

*Pricing Flexibility Suspension Order*, citing flaws in the competitive triggers adopted in the *Pricing Flexibility Order*, the Commission suspended, on an interim basis, any further grants of pricing flexibility for special access services under the pricing flexibility rules.<sup>287</sup>

As discussed herein, the explosive growth of competition has radically altered the wholesale transmission marketplace, especially high capacity services, since the *Pricing Flexibility Order* was released in 1999. Not only are ILECs competing with many other providers to provide legacy special access services, but demand for these services also has been shrinking as they are supplanted by higher-capacity and more flexible broadband services, which have been largely removed from the price cap regime. The marketplace has moved toward reliance on competitively provisioned Ethernet services that provide economical substitutes for legacy special access services but can also provide speeds many times higher than those legacy offerings. Recent developments – including increased competition from cable, fixed wireless, and other providers – have accelerated this trend.

In the context of these competitive developments, Phase I pricing flexibility has yielded significant benefits for consumers. For example, AT&T, Verizon and CenturyLink together have entered into a total of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

---

*Collection Order*”); *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557, 10568 ¶ 23 (2012) (“*Pricing Flexibility Suspension Order*”). Under “Phase II” pricing flexibility, price cap LECs, upon a more stringent competitive showing, were permitted to file tariffs on one day’s notice free from any price cap rate level or rate structure rules, thus permitting them to raise or lower rates. *Pricing Flexibility Order*, 14 FCC Rcd at 14235 ¶ 25, 14258 ¶ 69.

<sup>287</sup> *Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10558 ¶ 1, 10616 App. A (deleting only Section 1.774(f)(1) of the Commission’s rules, but leaving other pricing flexibility rules in place). Section 1.774(f)(1) deems pricing flexibility petitions granted unless denied by the Wireline Competition Bureau within 90 days. 47 C.F.R. § 1.774(f)(1).

REDACTED – FOR PUBLIC INSPECTION

negotiated agreements with customers filed as contract tariffs pursuant to Phase I pricing flexibility, reflecting a range of discounts of up to [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent in addition to the discounts available under generally available discount plans and discount tiers in some plans as high as [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] percent. These contract tariffs, some with major carriers and other customers, represent a tremendous saving for consumers and spur for competition. In each of those contracts, customers paid rates lower than the carrier's standard discount rates and purchased service on rates and terms better than any other competitor offered, showing that, on a level playing field, ILECs can compete with other providers.

In light of these benefits, it is not surprising that commenters representing large customers of access and other telecommunications services and commenters representing other providers supported AT&T's proposal to extend Phase I pricing flexibility relief to all price cap areas to meet competition or similar unlimited downward pricing flexibility.<sup>288</sup> It is also not surprising that the *Pricing Flexibility Suspension Order* left existing pricing flexibility grants in place.<sup>289</sup>

---

<sup>288</sup> See Supplemental Comments of AT&T Inc. at 27 & n.67, WC Dkt. No. 05-25 (Aug. 8, 2007); Comments of the Ad Hoc Telecommunications Users Committee at 50-52, WC Dkt. No. 05-25 (June 13, 2005); Comments of CompTel/ALTS, *et al.* at 31-32, WC Dkt. No. 05-25 (June 13, 2005) (supporting downward pricing flexibility through continuation of Phase I pricing flexibility, with additional limitations on terms and conditions); Comments of Sprint Corp. at 11, WC Dkt. No. 05-25 (June 13, 2005) (supporting ILEC special access contract tariffs and discount plans to meet competition as long as price cap rates remain available). See also Comments of the Ad Hoc Telecommunications Users Committee at 27, WC Dkt. No. 05-25 (Aug. 8, 2007).

<sup>289</sup> Rather than withdrawing or otherwise questioning its previous grants of Phase I relief, the Commission simply concluded that its competition triggers were flawed and needed to be updated to, *inter alia*, "extend[] relief to areas that are likely competitive but have been denied

**A. The Services Covered and Relief Sought in This Request**

Given the benefits resulting from Phase I pricing flexibility and the explosive growth in higher-capacity services competing with ILEC DSn services, the Commission should forbear from applying the rules that preclude price cap ILECs from offering Business Data Services via contract tariffs in the absence of Phase I pricing flexibility authorization. This relief would cover the full range of TDM special access services as well as the higher capacity enterprise broadband services now competing with legacy services. Because most price cap ILECs have obtained complete forbearance from all dominant carrier and tariff regulation of their enterprise broadband services,<sup>290</sup> the only enterprise broadband services covered by this request would be those ILEC services for which forbearance relief has not been obtained. Thus, the relief sought

---

regulatory relief under our existing framework.” *Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10560 ¶ 5, 10558-59, ¶ 1. Indeed, the Commission implicitly confirmed the benefits from Phase I relief by largely confining its concerns to the more expansive Phase II relief. *See id.* at 10561 ¶ 7 n.15 (commenters allege that “prices in Phase II areas are higher than prices in other areas” and that “month-to-month and term tariff rates have nearly universally increased in Phase II areas to levels higher than is the case in price cap markets”), *id.* at 10602-03 ¶ 81 (“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.”); *Special Access Data Collection Order*, 27 FCC Rcd at 16344 ¶ 63 (other carriers “raise concerns that, particularly in Phase II markets, incumbent carriers have increased special access rates to supracompetitive levels.”), *id.* at 16347 ¶ 69 n.153 (“While incumbent LECs assert that special access prices have fallen in pricing flexibility areas, competitors state that prices, particularly in Phase II areas, have increased.”). *See also* GAO, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO 07-80, at 4 (Nov. 2006) (list prices and revenues in Phase I areas lower than in Phase II areas).

<sup>290</sup> *See AT&T Forbearance Order*, 22 FCC Rcd 18705; *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (“*Embarq Forbearance Order*”); *Qwest Forbearance Order*, 23 FCC Rcd 12260.

REDACTED – FOR PUBLIC INSPECTION

here would at least partially level the playing field for all Business Data Services. Such relief would allow ILECs to offer reduced rates – but not increased rates – in contract tariffs nationwide while continuing to offer these Business Data Services at the generally applicable tariffed rates.

Specifically, the Commission should forbear from applying:

- Rule 61.3(o), limiting the definition of “Contract-based tariff” for a price cap ILEC to services offered by carriers that have obtained pricing flexibility;
- Rule 61.55(a), limiting the applicability of Rule 61.55, which details the contents of “Contract-based tariffs,” to price cap ILECs permitted to offer contract-based tariffs under Rule 69.727(a).
- Rule 69.709(b), establishing Phase I triggers for dedicated transport and special access services other than channel terminations between ILEC end offices and customer premises;
- Rule 69.711(b), establishing Phase I triggers for channel terminations between ILEC end offices and customer premises;
- The portion of Rule 69.727(a) requiring satisfaction of the Phase I triggers specified in Rules 69.709(b), 69.711(b) and 69.713(b) for an MSA or non-MSA portion of a study area in order to be granted Phase I relief for the services specified in Rules 69.709(a) (dedicated transport and special access services other than channel terminations between ILEC end offices and customer premises), and 69.711(a) (channel terminations between ILEC end offices and customer premises), *but not the portion of Rule 69.727(a) providing such relief (which includes contract tariff authority)*;
- Rule 69.705, requiring price cap ILECs to follow the procedures in Rule 1.774 to obtain Phase I pricing flexibility relief;<sup>291</sup> and
- If necessary, the requirement that packet-switched or optical transmission services must be subject to price cap regulation in order to be eligible for pricing flexibility.<sup>292</sup>

---

<sup>291</sup> Because Rule 1.774(f)(1), which deems pricing flexibility petitions granted unless denied within 90 days, was suspended in the *Pricing Flexibility Suspension Order*, 27 FCC Red at 10616 App. A, no forbearance from enforcement of that rule is necessary.

REDACTED – FOR PUBLIC INSPECTION

Forbearance from these rules will effectively provide blanket Phase I authority everywhere under the pricing flexibility rules as they existed prior to their suspension, for the limited purpose of allowing price cap ILECs to offer Business Data Service at reduced rates and more flexible terms and conditions in contract tariffs. These rules are unnecessary to protect consumers because, under the relief sought here, consumers will still have available to them all standard price cap access rates, terms and conditions, and relief will advance the public interest by making available *reduced* access rates in individualized contract tariffs, thereby facilitating competition by enabling price cap ILECs to respond to competitive offers more quickly.

---

<sup>292</sup> Previously, some price cap ILECs had not included their packet-switched and optical transmission services in their price cap tariffs, and those services thus were not eligible for pricing flexibility. See, e.g., *Petition for Waiver of Pricing Flexibility Rules for Fast Packet Services*, Memorandum Opinion and Order, 20 FCC Rcd 16840, 16843-44 ¶ 7 (2005) (“*Verizon Advanced Services Waiver*”); *Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services*, Order, 22 FCC Rcd 7482, 7482-83 ¶ 2 (WCB 2007) (“*Qwest Advanced Services Waiver*”) (together, “*Advanced Services Waiver Orders*”). In order to provide the “blanket” Phase I pricing flexibility authority sought here for any price cap ILECs whose packet-switched and/or optical transmission services have not received forbearance relief but which are also not otherwise subject to price cap regulation, the Commission should forbear from the requirement that services must be in price caps to be eligible for Phase I pricing flexibility. Cf. *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16844 ¶ 8 & n.32; *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7484 ¶ 5 & n.20 (waiving requirement that packet-switching services must be in price caps to be eligible for Phase I pricing flexibility). In order to treat those services the same as price cap services for purposes of this request, they should continue to be offered under currently available tariffs.

**B. Forbearance From Application of the Rules Prohibiting Price Cap ILECs' Use of Contract Tariffs to Provide Business Data Services in All Regions Meets the Section 10 Criteria**

**1. Applying the Rules Prohibiting the Use of Contract Tariffs to Provide Business Data Services in All Regions is Not Necessary to Ensure that Charges or Practices Are Just and Reasonable and not Unjustly or Unreasonably Discriminatory**

Applying the rules itemized above is not necessary to ensure that charges or practices in connection with price cap ILECs' offerings of Business Data Services are just and reasonable and not unjustly or unreasonably discriminatory.<sup>293</sup>

**a. Business Data Services Will Still be Generally Available in Current Tariffs**

Carriers with Phase I pricing flexibility authority offering access services in contract tariffs are required to continue making access services generally available via their standard tariffs.<sup>294</sup> This requirement ensures that "access customers can choose between obtaining services pursuant to contract tariff or [the] generally available tariff" and that "no access customer will be required to pay dramatically higher access rates as a result of Phase I pricing flexibility."<sup>295</sup> Petitioners do not seek forbearance from this requirement. Thus, forbearance from the rules prohibiting the offering of services via contract tariffs will result in a regime under which price cap ILECs will be able to offer Business Data Services in contract tariffs anywhere but will also continue to maintain generally available price cap tariffs for these services everywhere. Under this structure, price cap ILEC Business Data Service rates, terms and

---

<sup>293</sup> See 47 U.S.C. § 160(a)(1).

<sup>294</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14234-35 ¶ 24, 14288 ¶ 122.

<sup>295</sup> *Id.* at 14288 ¶ 122.

conditions, including those offered in contract tariffs, will continue to be just and reasonable and not unjustly or unreasonably discriminatory.

**b. Business Data Services Will be Available at Reduced Rates and/or on More Flexible Terms and Conditions in Contract Tariffs**

Because price cap ILECs offering access services in contract tariffs must continue to offer access services at generally available tariffed rates and terms, they will be able to offer the same services via contract tariffs, as a practical matter, only at reduced rates and/or on more flexible terms and conditions more favorable to the customer.<sup>296</sup> Thus, forbearance from the rules prohibiting the offering of access services via contract tariffs will result in a regime under which price cap ILECs will be able to offer Business Data Services at reduced rates and/or on more flexible terms and conditions in individually negotiated contract tariffs, while they continue to offer the same services under generally available rates, terms and conditions.

**c. Competition Will Continue to Ensure Just and Reasonable and Nondiscriminatory Rates, Terms and Conditions**

The high-capacity service marketplace is highly competitive and is growing more so as demand skyrockets. This increased demand is being driven in large part by an explosion in U.S. wireless data traffic, which is expected to grow 7.5 times between 2013 and 2018.<sup>297</sup> The Commission has confirmed that “demand for backhaul capacity is increasing.”<sup>298</sup> Competition

---

<sup>296</sup> See *Special Access Data Collection Order*, 27 FCC Rcd at 16321 ¶ 5; *Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10568 ¶ 23.

<sup>297</sup> See Cisco, Cisco Visual Networking Index Forecast Widget (2014), available at <http://www.ciscovni.com/forecast-widet/advanced.html>.

<sup>298</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifteenth Report, 26 FCC Rcd 9664, 9846 ¶ 322 (2011).

for these higher-capacity services is so intense that most of the higher-capacity services have been freed of price cap and tariffing rules.<sup>299</sup> At least 30 cable, wireless, CLEC and other fiber and Ethernet-over-copper providers now offer enterprise broadband services nationally or to large areas of the country.<sup>300</sup> ILECs enjoy no advantages over other providers in deploying fiber to a wireless provider's cell sites or to any type of customer location.<sup>301</sup> In fact, tw telecom was among the top three U.S. business Ethernet service providers as of mid-2014,<sup>302</sup> and ILECs now command less than half of the total Ethernet marketplace.<sup>303</sup> In responding to Sprint's request for bids for its nationwide wireless backhaul needs, Verizon won fewer than *six percent* of the Sprint sites within its region.<sup>304</sup>

The cable industry has become a force in the high-capacity service marketplace and expressly markets its business services as alternatives to ILEC DS1 and DS3 services. Cable companies already have one-quarter of the Ethernet service marketplace nationally, and that

---

<sup>299</sup> See, e.g., *AT&T Forbearance Order*, 22 FCC Rcd 18705; *Embarq Forbearance Order*, 22 FCC Rcd 19478; *Qwest Forbearance Order*, 23 FCC Rcd 12260, discussed in Comments of CenturyLink, Inc. at 18-20, WC Dkt. No. 05-25 (Feb. 11, 2013) ("CenturyLink Special Access Data Comments").

<sup>300</sup> CenturyLink Special Access Data Comments at 20-32.

<sup>301</sup> See, e.g., CenturyLink Petition for Forbearance at 34-36, WC Dkt. No. 14-9 (filed Dec. 13, 2013) ("CenturyLink Forbearance Petition").

<sup>302</sup> See Press Release, Vertical Systems Group, *Mid-Year 2014 U.S. Carrier Ethernet LEADERBOARD* (Aug. 20, 2014) available at <http://www.verticalsystems.com/vsglb/mid-year-2014-u-s-carrier-ethernet-leaderboard/>.

<sup>303</sup> Reply Comments of AT&T Inc. at 26, WC Dkt. No. 05-25 (Mar. 12, 2013) ("AT&T Special Access Data Reply Comments").

<sup>304</sup> Letter from Glenn Reynolds, VP, Policy, USTelecom, to Marlene Dortch, Secretary, FCC, at 2, WC Dkt. No. 05-25 (June 4, 2014).

share will likely grow to approximately one-third in the next few years. Bloomberg/BNA estimates that, by 2017, cable companies will control more than 40 percent of US small business Ethernet services and one-third of the wireless backhaul marketplace.<sup>305</sup>

Expanding capacity needs have reduced the preeminent role played by the DSn offerings principally at issue here, forcing them into competition with higher capacity packet-switched Ethernet services. DSn services have declined as other providers increasingly provide the higher-capacity services in their place. One analyst has reported that the proportion of enterprise purchasers' spending attributed to DS3s and lower capacity circuits declined from 68 percent in 2008 to 36 percent in 2011.<sup>306</sup> AT&T also has reported that its sales of DS1s and DS3s to wireless carriers peaked in April 2011, and by the end of 2012, wireless purchases of DS1s declined by nearly 20 percent.<sup>307</sup> AT&T reported that its Local Private Line/Special Access volumes shrank each month from March 2013 to February 2014, with the largest declines coming in the last five months of that period.<sup>308</sup> For CenturyLink, demand for DS1s and DS3s peaked in 2010 and 2011, respectively.<sup>309</sup>

Given the intense competition in the provision of higher-capacity services, precluding ILECs from offering Business Data Services through contract tariffs in all regions is unnecessary

---

<sup>305</sup> *Id.* at 3-4.

<sup>306</sup> CenturyLink Special Access Data Comments at 17.

<sup>307</sup> *Id.* at 17; Reply Declaration of Paley C. Casto ¶ 28 (attached to AT&T Special Access Data Reply Comments).

<sup>308</sup> Letter from Robert C. Barber, Gen. Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Dkt Nos. 13-5 and 12-353, Attachment at 1 (Mar. 27, 2014).

<sup>309</sup> CenturyLink Special Access Data Comments at 18.

REDACTED – FOR PUBLIC INSPECTION

to ensure just and reasonable and nondiscriminatory rates, terms and conditions. Competition already puts downward pressure on DSn and other Business Data Service rates, and the forbearance relief sought here is intended to help ILECs respond to that competition with contract offers that will further rate reductions for such services.

Wholesale competition, especially in higher capacity services, has accelerated even in the two years since the *Pricing Flexibility Suspension Order*. Even then, no one suggested that Phase I pricing flexibility was problematic. Rather, the Commission was reacting to parties' allegations that prices have increased in *Phase II* pricing flexibility areas.<sup>310</sup> The Commission also avoided any finding that competition was not sufficient to justify Phase I pricing flexibility where Phase I relief had been granted. Instead, the Commission simply concluded that its pricing flexibility triggers "are not working as predicted."<sup>311</sup> The *Pricing Flexibility Suspension Order* thus should not stand in the way of the narrow relief sought here, which is limited to the authority to offer rate reductions and more flexible terms and conditions in contract tariffs, while maintaining all existing Business Data Service tariffs.

---

<sup>310</sup> See *Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10561 ¶ 7 n.15 (commenters allege that "prices in Phase II areas are higher than prices in other areas" and that "month-to-month and term tariff rates have nearly universally increased in Phase II areas to levels higher than is the case in price cap markets"), 10602-03 ¶ 81 ("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."); *Special Access Data Collection Order*, 27 FCC Rcd at 16344 ¶ 63 (other carriers "raise concerns that, particularly in Phase II markets, incumbent carriers have increased special access rates to supracompetitive levels."), 16347 ¶ 69 n.153 ("While incumbent LECs assert that special access prices have fallen in pricing flexibility areas, competitors state that prices, particularly in Phase II areas, have increased."). See also GAO, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services* at 1 (Nov. 2006) (list prices and revenues in Phase I areas lower than in Phase II areas).

<sup>311</sup> See *Pricing Flexibility Suspension Order*, 27 FCC Rcd at 10558 ¶ 1.

REDACTED – FOR PUBLIC INSPECTION

Such narrow relief also is not barred by the allegations cited in the *Pricing Flexibility Order* to the effect that ILEC contract tariff terms and conditions unfairly “lock up” demand, thereby deterring competitive entry in an anticompetitive manner.<sup>312</sup> As the ILECs have demonstrated in the special access proceeding, those allegations are false and are fueled by the self-interest of other competitors who, as customers, demanded, and are taking full advantage of, longer term plans and deep discounts that go with them. Contract tariffs do not “lock up” demand. Rather, they simply offer more choices to the customer.<sup>313</sup>

In any event, permitting contract tariffs to provide lower rates and more flexible terms would not result in unjust or unreasonable rates or unjustly or unreasonably discriminatory rates in such an intensely competitive environment. In fact, the Commission has recognized the benefits of such term and volume discounts for decades.<sup>314</sup> “[B]oth volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term

---

<sup>312</sup> See *id.* at 10560 ¶ 3, 10561 ¶ 7 n.15.

<sup>313</sup> See AT&T Special Access Data Reply Comments at 20-40; CenturyLink Special Access Data Comments at 36-44; Reply Comments of Verizon and Verizon Wireless at 19-28, WC Dkt. No. 05-25 (Mar. 12, 2013); Reply Comments of CenturyLink Inc. at 21-33, WC Dkt. No. 05-25 (Mar. 12, 2013).

<sup>314</sup> See, e.g., *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, 16871 ¶ 29 (1998); *Private Line Rate Structure and Volume Discount Practices*, Report and Order (Proceeding Terminated), 97 FCC 2d 923, 947-48 ¶ 39-40 (1984).

relationships.”<sup>315</sup> The D.C. Circuit has concurred, explaining that these types of discounts are “most naturally viewed as a bargain containing terms that both benefit and burden its subscribers,”<sup>316</sup> and that discount plans necessarily offer far more benefits to consumers than non-discounted rates.<sup>317</sup> Indeed, courts have explained that “[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”<sup>318</sup>

Accordingly, forbearance from the rules precluding the offering of Business Data Services in contract tariffs in all regions meets the Section 10(a)(1) criterion because those rules are unnecessary to ensure just and reasonable and nondiscriminatory rates, terms and conditions.<sup>319</sup> All of the services offered at more favorable rates, terms and conditions in contract

---

<sup>315</sup> *Transport Rate Structure and Pricing*, Fourth Memorandum Opinion and Order On Reconsideration, 10 FCC Rcd 12979, 12984 ¶ 13 (1995) (citing *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463 ¶ 199 (1992)).

<sup>316</sup> *BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006).

<sup>317</sup> *Id.* at 1057 (“[I]n determining whether the . . . discount structure is discriminatory it seems far more logical to compare it to the . . . world of no volume discounts rather than to a hypothetical [ideal] volume discount plan.”). Indeed, the courts have consistently held that “bundled discounts are a common feature of our current economic system.” *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 895 n.5 (9<sup>th</sup> Cir. 2008) (“*Cascade*”); *LePage’s Inc. v. 3M*, 324 F.3d 141 (3<sup>rd</sup> Cir. 2003). See also *Cascade*, 515 F.3d at 896 (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)) (“[W]e should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition.”).

<sup>318</sup> *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990) (noting “[i]t would be ironic indeed if . . . antitrust suits themselves became a tool for keeping prices high.”)).

<sup>319</sup> 47 U.S.C. § 160(a)(1).

tariffs will also continue to be offered in generally available tariffs at existing rates, terms and conditions, and the increasingly intense competition in the Business Data Service marketplace, particularly higher capacity services, will help to ensure just and reasonable and nondiscriminatory rates and practices.

**2. Applying the Rules Prohibiting the Use of Contract Tariffs to Provide Business Data Services is Not Necessary to Protect Consumers**

Applying the rules prohibiting the offering by price cap ILECs of Business Data Services in contract tariffs is not necessary to protect consumers.<sup>320</sup> Given that the affected services will remain available at price cap rates and terms under the requested forbearance regime, customers will still be able to choose the generally available tariffed rates and terms. The dynamic competition that is transforming the high capacity marketplace will also ensure that customers have a wide range of choices. Finally, the rules precluding the offering of Business Data Services at reduced rates in individually negotiated contract tariffs reflecting customers' desired service arrangements in all regions do not protect consumers. Consumers do not need to be protected from having the service arrangements they want, at the rates they want to pay, from the service provider they have chosen – much less from having these options *plus* others.

Forbearance satisfies the Section 10(a)(2) consumer protection requirement where the requested relief provides a service option that “may benefit some customers, and existing customers may continue to purchase existing services if they find” the new option “unattractive.”<sup>321</sup> In the *ITTA Forbearance Order*, the Commission held that a request to forbear

---

<sup>320</sup> *Id.* § 160(a)(2).

<sup>321</sup> *Petition for Forbearance of the Independent Tel. & Tel. Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840, 10847 ¶ 11 (1999) (“*ITTA Forbearance Order*”).

REDACTED – FOR PUBLIC INSPECTION

from applying the Part 69 rules for mid-size ILECs to allow them to introduce new access services without obtaining prior permission met the Section 10(a)(2) threshold because “a new service expands the range of service options available to consumers,” and “the introduction of a new service does not by itself compel any access customer to reconfigure its access services and so cannot adversely affect any access customer.”<sup>322</sup> Here, too, allowing price cap ILECs to offer Business Data Services at reduced rates in contract tariffs “may benefit some customers,” and, because “existing customers may continue to purchase existing [tariffed Business Data Services] if they find” that they cannot qualify for the contract tariffs, the contract tariff option “cannot adversely affect any access customer.”<sup>323</sup> Forbearance thus satisfies the Section 10(a)(2) criterion.<sup>324</sup>

Moreover, far from protecting consumers, the current regime precludes customers from obtaining services from the provider they choose on terms that meet their needs, including lower rates. By preventing these sophisticated buyers from negotiating Business Data Service contracts designed to meet their specific needs, the rules hinder ILECs’ ability to meet competitive bids. Price cap carriers, but not their competitors, are prevented from offering the type of national and regional packages customers demand. Enabling price cap ILECs to offer Business Data Services at reduced rates and more flexible terms and conditions in contract tariffs thus would benefit consumers by providing them more competitively-priced choices than they have now.

---

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

REDACTED – FOR PUBLIC INSPECTION

The Commission has long recognized that special access customers are not individuals; rather, they are carriers and other “sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives where they exist and determining which competitor can best meet their needs.”<sup>325</sup> These wholesale and enterprise customers are capable of making informed decisions, “aware of the multitude of choices available to them.”<sup>326</sup> Such companies have access to “expert advice about service offerings and prices”<sup>327</sup> and “demand the most flexible service offerings possible.”<sup>328</sup> They are the types of customers that could benefit the most from the opportunity to negotiate customized arrangements.

Wireless providers, for example, have issued numerous RFPs for regional or national backhaul services.<sup>329</sup> Indeed, even customers with “more regional or localized operations ... are able to solicit telecommunications services from a range of potential providers.”<sup>330</sup> High-capacity customers use their buying power to play providers off each other to get more favorable rates, terms and conditions.<sup>331</sup> Thus, the sophistication of the customer base for high-capacity

---

<sup>325</sup> *Pricing Flexibility Order*, 14 FCC Rcd at 14302 ¶ 155.

<sup>326</sup> *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18475 ¶ 76 (2005). See also *AT&T Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24.

<sup>327</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24.

<sup>328</sup> *Id.*

<sup>329</sup> CenturyLink Forbearance Petition at 25.

<sup>330</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21; *Embarq Forbearance Order*, 22 FCC Rcd at 19491 ¶ 20; *Qwest Forbearance Order*, 23 FCC Rcd at 12274 ¶ 24.

<sup>331</sup> CenturyLink Forbearance Petition at 37-39.

services leads to a competitive marketplace in which complexity signals successful efforts to meet client needs, *not* the imposition of unreasonable terms and conditions.

Accordingly, forbearance from applying the rules prohibiting price cap ILECs from offering Business Data Services at reduced rates in contract tariffs in all regions meets the Section 10(a)(2) criterion because such enforcement is not necessary to protect consumers, and forbearance would give consumers more opportunities to acquire the service arrangements they desire from the providers they choose.<sup>332</sup>

**3. Forbearance From Applying the Rules Prohibiting the Use of Contract Tariffs to Provide Business Data Services Will Promote Competitive Conditions and Further the Public Interest**

Forbearance also would promote competitive market conditions and further the public interest, satisfying the requirements of Sections 10(a)(3) and 10(b).<sup>333</sup> Specifically, forbearance will enable price cap ILECs to compete more effectively against their less regulated and unregulated rivals and to focus resources on deployment of the next-generation facilities used to provide business data services. The rules that prohibit price cap ILECs from offering Business Data Services at reduced rates via contract tariffs inhibit price cap ILEC competitive responses to other providers' offers of those services and impede customers from receiving the competitively priced service arrangements they want from the providers they want. Enabling such competitive responses will promote competitive conditions and further the public interest, as reflected in the hundreds of contract tariffs at substantially discounted rates that the RBOCs have negotiated under Phase I pricing flexibility. As in the *ITTA Forbearance Order*, “[w]ith the removal of this

---

<sup>332</sup> See 47 U.S.C. § 160(a)(2).

<sup>333</sup> See *id.* §§ 160(a)(3), (b).

REDACTED – FOR PUBLIC INSPECTION

competitive disadvantage,” price cap ILECs “will be better able to respond to competition from CLECs” and others; forbearance thus is “consistent with . . . the public interest” and “would promote competitive market conditions.”<sup>334</sup>

As with the *Advanced Services Waiver Orders*, relief from rules limiting the application of Phase I relief will enable price cap ILECs to compete more effectively. In the *Verizon Advanced Services Waiver*, the Commission granted a waiver to allow Verizon to exercise Phase I pricing flexibility for certain advanced services that did not qualify for pricing flexibility in the absence of a waiver.<sup>335</sup> Verizon sought such relief in order to “respond to competition effectively” by “offer[ing] individually negotiated contracts for these advanced services and to adjust prices . . . for different customer and market segments.”<sup>336</sup> The Commission found good cause for a waiver to permit Verizon to exercise Phase I pricing flexibility for its advanced services because such relief would “promote[] competition for advanced services, resulting in more choices and better prices for customers.”<sup>337</sup> Subsequently, Qwest was granted similar waiver relief under the same competitive rationale, *i.e.*, “that the waiver granted here serves the public interest” by “[p]roviding Qwest the flexibility to offer contract tariffs tailored to the needs of individual customers,” which “will enable it to respond more effectively to competition” and thereby “promote competition in the market for advanced services and result in more choices and

---

<sup>334</sup> *ITTA Forbearance Order*, 14 FCC Rcd at 10847-48 ¶¶ 12-13.

<sup>335</sup> *Verizon Advanced Services Waiver*, 20 FCC Rcd at 16843-44 ¶ 7.

<sup>336</sup> *Id.* at 16842 ¶ 4.

<sup>337</sup> *Id.* at 16844-45 ¶¶ 8-9.

better prices for customers.”<sup>338</sup> The forbearance relief sought here would provide similar competitive and consumer benefits in the Business Data Services marketplace.

Enabling price cap ILECs to compete more effectively against their less regulated and unregulated rivals also will serve the public interest in regulatory parity. In the *AT&T Forbearance Order*, the Commission held that, “[b]y regulating AT&T on the same terms as its nondominant competitors” in the enterprise broadband marketplace, forbearance for AT&T would “serve the public interest by promoting regulatory parity among providers of these services.”<sup>339</sup> The ability to offer individualized arrangements in contract tariffs would not put ILECs completely on par with their competitors, who need not file any tariffs, but it would reduce the ILECs’ handicap in an increasingly unforgiving Business Data Services marketplace and thereby “serve the public interest by promoting regulatory parity among providers of these services.”<sup>340</sup> Indeed, the Commission further found in the *AT&T Forbearance Order* that such regulatory parity would “promote competitive market conditions and enhance competition among providers of telecommunications services as contemplated by section 10(b) [and] . . . in a manner consistent with the public interest.”<sup>341</sup>

---

<sup>338</sup> *Qwest Advanced Services Waiver*, 22 FCC Rcd at 7485 ¶ 7.

<sup>339</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49.

<sup>340</sup> *Id.* See also *Embarq Forbearance Order*, 22 FCC Rcd at 19504 ¶ 48; *Qwest Forbearance Order*, 23 FCC Rcd at 12288 ¶ 52.

<sup>341</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18731 ¶ 47; *Qwest Forbearance Order*, 23 FCC Rcd at 12287 ¶ 50; *Embarq Forbearance Order*, 22 FCC Rcd at 19503-04 ¶ 46. See also *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband*

REDACTED – FOR PUBLIC INSPECTION

In the *USTelecom Forbearance Order*, the Commission also cited the competitive and other public interest benefits of equal regulatory treatment as a significant consideration supporting various forbearance grants.<sup>342</sup> For example, in granting forbearance from the equal access “scripting” requirement, the Commission explained that such relief would “foster competition by removing regulatory requirements and the resulting costs that affect only ILECs subject to the rules and not their competitors.”<sup>343</sup> The Commission also found that forbearance for all price cap carriers from the cost assignment rules would “promote[] competition by providing a more level playing field because other providers of similar services are not subject to the rules.”<sup>344</sup> Finally, the Commission granted forbearance from certain reporting rules in order to “promote competitive market conditions and . . . competition among providers . . . because [forbearance] removes . . . obligations that only apply to certain carriers” and “ensure[s] that competing providers face a level playing field.”<sup>345</sup>

Similarly, customers will benefit from a more “level playing field”<sup>346</sup> in the Business Data Services marketplace following the grant of this petition. Forbearance will enable price cap

---

*Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304, 16355-56 ¶ 118 (2007).

<sup>342</sup> *USTelecom Forbearance Order*, 28 FCC Rcd 7627.

<sup>343</sup> *Id.* at 7637-38 ¶ 17.

<sup>344</sup> *Id.* at 7650-51 ¶ 41

<sup>345</sup> *Id.* at 7678-79 ¶ 115. *See also id.* at 7675-76 ¶ 107 (forbearance from ARMIS Report 43-01 filing requirement granted partly because “[i]mposing these costs on some competitors but not others may undermine competition.”).

<sup>346</sup> *Id.* at 7678-79 ¶ 115.

**REDACTED – FOR PUBLIC INSPECTION**

ILECs to respond more quickly to customer requests for individualized offerings tailored to their specific needs. Unrestricted Business Data Service contract tariff authority for price cap ILECs will thus allow them to compete more effectively for Business Data Service business against other providers, by reducing the inequality in “the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages.”<sup>347</sup> Although forbearance would still leave price cap ILECs substantially more heavily regulated than other providers, it would at least partially reduce the tilt in the playing field.

Accordingly, applying the rules prohibiting price cap ILECs from offering Business Data Services at reduced rates in contract tariffs in the absence of pricing flexibility is not necessary to ensure just and reasonable and nondiscriminatory charges and practices or to protect consumers, and forbearance from such enforcement would further the public interest and promote competitive conditions.

**IX. CONCLUSION**

For the reasons discussed above, the Commission should grant forbearance from application of the requirements discussed herein. Such forbearance will remove barriers to infrastructure investment, promoting deployment and competition in the provision of truly high-speed services and benefiting the American public.

Respectfully submitted,

By /s/ Jonathan Banks  
Jonathan Banks  
Senior Vice President,  
Law and Policy

---

<sup>347</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29; *Embarq Forbearance Order*, 22 FCC Rcd at 19496 ¶ 28; *Qwest Forbearance Order*, 23 FCC Rcd at 12279 ¶ 32.

**REDACTED – FOR PUBLIC INSPECTION**

Patrick S. Brogan  
Vice President, Industry Analysis

**United States Telecom Association**  
607 14th Street, N.W.  
Suite 400  
Washington, D.C. 20005  
(202) 326-7271

October 6, 2014

**CONTAINS CONFIDENTIAL INFORMATION – NOT FOR PUBLIC INSPECTION –  
COPYING PROHIBITED**

**APPENDIX A**

**47 C.F.R. § 1.54(a)(1); 47 C.F.R. § 1.54(e)(3)(i)**

USTelecom seeks forbearance (to the extent forbearance has not previously been granted) from statutory provisions, rules or requirements set forth in the table below.

***Section 271/272 and Equal Access Obligations***

| <b>Statutory Provision, Rule or Requirement</b>   | <b>As applied to</b> |
|---|----------------------|
| All remaining Section 271 obligations; 47 U.S.C. § 271.   | All RBOCs            |
| All remaining Section 272 obligations; 47 U.S.C. § 272.   | All RBOCs            |
| All remaining legacy equal access obligations carried forward via 47 U.S.C. § 251(g).   | All ILECs            |
| The nondiscrimination and imputation requirements set out in the <i>Section 272 Sunset Order, Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements</i> , Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007). | All RBOCs            |

***Rule 64.1903 Structural Separation Requirements***

| <b>Statutory Provision, Rule or Requirement</b>   | <b>As applied to</b> |
|---|----------------------|
| All remaining obligations under 47 C.F.R. § 64.1903, including any conditions imposed by prior Commission orders granting partial forbearance from 47 C.F.R. § 64.1903, including <i>Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations</i> , Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627 (2013). | All ILECs            |

***Requirement to Provide 64 kbps Voice Channel Where Copper Loop has been Retired***

| <b>Statutory Provision, Rule or Requirement</b>  | <b>As applied to</b> |
|--|----------------------|
| 47 C.F.R. § 51.219(a)(3)(iii)(C) ( <i>Triennial Review Order</i> requirement to make 64 kbps voice channel available where an ILEC retires copper in fiber loop overbuilds; <i>Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers</i> , Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (“ <i>Triennial Review Order</i> ”), <i>vacated in part on other grounds sub nom. USTA v. FCC</i> , 359 F.3d 554 (D.C. Cir. 2004)). | All ILECs            |

**CONTAINS CONFIDENTIAL INFORMATION – NOT FOR PUBLIC INSPECTION –  
COPYING PROHIBITED**

***Section 214(e) Obligations Where a Price Cap Carrier does not Receive High Cost Universal-Service Support***

| <b>Statutory Provision, Rule or Requirement</b>  | <b>As applied to</b> |
|--|----------------------|
| All remaining 47 U.S.C. § 214(e) obligations, where a price cap carrier does not receive high cost universal service support, including 47 C.F.R. §54.201(d)   | Price Cap ILECs      |
| The Commission's determination that an Eligible Telecommunications Carrier is required to provide the "supported" services throughout its service area regardless of whether such services are actually "supported" with high-cost funding throughout that area. <i>Federal-State Joint Board on Universal Service</i> , Report and Order, 12 FCC Rcd 8776, 8883-84 ¶ 192 (1997), <i>rev'd in part on other grounds sub nom. Texas Office of Public Utility Counsel v. FCC</i> , 183 F.3d 393 (5th Cir. 1999). See also <i>High-Cost Universal Service Support</i> , CETC Interim Cap Order, 23 FCC Rcd 8834, ¶ 29 (2008). | Price Cap ILECs      |

***Computer Inquiry Rules***

| <b>Statutory Provision, Rule or Requirement</b>  | <b>As applied to</b> |
|--|----------------------|
| All remaining obligations under 47 C.F.R. § 64.702.  | All ILECs            |
| All remaining obligations, including structural separation requirements, imposed by the Commission's <i>Computer II Orders; Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)</i> , 77 FCC 2d 384 (1980) (" <i>Computer II Final Decision</i> "), <i>recon.</i> , 84 FCC 2d 50 (1980) (" <i>Computer II Reconsideration Order</i> "), <i>further recon.</i> , 88 FCC 2d 512 (1981) (" <i>Computer II Further Reconsideration Order</i> "), <i>aff'd sub nom. Computer and Communications Industry Ass'n v. FCC</i> , 693 F.2d 198 (D.C. Cir. 1982), <i>cert. denied</i> , 461 U.S. 938 (1983) (collectively " <i>Computer II Proceedings</i> ").   | All ILECs            |
| All remaining obligations, including Comparably Efficient Interconnection (CEI), Open Network Architecture (ONA), and other requirements as set forth in the Commission's <i>Computer III Orders; Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)</i> , Report and Order, 104 FCC 2d 958 (1986) (" <i>Computer III Phase I Order</i> "), <i>recon.</i> , 2 FCC Rcd 3035 (1987) (" <i>Computer III Phase I Reconsideration Order</i> "), <i>further recon.</i> , 3 FCC Rcd 1135 (1988) (" <i>Computer III Phase I Further Reconsideration Order</i> "), <i>second further recon.</i> , 4 FCC Rcd 5927 (1989) (" <i>Computer III Phase I Second Further Reconsideration Order</i> "); <i>Computer III Phase I Order and Computer III Phase I Reconsideration Order vacated sub nom., California v. FCC</i> , 905 F.2d 1217 (9th Cir. 1990) (" <i>California I</i> "); <i>Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)</i> , Report and Order, 2 FCC Rcd 3072 (1987) (" <i>Computer III Phase II Order</i> "), <i>recon.</i> , 3 FCC Rcd 1150 (1988) (" <i>Computer III Phase II Reconsideration Order</i> "), <i>further recon.</i> , 4 FCC Rcd 5927 (1989) (" <i>Phase II Further Reconsideration Order</i> "); <i>Computer III Phase II Order vacated, California I</i> , 905 F.2d 1217 (9th Cir. 1990); <i>Computer III Remand Proceeding</i> , Report and Order, 5 FCC Rcd 7719 (1990) (" <i>ONA Remand Order</i> "), <i>recon.</i> , 7 FCC Rcd 909 | All ILECs            |

**CONTAINS CONFIDENTIAL INFORMATION – NOT FOR PUBLIC INSPECTION –  
COPYING PROHIBITED**

| <b>Statutory Provision, Rule or Requirement</b>   | <b>As applied to</b> |
|---|----------------------|
| (1992), <i>pets. for review denied sub nom. California v. FCC</i> , 4 F.3d 1505 (9th Cir. 1993) (“ <i>California II</i> ”); <i>Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards</i> , Report and Order, 6 FCC Rcd 7571 (1991) (“ <i>RBOC Safeguards Order</i> ”), <i>vacated in part and remanded sub nom. California v. FCC</i> , 39 F.3d 919 (9th Cir. 1994) (“ <i>California III</i> ”), <i>cert. denied</i> , 514 U.S. 1050 (1995); <i>Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services</i> , Notice of Proposed Rulemaking, 10 FCC Rcd 8360 (1995) (“ <i>Computer III Further Remand Notice</i> ”), Further Notice of Proposed Rulemaking, 13 FCC Rcd 6040 (1998) (“ <i>Computer III Further Remand Further Notice</i> ”); Report and Order, 14 FCC Rcd 4289 (1999) (“ <i>Computer III Further Remand Order</i> ”), <i>recon.</i> , 14 FCC Rcd 21628 (1999) (“ <i>Computer III Further Remand Reconsideration Order</i> ”) (collectively, “ <i>Computer III Proceedings</i> ”). | All ILECs            |

***Requirement to Provide Access to Newly Deployed Entrance Conduit at Regulated Rates***

| <b>Statutory Provision, Rule or Requirement</b>  | <b>As applied to</b> |
|--|----------------------|
| 47 U.S.C. § 224, as to the obligation to provide access to newly deployed entrance conduit at regulated rates.       | All ILECs            |
| 47 U.S.C. § 251(b)(4), as to the obligation to provide access to newly deployed entrance conduit at regulated rates. | All ILECs            |

***The Prohibition Against Using Contract Tariffs for Business Data Services in All Regions***

| <b>Statutory Provision, Rule or Requirement</b>   | <b>As applied to</b> |
|---|----------------------|
| Rule 61.3(o), 47 C.F.R. § 61.3(o), limiting the definition of “Contract-based tariff” for a price cap ILEC to services offered by carriers that have obtained pricing flexibility.  | All Price Cap ILECS  |
| Rule 61.55(a), 47 C.F.R. § 61.55(a), limiting the applicability of Rule 61.55, which details the contents of “Contract-based tariffs,” to price cap ILECs permitted to offer contract-based tariffs under Rule 69.727(a). | All Price Cap ILECS  |
| Rule 69.709(b), 47 C.F.R. § 69.709(b), establishing Phase I triggers for dedicated transport and special access services other than channel terminations between ILEC end offices and customer premises.                  | All Price Cap ILECS  |
| Rule 69.711(b), 47 C.F.R. § 69.711(b), establishing Phase triggers for channel terminations between ILEC end offices and customer premises.   | All Price Cap ILECS  |