DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI

Re: *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order

In Lewis Carroll's *Alice's Adventures in Wonderland*, the Queen of Hearts impatiently exclaims: "Sentence first—verdict afterwards."[1] Unfortunately, the Commission's approach today draws more inspiration from the Queen of Hearts than the Administrative Procedure Act. First, the Commission proclaims its "sentence" by suspending our current pricing flexibility triggers. It then announces its intent to go about collecting the data necessary to reach a "verdict" on the competitiveness of the special access market and the effect of the current rules on prices. In short, the Commission has reversed the steps that a data-driven agency should take. As a result, today's action appears consistent with the Administrative Procedure Act only when viewed through the proverbial looking glass.

These procedural infirmities, however, are not the most troubling aspect of this item. Rather, it is the demise of the bipartisan deregulatory framework constructed by the Clinton Administration (and maintained by the Bush Administration) so that the Commission can travel down the rabbit hole of re-regulation. I do not expect that special access will be the only stop on this journey. Rather, today's order lays the predicate for the Commission to re-regulate fiber; a consistent regulatory philosophy demands as much.[2] Industry players will likely draw the same conclusion. As a result, the Commission's decision will chill infrastructure investment, slow the deployment of next-generation networks, and impede job creation. At a time when the private sector needs regulatory certainty and incentives to invest tens of billions of dollars in broadband infrastructure, the Commission takes action today that will have precisely the opposite effect.

We should be encouraging competition and infrastructure investment, not undermining it. We should be looking forward toward an all-IP world, not backward at legacy regulations developed during the fading era of copper. And we should ground any changes to our rules on data, not regulatory impulse. For these reasons, I respectfully dissent.

I.

For at least six years, the Commission has acknowledged that it does not have adequate data to determine how the rules on the books are affecting competition and infrastructure investment in the special access market.[3] Scattered throughout the docket are the many milestones: The Commission has asked parties to refresh the record on the special access market,[4] sought comment on the appropriate analytical framework for examining that market,[5]

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[1] LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

[2] For example, while I do not doubt that the Commission views today's action as "critical to driving private sector deployment of next generation networks," that statement will likely give the operators of those next generation networks considerable pause about their future regulatory environment.

[3] U.S. GOV'T ACCOUNTABILITY OFFICE, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES, GAO-07-80 (2006) (GAO REPORT).

[4] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, 22 FCC Rcd 13352 (2007).

[5] *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638 (2009).

held a staff workshop on the analytical framework,[6] requested information about the deployment of special access facilities,[7] and requested information about the prices, terms, and conditions offered in the special access market.[8]

And yet, just four months ago, the then-Chief of the Wireline Competition Bureau accurately summed up where things stand: "There is an *incredible dearth of data*. We need to be able to show that costs either do or don't relate to a market. We cannot do the analysis without the data. I understand that it would be ideal for CLECs if we could just make a finding without it. But we can't."[9]

The Commission itself said much the same thing to the U.S. Court of Appeals for the District of Columbia Circuit late last year. Despite the fact that it has been "actively engaged in the process of gathering and analyzing data that might (or might not) bear out . . . assertions about special access pricing,"[10] the Commission represented to the D.C. Circuit that it did not have the data to assess "how the pricing flexibility rules have affected the special access market."[11] Specifically, the Commission told the court that it "[l]ack[ed] sufficient data to resolve this fundamental dispute" and therefore "appropriately recognized that it should make no decisions about revising its special access rules before it has compiled and analyzed an adequate evidentiary record."[12] In other words, "[g]iven the highly fact-bound nature of the issues raised by that proceeding," any changes to our special access pricing flexibility rules must be "based on a full evidentiary record."[13]

Now, if the Commission had gathered material data in response to its September 2011 *Special Access Competition Data Public Notice*, then it might be possible to reconcile its filing in the D.C. Circuit (but not the Bureau Chief's April 2012 comments) with today's order. But it has not.[14] Indeed, the Commission today does not claim that it has the data necessary to engage in a meaningful assessment of the state of the marketplace.

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[6] *Wireline Competition Bureau Announces July 19, 2010 Staff Workshop to Discuss the Analytical Framework for Assessing the Effectiveness of the Existing Special Access Rules*, WC Docket No. 05-25, Public Notice, 25 FCC Rcd 8458 (2010).

[7] *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 15146 (2010); *see also Clarification of Data Requested in Special Access NPRM,* WC Docket No. 05-25, RM-10593, Public Notice, 25 FCC Rcd 17693 (2010).

[8] *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011) (*Special Access Competition Data Public Notice*).

[9] Ted Gotsch, *USF Contribution FNPRM Will Propose Fixes, Gillett Says*, TRDAILY, Apr. 17, 2012 (quoting then-Wireline Competition Bureau Chief Sharon Gillett) (emphasis added).

[10] *In re Comptel et al.*, Case No. 11-1262, Opposition of the FCC to Petition for Writ of Mandamus at 22 (D.C. Cir., filed Oct. 6, 2011) (General Counsel's Brief) (attached as Appendix to this Statement).

[11] *Id.* at 17.

[12] *Id.* at 19.

[13] *Id.* at 15–16.

[14] In this item, the Commission cites data that it obtained through the *Special Access Competition Data Public Notice* just two times. *See* Report and Order at note 15. First, it refers to such data to note the combined special access revenues of the largest carriers in 2010. *See* Report and Order at para. 2. It next uses that data to show that carriers offers individualized contract tariffs to customers in areas where they have obtained pricing flexibility. *See* Report and Order at para. 59. As noted above, *supra* note 9, I have attached the General Counsel's Brief to my statement. I will leave it to readers (and potentially the D.C. Circuit) to decide for themselves whether these two unremarkable data points can explain the dramatic change in the Commission's position between October 2011 and today.

It acknowledges "limitations [in] our existing data set,"[15] concedes the "widespread accord in the record on the appropriateness of collecting additional data,"[16] and asserts that "further data . . . is needed" for "a comprehensive evaluation of competition in the market for special access services."[17] Moreover, despite myriad findings regarding how well (or poorly) the existing competitive triggers reflect the state of competition in the special access marketplace, the Commission does not make a single finding about the effect our pricing flexibility rules have had upon that marketplace—and the reason, it is safe to say, is a lack of data.

For example, when it comes to the key issue of the effect that our pricing flexibility triggers have on prices, the most that the Commission can muster is that the "evidence is inconclusive."[18] Thus, it "does not pass judgment on assertions" concerning our rules' impact on prices.[19] Others who have looked at this question have reached a similar determination. The General Accounting Office has concluded that the Commission "needs a more accurate measure of effective competition and needs to collect more meaningful data,"[20] but drew no conclusions regarding how our pricing flexibility rules affected prices and deployment of special access services. Similarly, the National Regulatory Research Institute has concluded that "the available special access pricing data 'do not support any clear conclusions about price trends. Some data suggest rising prices, while other data suggest declining prices. Data quality could well be the reason for these ambiguities.'"[21]

Given the state of the record, the next step that we should be taking in this proceeding is obvious: a mandatory data collection.[22] In May, when the Chairman's Office first circulated an order addressing special access, I made it clear that I strongly supported moving forward with such a collection. Had we followed that path, we could have unanimously approved a mandatory date collection in June. But it is now August, and *still* no mandatory data collection has been issued. Remarkably, even today's order does not contain one; instead, it only contains a promise that a mandatory data collection will be forthcoming within 60 days.[23] A Commission aspiring to function as a data-driven agency should prioritize gathering the facts, not jumping to conclusions.

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[15] Report and Order at para. 52.
[16] *Id.* at para. 85.
[17] *Id.* at para. 7.
[18] *Id*. at para. 81.
[19] *Id*. Given that today's decision makes no findings as to how our current rules are impacting prices or competition in the special access marketplace, the Chairman's assertion that Commissioner McDowell and I have "no answer to the harm" that our approach would allegedly cause misses the mark. We cannot rebut findings that are nowhere to be found in the item.
[20] GAO REPORT at 15.
[21] General Counsel's Brief at 19 (quoting PETER BLUHM & ROBERT LOUBE, NATIONAL REGULATORY RESEARCH INSTITUTE, COMPETITIVE ISSUES IN SPECIAL ACCESS MARKETS 67 (Jan. 21, 2009) (NRRI REPORT)).
[22] Our past voluntary efforts have failed to provide the data we need in part because "the vast majority of the service provider members of . . . the trade association COMPTEL[] did not provide any data in response to the agency's October 2010 request." General Counsel's Brief at 14. If voluntary requests cannot provide the data we need, a mandatory data collection—with real penalties for non-compliance and an actual enforcement mechanism—is the only logical solution.
[23] Report and Order at paras. 7, 86.

We should bring this decade-old proceeding[24] to a close soon so that special-access providers and purchasers will have the regulatory certainty they need to carry out their businesses and invest in high-capacity infrastructure. The Commission apparently agrees: It aims "for final conclusions on the need for overall reform of the special access marketplace to occur in 2013."[25] I fear, however, that today's order does not move us closer to resolving this proceeding; it moves us farther away.

To begin with, the Commission's timeframe is just not realistic. Any reasonable outline of the necessary steps in the regulatory process illustrates why this is so. Let us say the Commission does meet its 60-day target and issues a mandatory data collection in October. The Paperwork Reduction Act does not allow such information collections to take immediate effect; instead, we must first seek approval from the Office of Management and Budget (OMB). Assuming we commence that process in a timely manner and everything goes smoothly, the comment period on our proposed information collection will end in December.[26] Then, if we respond to comments and submit the collection to OMB by January 2013, there will need to be another comment cycle, and the earliest OMB would approve the collection would be in March 2013.[27] Under the best of circumstances, we will collect the information by May (60 days). After that, our experts surely will need a few months to filter through that data, correct for errors, and analyze it; perhaps they could do it by September 2013. Next, we would need to develop a Notice of Proposed Rulemaking. If the NPRM were issued in November, the comment cycle would close in 2014. Final action in the proceeding might not happen for many months thereafter, if not for a year.

Even if such an aggressive schedule were possible, today's order makes it less likely that the Commission will be able to stick to it. For one, today's order declines to "exhaustively specify the factors that will comprise our market analysis,"[28] which muddies the contours of the mandatory data collection (how do we know what data to seek if we do not know what factors we should consider?). Instead, the Commission will seek public comment on the factors "in an upcoming notice"—sometime.[29]

Furthermore, the Commission's chosen framework—a full-blown market analysis—may provide "analytical precision,"[30] but it is also resource- and time-intensive. The fact that such analyses take up "considerable time and expense" on the part of all interested parties was precisely why the Commission rejected conducting market analyses prior to granting regulatory relief in the *Pricing Flexibility Order*.[31]

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[24] Although this proceeding formally commenced in 2005, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25*; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*), it actually started with a 2002 petition to reform the Commission's pricing flexibility rules. *See* AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (Oct. 15, 2002).

[25] Report and Order at note 16.

[26] 44 U.S.C. § 3506(c)(2)(A).

[27] *Id.* § 3507(a)(1)(D).

[28] Report and Order at para. 86.

[29] *Id.*

[30] *Id.* Subsection V.B.2.

[31] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases Of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West*

All in all, today's decision illustrates two starkly different approaches for how the Commission should proceed in the face of uncertainty. In my judgment, when faced with an "incredible dearth of data," the right answer is to collect the necessary information and analyze that data before taking action. By contrast, the Commission's choice is to re-regulate first and collect data later.[32]

II.

Turning from procedure to substance, I strongly disagree with the merits of the Commission's decision to suspend the competitive showings (and accompanying regulatory relief) adopted for special access and transport services in the Commission's 1999 *Pricing Flexibility Order*.[33] In that order, the Commission recognized that traditional price-cap tariffing rules "clearly limit [price-cap carriers'] ability to respond to competition."[34] For example, traditional tariffing requires geographic averaging,[35] putting price-cap carriers to a Hobson's choice of "lowering a rate throughout the area at issue or not lowering the rate at all" when competing for an enterprise customer's business.[36] Similarly, unregulated competitors could use volume and term discounts as a means of attracting customers and recouping the up-front costs of investing in high-capacity infrastructure; restricting price-cap carriers from doing the same, as traditional tariffing did, "distort[ed] the market for access services by preventing [them] from competing efficiently."[37] In sum, traditional tariffing prevented price-cap carriers from "tailor[ing] services to their customers' individual needs"[38] resulting in less competition and less efficient deployment of high-capacity services.[39]

The *Pricing Flexibility Order* also recognized that, because ratemaking "is not an exact science,"[40] traditional price-cap tariffing could distort the competitive market and deter

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Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, 14 FCC Rcd 14221, 14271–72, para. 90 (1999) (*Pricing Flexibility Order*).

[32] I disagree with the Chairman's view that today's item preserves the status quo. Rather, it suspends pricing flexibility triggers that are part of the status quo. If, for example, a state were to suspend issuing driver's licenses tomorrow, I hardly believe that most people would think of such a step as preserving the status quo in any meaningful sense. Rather, it would constitute a fundamental change to the state's licensing regime. Similarly, the Commission's action here constitutes a substantial change to our regulatory regime for special access – a change that moves in a re-regulatory direction.

[33] *Id.* Part IV.

[34] *Pricing Flexibility Order*, 14 FCC Rcd at 14273, para. 92.

[35] In recognition that greater deaveraging of tariffs would benefit consumers and competition by bringing prices more in line with costs, the *Pricing Flexibility Order* expanded the ability of price-cap carriers to deaverage their special access rates. *See id.* at 14252–57, paras. 59–66. Even with deaveraging, however, price-cap carriers' flexibility remained constrained: Each pricing zone other than the highest priced zone had to account for at least 15 percent of the price-cap carrier's trunking revenues for the study area and the annual price increase within any given zone is limited to 15 percent. *Id.* at 14254–56, paras. 62–63.

[36] *Id.* at 14288, para. 122.

[37] *Id.* at 14289, para. 124.

[38] *Id.* at 14291, para. 128.

[39] Although small enterprise customers may not need their special access services tailored in any particular fashion, larger customers—which include regional and national wireless providers—may request highly specialized proposals for deployments covering a city or region. *See id.* at 14293, para. 133 (noting that traditional tariffing restricts the ability of price-cap carriers to compete for RFPs, but the contract tariffs of Phase I pricing flexibility should be sufficient to allow competition).

[40] *Id.* at 14276, para. 96.

infrastructure investment. For example, Part 69 rate structure rules could "create implicit subsidies if [that rate structure] does not reflect accurately the manner in which [price-cap carriers] incur the costs of providing a service."[41] Similarly, competitive entry would be deterred if traditional tariffing required price-cap carriers "to price access services below cost in certain areas."[42]

The *Pricing Flexibility Order* determined that removing these regulatory obstacles to competition and infrastructure investment advanced the Telecommunications Act of 1996's deregulatory, pro-competitive national policy[43] and the goal of "foster[ing] competition and allow[ing] market forces to operate where they are present."[44] And its theory for when to afford relief was well within the mainstream of antitrust theory: The "presence of facilities-based competition with significant sunk investment," i.e., irreversible competitive entry, "makes exclusionary pricing behavior costly and highly unlikely to succeed."[45] In other words, the presence of competitive, high-capacity facilities in an area undermined a price-cap carrier's market power and justified allowing price-cap carriers to compete with their unregulated brethren.[46]

I do not read anything in the Commission's order as questioning the costs of traditional tariffing, the benefits of the deregulatory relief afforded through pricing flexibility, or even the theory of irreversible entry. Indeed, the Commission states that it cannot "evaluate . . . claims of competitive harm based on the evidence to date in the record."[47] Nevertheless, the Commission suspends the operation of the competitive triggers adopted in the *Pricing Flexibility Order* because they are supposedly "not working as predicted,"[48] are "both over-inclusive and under-inclusive,"[49] and are "likely resulting in both over- and under- regulation."[50] These conclusions are, in turn, premised on three assertions: (1) that the competitive showings are not as simple to administer as expected; (2) that collocation may produce an unreliable picture of competitive conditions; and (3) that competitive entry in the special access marketplace occurs in areas smaller than metropolitan statistical areas (MSAs). I address each of these assertions in turn.

Administrative Simplicity.—The evidence that the existing triggers are administrable is simply overwhelming. By my count, the Bureau has processed 35 separate petitions for pricing flexibility encompassing over 200 separate requests for pricing flexibility, all within the 90-day deadline established by the Commission's rules.[51] That seems like a pretty substantial administrative success to me. This is even more so the case when the biggest "controversies" the

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[41] *Id.* at 14301, para. 154; *see also* 47 C.F.R. Part 69.
[42] *Id.* at 14301, para. 155.
[43] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[44] *Pricing Flexibility Order*, 14 FCC Rcd at 14235, para. 26.
[45] *Id.* at 14264, para. 80.
[46] The Commission's only hesitation—and the reason it required a competitive showing before affording regulatory relief—was its concern that automatic relief could lead to the exclusion of competitive entry or unreasonably high special-access prices. *Id*. at 14257, para. 68.
[47] Report and Order at para. 3.
[48] *Id.*
[49] *Id.* at para. 77.
[50] *Id.* at para. 22.
[51] *See id.* Appendices D–F. I am only aware of two petitions that the Bureau did not issue orders resolving within the 90-day period. Both were filed earlier this year, and as I understand it, the Bureau was able to review both petitions in time but for whatever reason did not issue orders. Instead, it issued public notices explaining that each was deemed granted by operation of law.

Bureau has faced are mistakes by two petitioners regarding the scope of geographic relief[52] and minor ambiguities regarding whether particular wire centers or revenues should be counted as part of the competitive showing.[53]

Collocation.—I agree with the Commission that a competitor's collocation of high-capacity equipment within a price-cap carrier's wire center, coupled with the competitive provision of transport, is not a perfect proxy for channel termination facilities or facilities built out by non-collocating competitors.[54]

But then again, it was never meant to be. The *Pricing Flexibility Order* established collocation-and-transport triggers because the high costs of collocation suggested substantial sunk investment by competitors,[55] because the existence of competitive transport facilities at each collocation created actual competition for the price-cap carrier's transport services,[56] and because such a measure was administrable and verifiable.[57] Indeed, the arguments recited by the Commission against using collocation as a measure of competitive entry were presaged in the *Pricing Flexibility Order*. There, the Commission noted that collocation likely overstated competitive entry in the channel termination market because competitors are likely to focus their initial investments in carrying traffic from one aggregation point to the next and are most likely to collocate if they intend to use the price-cap carrier's last-mile facilities.[58] Conversely, "collocation may underestimate the extent of competitive facilities within a wire center because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed [price-cap carrier] facilities."[59] The *Pricing Flexibility Order* explicitly accounted for these imperfections when it established its competitive triggers.[60]

Moreover, even if the *Pricing Flexibility Order* incorrectly predicted that facilities-based, collocating competitors would rely on price-cap carrier channel terminations "only on a transitional basis,"[61] that fact alone does not justify suspending the competitive triggers. The question the Commission needs to ask and answer if it wants to suspend the triggers based on this finding is why collocating competitors have not deployed channel termination facilities to the extent predicted by the *Pricing Flexibility Order* (assuming that to be the case). One possibility is that the persistence of price-cap regulation in Phase I areas or the potential competition triggered by the irreversible competitive entry of collocating (and non-collocating) competitors has in fact constrained special access prices so much that competitive deployment of

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[52] *Id.* at para. 63. Notably, our rules hardly make it easy on parties to determine the contours of what we call an MSA for purposes of the pricing flexibility triggers. The pricing flexibility rules refer to a definition within our rules defining cellular telephone markets, *see* 47 C.F.R. §§ 1.774(a), 22.909(a), and that definition provides no guidance whatsoever as to what year's MSA list is used for pricing flexibility purposes. That the occasional petitioner chose the wrong MSA list is an argument for clarifying our rules, not for suspending them.
[53] Report and Order at para. 64.
[54] *Id.* at paras. 68–70, 73.
[55] *Pricing Flexibility Order*, 14 FCC Rcd at 14265–66, para. 81.
[56] *Id.* at 14267, para. 82.
[57] *Id.* at 14267–68, para. 84.
[58] *Id.* at 14278–79, paras. 102–03.
[59] *Id.* at 14274, para. 95.
[60] *See id.* at 14274–76, 14278, paras. 95, 100–01.
[61] *Id.* at 14280, para. 104; *see* Report and Order at paras. 68–70 (arguing that collocation does not correlate with competitive channel terminations based on available data).

last-mile channel terminations is unprofitable.[62] If true, the lack of such facilities would show that pricing flexibility *works*, not that it's broken. Another possibility, of course, is that build-out by non-collocating competitors has deterred collocating competitors from deploying their own last-mile channel terminations, a phenomenon that also would not provide any justification for suspending our pricing flexibility rules.

Geographic Scope of Relief.—The Commission's final attack on the pricing flexibility triggers targets the use of MSAs as the geographic scope of relief for pricing flexibility.[63] Today's order seizes upon a stray comment within the *Pricing Flexibility Order*—the decision to set revenues-based triggers higher than wire-center-based triggers "to ensure that competitors have extended their networks beyond a few revenue-intensive wire centers"[64]—and then ably demonstrates that the current triggers do not always bear out that comment.[65] The Commission also finds, unsurprisingly, that "evidence suggests that demand varies significantly within any MSA,"[66] "that competitors have a strong tendency to enter in concentrated areas of high business demand,"[67] that "competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand,"[68] and that the few times we have granted regulatory relief outside of MSAs, the grants were "based on high concentrations of demand."[69]

None of these facts undermines the choice of MSAs as the most appropriate area for analyzing irreversible competitive entry into a market. The *Pricing Flexibility Order*, for example, specifically anticipated that "a few wire centers may account for a disproportionate share of revenues for a particular service" and that is precisely why that order established revenues-based triggers.[70] Indeed, revenues-based triggers protect consumers by ensuring that the competitive facilities are located where the customers actually are. Revenues-based triggers also guard against gamesmanship by competitive local exchange carriers, who might only collocate in areas of high demand to prevent a price-cap carrier from receiving any regulatory relief.

What is more, the Commission's approach ignores the complete cost-benefit calculus underlying the *Pricing Flexibility Order*'s selection of MSAs rather than smaller geographic areas: choosing a smaller area would require the filing of "additional pricing flexibility petitions" (perhaps hundreds or thousands if done by wire center or zip code) that "might produce a more finely-tuned picture of competitive conditions" but cannot "justif[y] the increased expenses and administrative burdens."[71] If the Commission had reliable evidence that pricing flexibility

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[62] Recall that the competitive triggers are based on the theory that irreversible competitive entry into a market constrains a price-cap carrier's ability to engage in anticompetitive conduct or significantly raise prices for sustained period. That theory does not depend on a competitor building out facilities to each and every special access customer. Instead, it recognizes that a competitor's investment-backed presence in a market creates the very real potential for competitive-facilities deployment, which in turn should constrain the behavior of price-cap carriers. The Commission recognizes that the issue is not just actual competition, but potential competition as well. *See* Report and Order at para. 85.

[63] *Pricing Flexibility Order*, 14 FCC Rcd at 14260, para. 72.

[64] *Id.* at 14277, para. 98; *see* Report and Order at paras. 42–43.

[65] Report and Order at paras. 44–47.

[66] *Id.* at para. 36; *see also id.* at paras. 37–40.

[67] *Id.* at para. 48; *see id.* at paras. 49–53.

[68] *Id.* at para. 36.

[69] *Id.* at para. 61.

[70] *Pricing Flexibility Order*, 14 FCC Rcd at 14276, para. 97.

[71] *Id.* at 14260, para. 74.

granted under the existing triggers had led to anticompetitive conduct or unreasonably high prices in the portions of an MSA without collocation-and-transport based entry, I perhaps could see the logic behind requiring more granular geographic triggers despite the administrative hassle they would likely create. But again, we lack the data to make that type of determination.[72]

In short, the Commission seems to believe that using MSAs is flawed because the corresponding triggers grant price-cap carriers Phase II pricing flexibility even if a small minority of customers within an MSA does not have competitive facilities collocated at the nearest wire center.[73] It seems to me this is precisely backwards. The vast majority of customers within an MSA should not be denied the benefits of additional competition and infrastructure investment on the theoretical possibility that a few customers may face higher prices.

The Decision to Suspend the Triggers.—Even if I were convinced by the Commission's analysis that the current pricing flexibility triggers were incurably flawed, I still could not join today's order because the remedy the Commission chooses is fatally overbroad.

For example, if the problem with the triggers is that revenues-based triggers allow regulatory relief even if collocation and transport has occurred only in a few key wire centers, then the Commission should suspend revenues-based triggers, not all the triggers. If using MSAs yields pricing flexibility even when no competitor has deployed in a given wire center, then shrink the scope of a relief to a single wire center. If our rules are ambiguous regarding what wire centers or revenues to include in the analysis, we should clarify the rules. And if "our decision to use the non-MSA parts of a study area . . . has made it impossible for Embarq to obtain relief in Missouri despite the presence of competition,"[74] if the triggers deny "pricing flexibility where competitive alternatives are not recognized by the existing rules,"[75] if our existing triggers actually understate the extent of competition within the marketplace,[76] then revision of the triggers is the right remedy. Indeed, suspending the current triggers because they are insufficiently broad is the regulatory equivalent of cutting off one's nose to spite one's face.

I also find the decision to suspend our pricing flexibility triggers troubling for three other reasons. First, the primary complaint I have heard in this proceeding is about the price of special-access services. And yet pricing flexibility Phase I, which we deny to any future petitioners today, only lets price-cap carriers *reduce* their prices in response to competition. I am not sure I see the consumer benefit in forbidding price reductions.[77]

Second, the Commission's analysis entirely focuses on the pricing flexibility triggers for special-access channel terminations. And yet the Commission suspends the triggers for transport

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[72] The most relevant data the Commission cites regarding competitive deployment was confidentially filed by SBC in response to the 2005 NRPM. *See* Report and Order at para. 55 & notes 155–56. But we should not draw any firm conclusions about the state of facilities-based deployment from a single party's seven-year-old filing regarding four MSAs.

[73] For channel terminations, the revenues-based threshold is 85 percent, meaning the price-cap carrier receives less than 15 percent of its special-access revenues from customers in wire centers without collocation and competitive transport.

[74] Report and Order at para. 60.

[75] *Id.* at para. 77.

[76] *Id.* at paras. 77, 103.

[77] *See*, *e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.").

services as well,[78] even though the collocation-and-transport triggers are not a proxy for potential special-access facilities (as they are with channel terminations) but instead represent the deployment of actual, competitive alternatives to a price-cap carrier's transport services.

Third, I question whether the Commission has provided adequate notice of its decision to suspend the pricing flexibility rules in a manner consistent with the Administrative Procedure Act. The Commission reasons that we have a "continuing obligation to practice reasoned decision making,"[79] and our rules allow us to suspend our own rules for "good cause."[80] No quibble here, but the APA demands more: We must either publish notice of our intent to suspend and amend our rules in the *Federal Register* or "for good cause find[] (and incorporate[] the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[81]

In a footnote, the Commission points to the *seven-and-a-half year old* Special Access NPRM as the source of its notice. But that item specifically rejected the request for "a moratorium on consideration of further pricing flexibility applications pending completion of the rulemaking."[82] Given that the Commission today does not purport to rule on a petition for reconsideration of that earlier decision (and the thirty-day deadline for the Commission to reconsider that decision *sua sponte* has long since passed), I fail to see how the Commission can reverse course here without providing new notice. In addition, leaving aside the requirements of the Administrative Procedure Act, the fact that the Commission is forced to rely upon a near-decade-old NPRM as the foundation for today's action itself demonstrates that the normal means of rulemaking have been subsumed by the end of re-regulation.

III.

Aside from disagreeing with the Commission's decision to suspend the pricing flexibility triggers, I also cannot follow the path forward sketched out by the Commission.

First, the Commission suggests that a market-power/non-dominance analysis should be the test for any regulatory relief.[83] The *Pricing Flexibility Order* specifically considered—and rejected—that approach,[84] and I agree. For one thing, "non-dominance showings are neither administratively simple nor easily verifiable."[85] Instead, they require the Commission to consider "several complex criteria," such as market share and supply elasticity, which "generate considerable controversy that is difficult to resolve."[86] For another, I agree with the *Pricing Flexibility Order* that the costs of "delaying regulatory relief outweigh any costs associated with granting that relief before competitive alternatives have developed to the point that the

[78] Report and Order at para. 79.
[79] *Id.* at para. 77 (citing *Aeronautical Radio v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991)).
[80] *Id.* at para. 78 (citing 47 C.F.R. § 1.3).
[81] 5 U.S.C. § 553(b). Nothing in the Commission's order suggests that "notice and public procedure" would be impractical here, and I do not think that our newfound disagreement with the Clinton Administration's deregulatory framework would constitute "good cause" to waive such notice.
[82] *Special Access NPRM*, 20 FCC Rcd at 2035, para. 128.
[83] Report and Order Section V.B.
[84] *Pricing Flexibility Order*, 14 FCC Rcd at 14271–72, para. 90.
[85] *Id.*
[86] *Id.* Indeed, the Commission singled out market share analyses as especially burdensome, requiring "considerable time and expense" on the part of all interested parties. *Id.*

incumbent lacks market power."[87] For yet another, the market power test developed in the *Competitive Carrier* proceedings[88] has traditionally been used by the Commission to determine when regulatory obligations should be effectively eliminated—not merely altered.[89] And because pricing flexibility does not grant price-cap carriers "all the regulatory relief we afford to non-dominant carriers," a market power test is simply unnecessary.[90]

Second, the Commission seems to consider forbearance under section 10 of the Act to be a sufficient means of granting regulatory relief to price-cap carriers during the suspension of the competitive triggers.[91] But the *Pricing Flexibility Order* adopted the competitive triggers in response to forbearance petitions filed by price-cap carriers,[92] and specifically rejected forbearance (and the pending forbearance petitions) because the bright-line competitive triggers obviated the need for the Commission to make "difficult market share determinations," as required by forbearance petitions.[93] Moreover, forbearance petitions are handled in a far less timely manner than are petitions for relief under our pricing flexibility triggers. The Commission usually takes fifteen months to process the former, while the latter have almost always been resolved within 90 days.

Third and finally, the Commission seems to discount the value of administrative simplicity in favor of analysis on a more granular basis. I certainly agree that we should strive to

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[87] *Id.*

[88] *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (initiating those proceedings).

[89] *See, e.g.*, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 FCC 2d 1020 (1985) (imposing mandatory detariffing on non-dominant carriers), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (imposing mandatory detariffing on non-dominant interexchange carriers); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1479, para. 178 (1994) ("Even permitting the filing of tariffs, in the case of non-dominant carriers in competitive markets, is not in the public interest."); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CCB/CPD No. 96-3, 96-7, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (imposing permissive detariffing on non-dominant local exchange carriers); *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (denying non-dominant carrier treatment based on a market power test). This is because "firms lacking market power simply cannot rationally price their services in a way which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 31, para. 88 (1980).

[90] *Pricing Flexibility Order*, 14 FCC Rcd at 14300, para. 151.

[91] Report and Order at para. 6.

[92] *See, e.g.*, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157 (filed Aug. 24, 1998).

[93] *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA et al.*, CC Docket Nos. 98-157 et al., Memorandum Opinion and Order, 14 FCC Rcd 19947, 19948, para. 2 (1999); *id.* at 19953, para. 11 ("As the record in these proceedings clearly illustrates, non-dominance showings are neither administratively simple nor easily verifiable. The Commission previously has based non-dominance findings on complex criteria, including market share and supply elasticity. Market share analyses require considerable time and expense, and they generate controversy that is difficult to resolve.").

understand the market as best we can. But I also agree with the assessment of the *Pricing Flexibility Order* that we must not let the perfect be the enemy of the good. We are an agency of limited resources, after all, and congressional appropriators are not likely to increase our budget to analyze pricing flexibility petitions if we switch the geographic scope of our analysis from 306 MSAs to more than 40,000 zip codes.

IV.

At the end of the day, those in the private sector will likely be left with the same question that I am: Why is the Commission in such a rush to re-regulate? As the Commission pointed out to the D.C. Circuit, there are several avenues available to those who believe that carriers are offering special access at rates, terms, and conditions that are not "just and reasonable." First, "[i]f they object to the rates or terms contained in a newly filed special access tariff, [they] can ask the FCC to suspend [a] tariff for up to five months and to hold a hearing on the tariff's lawfulness pursuant to section 204 of the Act, 47 U.S.C. § 204."[94] Second, "if [they] believe that [carriers] are providing special access on terms or conditions that are not just and reasonable, they can bring an action in federal district court seeking damages under sections 206 and 207 of the Act, 47 U.S.C. §§ 206–207."[95] Or third, "they can file an administrative complaint with the Commission under section 208."[96] If these alternatives were good enough for the Commission ten months ago, why are they no longer sufficient today?[97] And more broadly, if the Commission did not have sufficient data to take action back then, how are things any different today?

I do not know the answer to these questions, and neither will those in the private sector. I fear that those who must decide whether to invest tens of billions of dollars in next-generation networks will conclude that this Commission's first instinct is to re-regulate, even though it is unable to assess the competitiveness of the special access market or the effect of the current pricing flexibility triggers on prices given the current state of the record.

What does this portend for the future? If the Clinton Administration's deregulatory framework for special access can be dismantled upon such a thin record, will our current deregulatory framework for fiber survive? The private sector will have serious doubts (as do I), and this uncertainty will chill industry's willingness to invest capital in broadband infrastructure, deploy next-generation broadband networks, and create jobs. In a misguided attempt to re-regulate the networks of yesterday,[98] we will end up deterring investment in the IP networks of tomorrow.

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[94] General Counsel's Brief at 27.
[95] *Id.* at 28.
[96] *Id*.
[97] The Commission's only answer to this question is it prefers to take a systemic approach to deal with "systemic issues with [the] special access rules." Report and Order at note 268. Among other problems with this response, the Commission today does not make any "systemic" findings regarding the effect of our current pricing flexibility triggers on either special access prices or the competitiveness of the marketplace.
[98] For example, DS1 connections, which provide service at 1.5 Mbps, do not even qualify as broadband according to the benchmark outlined in the National Broadband Plan or our recent *Broadband Deployment Reports*. *See* Omnibus Broadband Initiative, FCC, Connecting America: The National Broadband Plan, at 135 (setting a broadband target of 4 Mbps downstream); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-137, 09-51, Sixth Broadband

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At the end of *Alice's Adventures in Wonderland*, Alice wakes up from a trial that has gone awry to discover that it had all been a dream. Similarly, it is my hope that someday, we will look back on today's order as merely a fleeting departure from the pursuit of policies that provide strong incentives for infrastructure investment and facilities-based competition. If the Commission can re-regulate special access on evidence comparable to that presented against the Knave of Hearts,[99] then it will not be difficult to reverse today's decision and return to a more pragmatic path.

Until then—curiouser and curiouser. I respectfully dissent.

Deployment Report, 25 FCC Rcd 9556, 9563, para. 11 (2010) (defining broadband for as a service with speeds of at least 4 Mbps downstream).

[99] *See* CARROLL, ALICE'S ADVENTURES IN WONDERLAND ("'If that's all you know about [the Knave's alleged theft of the Queen's tarts], you may stand down,' continued the King. 'I can't go no lower,' said the Hatter: 'I'm on the floor, as it is.'"); *id*. ("'Give your evidence,' said the King. 'Shan't,' said the cook."); *id*. ("Alice watched the White Rabbit as he fumbled over the [witness] list, feeling very curious to see what the next witness would be like, '— for they haven't got much evidence *yet*,' she said to herself.").