act was to establish ''a pro-competitive, deregulatory national policy framework.'' Indeed, among its primary goals were ''opening the local exchange and exchange access markets to competitive entry'' and ''promoting increased competition in telecommunications markets that are already open to competition, including the long-distance services market.'' We undertake an analytical process to assess the level of competition in the special access market with these goals in mind. For example, our analysis may indicate that further regulatory relief is warranted in areas where competition exists, but is not captured by the current competitive proxies. As detailed above, the competitive showings adopted in the *Pricing Flexibility Order* are both over- and under-inclusive, resulting in inaccurate assessments of whether actual and potential competition is sufficient to constrain special access prices in the areas granted relief. Indeed, given the unreliable nature of the competitive showing requirements adopted in 1999, we believe a market analysis will aid us in granting deregulation in areas where actual and potential competition is sufficient to constrain prices. A nuanced market analysis will also allow us to better balance the potential costs of regulating too heavily against the potential harms of failing to undertake appropriate regulation where it is needed.

c. Dominance/Non-Dominance Classification

104. Finally, incumbent LECs assert that special access pricing flexibility should not be treated as akin to the non-dominance analyses undertaken by the Commission in the *Competitive Carrier* proceeding. Further, AT&T argues that, under a non-dominance framework, upon a finding that an incumbent lacked market power, the Commission would have to reclassify the carrier as non-dominant and relieve its dominant carrier obligations. We agree with AT&T that, once we have performed a broader evaluation of competitive conditions, our analysis may show that a carrier classified as dominant does not possess market power as defined in the *Competitive Carrier* proceeding for a particular special access service in a geographic area. In that case, the Commission may ultimately conclude that it is appropriate to grant regulatory relief in the form of non-dominance treatment for the particular service and geographic area. We will determine at a future date what criteria the Commission will consider to assess whether a finding of non-dominance for special access service is warranted in a given area.

VI. Procedural Matters

A. Paperwork Reduction Act Analysis

105. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

B. Final Regulatory Flexibility Certification

106. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *2005 Special Access NPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *2005 Special Access NPRM,* including comments on the IRFA.

107. As required by sec. 603 of the RFA, the Commission has prepared a Final Regulatory Flexibility Certification (FRFC) of the expected impact on small entities of the requirements adopted in the Report and Order, which is set forth in Appendix B of the Report and Order. The Commission will send a copy of the Report and Order, including the FRFC, to the Chief Counsel for Advocacy of the Small Business Administration.

C. Congressional Review Act

108. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

II. Ordering Clauses

109. Accordingly, *it is ordered* that pursuant to sections 1, 4(i), 4(j), and 201–205 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 201, 202, 203, 204, 205, this Report and Order *is adopted.*

110. *It is further ordered* that part 1 of the Commission's rules *is amended* as set forth in the final rules, and such rule amendments shall be effective October 18, 2012.

111. *It is further ordered* that § 1.774(f)(1) of the Commission's rules, 47 CFR 1.774(f)(1), *is suspended* until the amendments set forth in the final rules are effective.

112. *It is further ordered* that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this Report and Order *is effective* upon release.

113. *It is further ordered* that the Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

114. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Telecommunications.

Federal Communications Commission

Marlene H. Dortch,

Secretary.

Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 continues to read as follows:

Authority: 15 U.S.C. 79, *et seq.,* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r) and 309.

§ 1.774 [Amended]

■ 2. In § 1.774, remove and reserve paragraph (f)(1).

[FR Doc. 2012–23020 Filed 9–17–12; 8:45 am]

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