Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593
	)	
Windstream Petition for Declaratory Ruling	)	WC Docket No. 15-1

COMMENTS OF BIRCH, INTEGRA, AND LEVEL 3

WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000

Counsel for Birch, Integra, and Level 3

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TABLE OF CONTENTS

Page

Before the
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In the Matter of	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
	)	
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	)	
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BIRCH, INTEGRA, AND LEVEL 3

Birch Communications, Inc. ("Birch"), Integra Telecom, Inc. ("Integra"), and Level 3 Communications, LLC ("Level 3") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these comments in the above-captioned proceedings on the Commission's November 25, 2014 Notice of Proposed Rulemaking ("*NPRM*")[1] and Windstream's December 29, 2014 Petition for Declaratory Ruling on the technology transitions.[2]

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[1] *See generally Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement of Cooper Loops by Incumbent Local Exchange Carriers; 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*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 (rel. Nov. 25, 2014) ("*NPRM*").

[2] *See generally* Petition for Declaratory Ruling of Windstream Corporation, WC Dkt. No. 15-1 & GN Dkt. No. 13-5 (filed Dec. 29, 2014); *see also Wireline Competition Bureau Seeks Comment on Windstream's Petition for Declaratory Ruling Seeking to Confirm ILEC's Continued*

I. INTRODUCTION AND SUMMARY

The Joint Commenters and other competitive carriers have been leading the transition to packet-based technologies—and bringing the benefits of those technologies to American businesses—for more than a decade. Competitive carriers have also made substantial network investments and provide service over their own last-mile facilities wherever possible. As the Commission has repeatedly found, however, these competitors generally face extensive economic and operational barriers to the self-deployment of such facilities. Therefore, at many business customer locations, competitive carriers must purchase last-mile access (either by leasing copper loop facilities or purchasing TDM-based last-mile transmission services) from the incumbent LEC.

In the *NPRM*, the Commission appropriately concluded that incumbent LECs' transition from copper to fiber facilities and TDM- to packet-based services "must not harm or undermine competition."[3] Absent Commission action to address flaws in its regulations governing incumbent LEC last-mile facilities, however, the incumbent LECs' technology transitions will undermine competition. In particular, competitive carriers will face substantial increases in their input costs that may force them to increase their downstream retail prices or exit the market altogether in certain relevant product or geographic markets, thereby leaving the businesses in those markets vulnerable to price increases by the incumbent LEC.

To prevent this and other harms to competition and business customers as a result of the technology transitions, the Commission should comprehensively update its last-mile access regime. The most appropriate way for the agency to accomplish this is by completing the special

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Obligation to Provide DS1s and DS3s on Unbundled Basis After Technology Transitions, Public Notice, DA 15-4 (rel. Jan. 6, 2015).

[3] *NPRM* ¶ 110.

access rulemaking proceeding and adopting final rules governing the rates, terms, and conditions on which incumbent LECs must offer access to last-mile inputs in the product and geographic markets in which they have market power. Until this occurs, however, the Commission should take the following steps to ensure that neither the discontinuance of DSn special access services and term discount plans nor the retirement or degradation of copper loop facilities by incumbent LECs harms competition or consumer welfare.

First, the Commission should adopt its proposal to require incumbent LECs that seek to discontinue, reduce, or impair legacy wholesale services (including DSn special access services) to commit to providing competitive carriers with "equivalent wholesale access" on equivalent rates, terms, and conditions. *See* Part II.A.

Second, the Commission should adopt its proposed rebuttable presumption that an incumbent LEC must obtain agency approval before discontinuing, reducing, or impairing a wholesale service such as a DSn special access service. Additionally, the Commission should require incumbents to (1) provide at least 12 months of notice before filing a discontinuance application, and (2) grandfather the existing DSn special access circuits to be discontinued for 36 months from grant of the discontinuance or the remaining duration of the term applicable to a circuit, whichever is longer. *See* Part II.B.

Third, the Commission should condition grant of a discontinuance application on compliance with the Equivalent Wholesale Access requirement. *See id.* The Commission should evaluate whether an incumbent LEC's packet-based replacement service offerings for TDM-based DSn special access services meet the Equivalent Wholesale Access requirement by using the criteria proposed by Windstream as well as several additional criteria discussed in Part II.C. In addition, the Commission should ensure that incumbent LECs do not use special construction charges as a way to circumvent the requirement that equivalent wholesale access be provided at equivalent rates. *See* Part II.D.

Fourth, the Commission should establish a rebuttable presumption that an incumbent LEC must seek approval before eliminating a term discount plan for DSn special access service. *See* Part II.E.

Fifth, the Commission should take action to ensure that competitive carriers have access to the inputs needed to provide affordable Ethernet service to small and medium-sized businesses. As discussed in Part III.A, the agency should not permit an incumbent LEC to retire copper loops that are or could be used to serve business customer locations prior to the conclusion of the special access rulemaking unless and until the incumbent LEC provides equivalent substitutes for unbundled copper loops used to provide Ethernet service.

Sixth, the Commission should update its definition of copper retirement to encompass (1) an incumbent LEC's replacement of the feeder portion of copper loop facilities with fiber, and (2) an incumbent LEC's failure to maintain copper loop facilities. *See* Part III.B.

Seventh, the Commission should adopt its proposal to require incumbent LECs to provide information about changes in rates, terms, and conditions that will accompany planned copper retirements. In addition, the Commission should require incumbent LECs to provide the network change notifications containing this information at least 12 months in advance of a planned copper retirement. *See* Part III.C.

Finally, the Commission should ensure that incumbent LECs provide unbundled access to DS0, DS1, and DS3 capacity loops during and after the technology transitions. *See* Part IV.

II. THE COMMISSION SHOULD ADOPT REQUIREMENTS TO PREVENT INCUMBENT LECs' DISCONTINUANCE OF LEGACY DSn SPECIAL ACCESS SERVICES AND TERM DISCOUNT PLANS FROM HARMING COMPETITION AND BUSINESS CUSTOMERS.

A. The Commission Should Adopt Its Proposed "Equivalent Wholesale Access" Requirement.

In the *NPRM*, the Commission tentatively concludes that it should require incumbent LECs that seek to "discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers to commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions."[4] The Commission should adopt this proposed "Equivalent Wholesale Access" requirement for discontinued incumbent LEC DSn special access services for several reasons.

To begin with, the Equivalent Wholesale Access requirement is necessary because competitive carriers continue to rely on incumbent LEC TDM-based DS1 and DS3 special access services to serve a large number of customer locations across the country. And in most of those locations, there are no viable alternatives to purchasing these legacy wholesale inputs from the incumbent LEC. The absence of wholesale competition is not surprising. Between 2003 and 2010, the Commission repeatedly found *de minimis* self-deployment by non-incumbents, and in 2005 and 2006, respectively, the Department of Justice and Government Accountability Office found that competitors had deployed their own facilities to only a small percentage of commercial buildings across the United States.[5] Given that the Commission has expressly

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[4] *Id.* ¶ 110; *see also id.* ¶ 92.

[5] *See*, *e.g.*, Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 42-44 (filed Nov. 2, 2012) (discussing FCC, DOJ, and GAO findings); *see also id.*, Attachment 2, Declaration of Susan M. Gately, ¶ 4 (demonstrating that, based on the information submitted in response to the FCC's

recognized that the economic barriers to the construction of last-mile facilities it identified more than a decade ago still exist,[6] there is no reason to question the continued relevance of these findings.

Nor can competitive carriers replace most of the DSn special access services they purchase from the incumbent LEC with unbundled network elements ("UNEs"). This is in part because UNEs are unavailable in a number of circumstances, including the following: (1) in wire centers where the non-impairment triggers established in the *TRRO* are satisfied;[7] (2) in areas where the Commission has granted forbearance from Section 251 unbundling obligations;[8] (3) in buildings where the caps established in the *TRRO* have been exceeded;[9] and (4) where competitors seek to provide certain downstream retail services (*e.g.*, standalone long distance

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2010 voluntary special access data request, incumbent LECs retain an extremely high share of the last-mile connections necessary to provide TDM-based and packet-based special access services); Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 45-46 (filed May 31, 2013).

[6] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 84 (2010) ("*Phoenix Order*") ("[T]he Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile facilities. . . . We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today."); *id.* ¶ 90 (reaching similar conclusion).

[7] *See, e.g.*, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶¶ 174, 178 (2005) ("*TRRO*").

[8] *See, e.g.*, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (2005).

[9] *See, e.g.*, *TRRO* ¶¶ 177, 181.

services) for which UNEs are unavailable.[10] Where UNEs are available, the terms and conditions in incumbent LEC special access volume/term discount plans (*e.g.*, volume shortfall penalties and UNE/special access ratio provisions) often effectively increase the cost of purchasing UNEs and thereby preclude their use as a substitute for DSn special access. Furthermore, competitive carriers may be unable to rely on UNEs in lieu of DSn special access because the process of converting circuits from special access to UNEs is often costly and slow, and may result in disruptions (*e.g.*, outages) to the business customer's service.

Given the lack of alternative suppliers of wholesale inputs and competitors' inability to rely on UNEs instead of special access in many instances, if incumbent LECs were permitted to discontinue their DSn special access services without complying with the proposed Equivalent Wholesale Access requirement, competitive carriers' input costs would increase significantly. This is because competitors would be forced to substitute overpriced incumbent LEC Ethernet services for DSn special access services at many customer locations.[11] As a result of these increased input costs, prices for downstream retail business services would increase and

[10] *See* 47 C.F.R. § 51.309(b).

[11] *See, e.g.*, Comments of COMPTEL, WC Dkt. No. 05-25 & RM-10593, at 10-11 (filed Apr. 16, 2013) (finding that AT&T's Ethernet channel termination prices are between six times higher (for 2 Mbps service) and 11 times higher (for 1 Gbps service) than a comparable service built using NECA Tariff No. 5 wholesale components, even with a three-year contract, and that CenturyLink's Ethernet channel termination prices on a three-year term are between two times higher (for 2 Mbps service) and 11 times higher (for 1 Gbps service) than a comparable service); Letter from Malena F. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, at 1-2 & Attachment (filed May 20, 2014) (comparing "AT&T's rates available to Windstream for TDM special access services and comparable Ethernet products—both tariffed/publicly available and those specified in Windstream's commercial agreements with AT&T—as applicable to the Kings Point, Florida wire center," and concluding that "AT&T's proposal to rely on 'market-based' pricing for the last-mile Ethernet special access services that would replace . . . TDM DS1s would effect a significant price increase for small and medium business customers with limited bandwidth needs—and may force competitive providers to exit the market altogether").

competition would be reduced. That is, competitive carriers would be forced to raise their retail prices and/or stop serving certain business customer locations altogether, thereby leaving customers at those locations vulnerable to price increases from the incumbent LEC (or the incumbent LEC and the incumbent cable company). The Commission should adopt the proposed Equivalent Wholesale Access requirement to prevent this outcome.

The Commission should also adopt the Equivalent Wholesale Access requirement because competitive carriers need to know *now* that they will be able to obtain equivalent wholesale access on equivalent rates, terms, and conditions following the discontinuance of incumbent LEC wholesale services such as DSn special access services. Without certainty regarding the availability of replacement services for incumbent LEC DS1 and DS3 special access or the costs of those replacement inputs, competitive carriers' attempts to offer service to new retail business customers, many of whom demand multi-year contracts, will be impaired. Nor can competitive carriers conduct the requisite business planning without certainty about the inputs they use to provide their services or the costs of those inputs. An Equivalent Wholesale Access requirement would eliminate this uncertainty and the resulting threats to competition in the retail business market.

B. The Commission Should Adopt Clear Procedural Rules Governing Incumbent LECs' Discontinuance of Legacy DSn Special Access Services and Condition Grants of Such Discontinuance on Compliance With the Equivalent Wholesale Access Requirement.

In the *NPRM*, the Commission seeks comment on adopting a rebuttable presumption that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a wholesale service.[12] The Commission should adopt this rebuttable presumption because, as explained, granting incumbent LECs a right to unilaterally discontinue wholesale services gives

[12] *NPRM* ¶ 103.

the incumbents the power to raise rivals' costs and harm competition. Unchecked exercise of this power would result in higher business broadband prices and slower, less efficient technology transitions.

The *NPRM* also seeks comment on how incumbent LECs should be permitted to rebut this presumption.[13] The Commission should require an incumbent LEC to file a certification explaining why discontinuance, reduction, or impairment of the legacy wholesale service (*e.g.*, DSn special access service) does not result in a discontinuance, reduction, or impairment of the wholesale customers' downstream retail services to a community or part of a community. Given the potential effect of discontinuance of these legacy wholesale services on competitive carriers' retail customers,[14] the Commission should reject its alternative proposal of allowing an incumbent to merely "maintain a record of the facts and analysis it relied on to determine [that] the presumption was rebutted."[15] Instead, the Commission should (1) require an incumbent LEC to file the aforementioned certification with the agency and serve it on all wholesale customers of the service at issue at least six months before the proposed discontinuance; and (2) give interested parties an opportunity to comment on the certification.

An incumbent LEC seeking to rebut the presumption in favor of prior approval should be required to show that its wholesale customers' retail service offerings will not be discontinued, reduced, or impaired as a result of either changes in the features, functionalities, and other attributes (*e.g.*, the capacity offered or the compatibility of existing customer premises equipment) or significant changes in the rates, terms, and conditions of the wholesale offering.

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[13] *Id.* ¶ 103.

[14] *Id.* ¶ 102.

[15] *Id.* ¶ 103.

For example, where a wholesale customer would incur significantly higher input costs as a result of the proposed discontinuance, reduction, or impairment, the wholesale customer's retail offering should itself be deemed to be discontinued, reduced, or impaired where the wholesale customer would likely need to (1) pass those higher costs through as higher end user rates (*i.e.*, the service offering would be impaired), (2) materially reduce the number and/or type of customers to which it markets retail services (*i.e.*, the service offering would be reduced or partially discontinued), or (3) materially alter the features, functions, or characteristics of the retail services it offers (*i.e.*, the service offering would be impaired).

Moreover, where the presumption is not rebutted, the Commission should require compliance with the Equivalent Wholesale Access requirement as a condition of any grant of an incumbent LEC application to discontinue, reduce, or impair a legacy wholesale service (*e.g.*, DSn special access service) used by competitive carriers as an input to downstream retail service. To ensure such compliance, the incumbent LEC should be required to demonstrate in its discontinuance application that it is fully prepared to satisfy the substantive criteria associated with the Equivalent Wholesale Access requirement (discussed in Part II.C below).

The *NPRM* further seeks comment on what constitutes sufficient notice for competitive carriers when an incumbent LEC seeks approval to discontinue, reduce, or impair a legacy wholesale service.[16] The Joint Commenters submit that incumbent LECs should provide at least 12 months of notice before filing a discontinuance application. This timeframe will likely allow "a competitive LEC to move its customers to alternative service arrangements absent disruptions in service while not unduly impeding the incumbent LEC's ability to transition[.]"[17] If this

[16] *Id.* ¶ 113.

[17] *Id.*

timeframe proves to be insufficient in any particular situation, then the Commission can address the need for an extended notice period in its review of the discontinuance application itself.

Finally, the Commission should adopt a rule requiring incumbent LECs to grandfather the existing DSn special access circuits to be discontinued for the longer of 36 months from the grant of the discontinuance application or the remaining duration of the term applicable to a circuit. Such a requirement is necessary because it is often difficult to persuade retail business customers to switch from DSn to packetized transmission in the middle of a contract term, and many contracts for business broadband service have a duration of three years or even longer. It is therefore reasonable to allow wholesale customers to wait until the conclusion of their retail business customers' contracts before being required to replace DSn inputs with packet-based inputs.

C. The Commission Should Clearly Define the Equivalent Wholesale Access Requirement.

In the *NPRM*, the Commission states that it seeks to "establish important ground rules that would facilitate the IP transition by establishing objective standards and clear criteria for applying the [Equivalent Wholesale Access Requirement]."[18] To that end, the agency should adopt the criteria proposed by Windstream for evaluating whether incumbent LECs' packet-based replacement service offerings (hereinafter "Replacement Services") for TDM-based DSn special access services meet the Equivalent Wholesale Access requirement.[19] In particular, the Commission should ensure as follows:

> (1) The price per Mbps of a Replacement Service shall not exceed that of the "TDM product that otherwise would have been used to provide comparable

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[18] *Id.* ¶ 111.

[19] *Id.*

special access service at 50 Mbps or below."[20] To the extent that an incumbent LEC offered its lowest per-Mbps DS1 or DS3 price pursuant to a volume or term discount plan, it should be permitted to do so for Replacement Services as well. However, to the extent that the Commission holds in a tariff investigation or rulemaking that certain components of DSn special access volume/term discount plans are unlawful, the incumbent LECs' offer of Replacement Services should comply with such determinations. For example, if the Commission applies a 50 percent cap on a purchaser's historic volume commitment for DSn special access services, that cap should also apply to Replacement Services.

(2) An incumbent LEC's wholesale rates for Replacement Services shall not exceed its retail rates.[21] Specifically, the incumbent LEC should adjust its wholesale prices for Replacement Services on an ongoing basis to provide wholesale customers with "most favored nation" treatment as compared to retail prices for services of the same type and capacity.

(3) Basic service pricing shall not increase when a customer switches from DSn special access to a Replacement Service of equivalent capacity, or, if no equivalent capacity service is available, the next-highest capacity service.[22]

(4) Bandwidth options shall not be reduced.[23] Specifically, the incumbent LEC should offer Replacement Services at capacities that are at least the same capacity offered for the discontinued DS1 or DS3 special access service (*e.g.*, Ethernet service at a capacity of at least 2 Mbps or 50 Mbps), and wholesale offerings must include, at a minimum, all of the capacity options available to retail customers.

(5) There are no "backdoor" price increases (*e.g.*, no significant changes to the charges for certain rate elements, special construction charges, lock-up provisions, etc.).[24]

And

(6) There is no impairment of service delivery or quality.[25]

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[20] *Id.*

[21] *Id.*

[22] *See id.* ("*e.g.*, [the] 2 Mbps Ethernet price shall not exceed the DS1 price when 2 Mbps is the lowest Ethernet option available").

[23] *Id.*

[24] *Id.*

[25] *See id.* ("Service functionality and quality, OSS efficiency, and other elements affecting service quality shall be equivalent to, if not better than, what is provided for TDM inputs today.

In addition to the aforementioned criteria, the Commission should adopt the following criteria to "guide its determinations of a functionally equivalent service with equivalent rates, terms, and conditions."[26] *First*, Replacement Services must be made available in all of the locations where the incumbent LECs' legacy DSn special access services were offered. This will ensure that competitive carriers can continue to serve all of the retail business customers they currently serve using the incumbent LECs' legacy wholesale inputs.

Second, the incumbent LEC should be required to memorialize all of the rates, terms, and conditions governing its Replacement Service offerings in a document on its website. Such documents (hereinafter "Equivalent Offer Descriptions") should encompass all of the subject matter areas addressed in the tariffs of the discontinued legacy DSn special access services (*e.g.*, ordering and provisioning). In addition, if an incumbent LEC makes changes to its Equivalent Offer Descriptions, (1) it should be required to notify all wholesale customers at least 6 months in advance of any such change; (2) interested parties should have the right to notify the Commission if any such change violates the Equivalent Wholesale Access requirement; and (3) where necessary, the Commission should mandate that the incumbent LEC revise the rates, terms, and/or conditions in its Equivalent Offer Description to comply with the Equivalent Wholesale Access requirement. The Commission should also adopt a presumption that an incumbent LEC's failure to offer a wholesale customer the rates, terms, and conditions set forth in the Equivalent Offer Description constitutes (1) an unreasonable practice under Section 201(b)

Installation intervals and other elements affecting service delivery shall be equivalent to, if not better than, what the incumbent delivers for its own or its affiliates' operations.").

[26] *Id.*

of the Act,[27] and (2) a failure to provide service "upon reasonable request therefor" under Section 201(a).[28]

Finally, the Commission should require incumbent LECs to certify their compliance with the Equivalent Wholesale Access requirement. Specifically, a corporate officer should submit an annual certification, under penalty of perjury, that the incumbent LEC has complied with the criteria discussed above.

D. The Commission Should Prevent Incumbent LECs From Using Special Construction Charges As a Means of Evading the Equivalent Wholesale Access Requirement.

As discussed above, incumbent LECs should not be permitted to impose "backdoor" price increases on Replacement Services via special construction charges (or any other charges). To ensure that this criterion of the Equivalent Wholesale Access requirement is met, the Commission should adopt rules, interpretive rules, or policy statements regarding special construction charges. As COMPTEL, Windstream, and XO have explained, such charges often provide incumbent LECs with an opportunity to hobble competitors by raising their costs and making service by a competitive carrier to particular business customer locations uneconomic.[29] Accordingly, the Commission should take several actions.

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[27] 47 U.S.C. § 201(b).

[28] *Id.* § 201(a).

[29] *See, e.g.*, Letter from Eric Einhorn, Windstream Communications, Inc., to Jonathan Sallet, General Counsel, FCC & Julie Veach, Chief, Wireline Competition Bureau, FCC, GN Dkt. Nos. 13-5 & 12-353, at 14 (filed Apr. 28, 2014); Letter from Thomas Cohen, Counsel for XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, at 7 (filed June 4, 2014); *see also* Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, at 1 (filed Oct. 24, 2014) ("COMPTEL *et al.* Oct. 24, 2014 Letter").

To begin with, the Commission should clarify that special construction charges may not be assessed in several specific circumstances. *First*, no special construction charges should apply where the incumbent LEC's existing copper or fiber facilities can be used to serve the wholesale customer. With respect to existing copper facilities, incumbent LECs must perform routine network modifications (such as those described in Section 51.319(d)(4) of the Commission's rules)[30] needed to make such facilities suitable for providing service to competitive carriers without assessing special construction charges. Similarly, when fiber facilities (whether used for the incumbent LEC's retail or wholesale services) already connect to the location at issue, the incumbent LEC must make capacity available to the requesting competitive carrier without assessing a special construction charge in circumstances where it could do so for a retail customer at the same location.

Second, special construction charges should not apply where the incumbent LEC would add capacity to its network in the normal course of business. As COMPTEL and other parties have explained, in circumstances where existing infrastructure is legitimately at exhaust, any new network delivery infrastructure (conduit, subduct, buried, aerial infrastructure) configured for capacity beyond that requested should be presumed to be in part for the incumbent LEC's own use and therefore deemed normal construction that is not subject to special construction charges.[31] In order to rebut this presumption, the incumbent LEC should be required to certify that it will not use the infrastructure for any of its retail services (including those of its affiliates) in the future.[32]

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[30] 47 C.F.R. § 51.319(a)(7).

[31] COMPTEL *et al.* Oct. 24, 2014 Letter, Attachment 1, at 1.

[32] *See id.*

Third, special construction charges should not apply where the incumbent LEC would make simultaneous or subsequent modifications to its network in order to comply with applicable codes or other safety or engineering requirements. Incumbents would incur these costs in the normal course of business and should not be permitted to shift them onto competitors.

The Commission should also clarify that incumbent LECs must provide wholesale customers with the following items before assessing special construction charges. *First*, the incumbent LEC must provide a detailed factual basis for any assertion that existing facilities have reached exhaust and special construction must therefore be conducted. *Second*, the incumbent LEC must provide competitors with a prompt cost basis for all estimates of special construction charges. As explained in the record, these clarifications are necessary because, among other reasons, competitive carriers have little assurance that incumbent LECs are actually testing copper facilities before declaring that the facilities are unavailable and competitors have little transparency into incumbent LEC determinations of special construction costs.[33] Finally, competitive carriers should be permitted to audit an incumbent LEC's records with respect to special construction charges.

E. The Commission Should Adopt New Requirements Governing Incumbent LECs' Discontinuance of Term Discount Plans.

The incumbent LECs' term discount plans are critical to competitors' ability to provide services to downstream retail business customers. Because the incumbents' undiscounted month-to-month rates (also known as "rack rates") for DS1 and DS3 special access services are

[33] *See, e.g.*, COMPTEL *et al.* Oct. 24, 2014 Letter at 1; Letter from Eric N. Einhorn, Windstream Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, at 3, n.7 (filed Nov. 22, 2013) ("For example, Windstream received a 10 Mbps Ethernet special construction quote last month from AT&T for $99,685 (material, labor, and taxes) to which 'revenue recovery charges in the amount of $53,125' also applied.").

unreasonably high, these plans often provide the only economically viable means of obtaining the wholesale inputs competitive carriers need to compete. As was clear when AT&T proposed grandfathering certain term discount plans in 2013, elimination of these plans would effectively impose a substantial rate increase on competitors, impairing their ability to serve business customers. In order to prevent harm to competition and to these customers, the Commission should establish a rebuttable presumption that an incumbent LEC must seek approval prior to eliminating any tariffed term discount plan.

1. Due to Incumbent LECs' Unreasonably High Rack Rates, Special Access Services Offered Under Term Discount Plans Are Critical Inputs to Competitive Carriers' Retail Business Service Offerings.

As discussed above, competitive carriers continue to rely on incumbent LEC TDM-based DS1 and DS3 special access services to serve a large number of business customer locations across the country, and in most of those locations, there are no viable alternatives to purchasing these legacy wholesale inputs from the incumbent LEC.[34] Where this is the case, competitors would like to purchase these services on a month-to-month basis, but the incumbent LECs' rack rates are typically so high as to be cost prohibitive. If a competitor were to rely on services purchased at the rack rates, it would generally be unable to offer services to downstream retail business customers at competitive prices. As economists have explained, incumbent LECs have an incentive to keep their rack rates very high in order to induce competitors to agree to term and volume commitments in exchange for discounts and other benefits.[35]

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[34] *See supra* Part II.A.

[35] *See* Reply Declaration of Joseph Farrell on Behalf of COMPTEL, ¶ 21 (dated July 29, 2005) (attached to Reply Comments of COMPTEL *et al.*, WC Docket No. 05-25 *et al.* (filed July 29, 2005)) ("[O]nce an ILEC has contracted with some of its customers for a percentage discount off the month-to-month tariff, it has an incentive to raise the latter above the level that it would have chosen otherwise.") (internal citation omitted).

Term discount plans offer substantial discounts off of incumbent LECs' rack rates. For example, for a DS1 channel termination in legacy Bell Atlantic territory, Verizon charges an undiscounted installation non-recurring charge ("NRC") of $355.00 and monthly recurring charges ("MRCs") that range from $197.00 to $310.64,[36] but if the customer commits to a seven-year term, Verizon charges only a $1.00 NRC and MRCs that range from $118.20 to $186.39 for a monthly discount of approximately 40 percent.[37] Similarly, for a DS1 channel termination in legacy Southwestern Bell territory, AT&T charges an installation NRC of $900.00 and MRCs that range from $195.00 to $205.00.[38] If a customer commits to purchasing this circuit for a term of seven years, however, AT&T waives the $900.00 NRC in its entirety and charges the customer MRCs that range from $90.00 to $105.00 per channel termination for a monthly discount of up to 53.85 percent.[39] These discounted rates—while still higher than what a competitive market would yield—make it feasible for competitors to offer downstream retail services to business customers. Thus, as AT&T itself has acknowledged, "very few special access customers pay the rack rate."[40]

Nevertheless, in 2013, AT&T unilaterally sought to grandfather its term discount plans

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[36] *See* Verizon Telephone Companies Tariff F.C.C. No. 1 § 7.5.9(A)(1) (effective date July 2, 2013). These rates do not include the cost of interoffice transport. *See id.* § 7.5.9(B)(1)(b).

[37] *See id.* § 7.5.16(D).

[38] *See* Southwestern Bell Tariff F.C.C. No. 73 § 7.3.10(F)(1) (effective date Jan. 16, 2014). These rates do also not include the cost of interoffice transport. *See id.* § 7.3.10(F)(2).

[39] *See id.* § 7.3.10(F)(10.4)(1)

[40] Supplemental Comments of AT&T, Inc., WC Docket No. 05-25 & RM-10593, at 36-37 (filed Aug. 8, 2007). In fact, competitors' reliance on term discount plans is so great that AT&T has argued that its rack rates have "no relevance" to the Commission's evaluation of the special access market. *Id.*; *see also* Supplemental Reply Comments of AT&T Inc., WC Docket No. 05-25, at 25-26 (arguing that "the relevant rates are the discounted rates that customers actually pay, not the 'rack' rates") (filed Aug. 15, 2007).

longer than three years for DS1 and DS3 special access services—a change that would have eliminated the core inputs that AT&T's competitors use to serve downstream retail business customers—with a simple, streamlined tariff filing requesting "deemed lawful" status on 15 days' notice.[41] By forcing customers from lower-priced, longer-term plans to higher-priced, shorter-term plans, AT&T's proposed change would have increased special access prices by as much as 24 percent.[42] Because competitors purchase "the vast majority of their DS1 and DS3 special access from AT&T under [the longer-term plans],"[43] they stood to incur "tens of millions

[41] *See* Ameritech Transmittal No. 1803, Tariff F.C.C. No. 2 (filed Nov. 25, 2013); BellSouth Transmittal No. 71, Tariff F.C.C. No. 1 (filed Nov. 25, 2013); Nevada Bell Transmittal No. 254, Tariff F.C.C. No. 1 (filed Nov. 25, 2013); Pacific Bell Transmittal No. 498, Tariff F.C.C. No. 1 (filed Nov. 25, 2013); SNET Transmittal No. 1061, Tariff F.C.C. No. 39 (filed Nov. 25, 2013); SWBT Transmittal No. 3383, Tariff F.C.C. No. 73 (filed Nov. 25, 2013).

[42] *See* Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, William H. Weber, General Counsel, Cbeyond, Inc., Christopher Murray, Senior Vice President, Public Policy, EarthLink, Inc., Michael Mooney, General Counsel, Regulatory Policy, Level 3 Communications LLC, Katherine K. Mudge, Vice President – Regulatory Affairs & Litigation, MegaPath Corporation, Charles W. McKee, Vice President, Government Affairs, Federal and State Regulatory, Sprint Corporation, Michael Rouleau, Senior Vice President – Business Development and Public Policy, tw telecom inc., & Lisa R. Youngers, Vice President and Assistant General Counsel – Federal Affairs, XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25, 10-90, RM-10593, GN Docket Nos. 13-5, 12-353, at 2 (filed Oct. 18, 2013) ("Joint Oct. 18, 2013 Ex Parte"); *see also* Petition of Sprint Corporation to Reject and to Suspend and Investigate, at 10-11 (filed Dec. 2, 2013) ("Sprint Petition") (estimating that the changes would have increased the cost of representative DS1 and DS3 circuits by between 4 and 24 percent, depending on the circuit and the AT&T region); Ad Hoc Telecommunications Users Committee, Petition to Suspend and Investigate, at 2-3 (filed Dec. 2, 2013) ("Ad Hoc Petition to Suspend and Investigate") (estimating rate increases of 22 and 27 percent for various services); Consolidated Communications, Petition to Reject or Suspend and Investigate AT&T Tariff Revisions, at 4-5 (filed Dec. 2, 2013) (estimating increases as high as 43.8 percent for certain rate elements) ("Consolidated Communications Petition"); XO Communications, LLC, Petition to Suspend and Investigate, at 4 (filed Dec. 2, 2013) ("XO Petition") (estimating increases "in the range of 14-23%").

[43] Petition of Cbeyond, Integra, Level 3, and tw telecom to Suspend and Investigate, at 7 (filed Dec. 2, 2013); *see also* XO Petition at 3 ("To obtain DS1 and DS3 capacity circuits at prices that enable some measure of meaningful competition with AT&T, XO has been required to enter into long term plans of more than 36 months with lock-up provisions that require minimum volume thresholds and impose other onerous provisions that keep XO 'loyal' to AT&T."); Sprint Petition

of dollars" in new costs, which would have had "a sweeping effect on a wide range of services and activities."[44] If AT&T's proposed changes had been approved, competitors' margins would have been "reduced dramatically,"[45] and these reduced margins would have "hinder[ed] the ability of [competitive LECs] to compete in the downstream retail small and medium-sized business market."[46] According to a coalition of business customers, "the impact upon the end user market" would have been "substantial."[47]

The Bureau suspended AT&T's proposed tariff changes,[48] prompting AT&T to withdraw the changes rather than face an investigation. However, competitors remain reliant on AT&T's

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at 2-3 (explaining that "Sprint and others rely on [these plans] to meet many of their special access needs"); Consolidated Communications Petition at 3 ("These pricing plans appear to be the preferred pricing option for bulk purchasers of AT&T's special access services, including its competitors such as Consolidated that use AT&T's special access services to reach customers that Consolidated would otherwise be unable to reach economically through deployment of its own last mile facilities or use of third-party facilities.").

[44] Joint Oct. 18, 2013 Ex Parte at 2; *see also* Petition of Windstream Corporation to Suspend and Investigate Southwestern Bell Telephone Company Transmittal No. 3383, at 1-2 (filed Dec. 2, 2013) ("Windstream Petition to Suspend and Investigate") (estimating that Windstream's aggregate expenses under Southwestern Bell's Term Commitment Plan would have increased by more than $25M).

[45] XO Petition at 10.

[46] Windstream Petition to Suspend and Investigate at 10 ("Such increases in circuit expenses would hinder the ability of CLECs to compete in the downstream retail small and medium-sized business market. CLEC customers either will have to pay significantly higher rates (as prices will increase for the lowest priced options for business class-services), or effectively they will be driven to AT&T service, where they will be locked into long-term retail contracts created in the absence of meaningful competitive choices. Either way, competition in the business consumer marketplace will be substantially impaired.").

[47] Ad Hoc Petition to Suspend and Investigate at 4.

[48] *See Suspension and Investigation of AT&T Special Access Tariffs; Ameritech Operating Companies Tariff F.C.C. No. 2; BellSouth Telecommunications, LLC Tariff F.C.C. No. 1; Nevada Bell Telephone Company Tariff F.C.C. No. 1; Pacific Bell Telephone Company Tariff F.C.C. No. 1; The Southern New England Telephone Company Tariff F.C.C. No. 39;*

and other incumbent LECs' term discount plans around the country, and as the transition to packet-based technologies advances, the elimination of such plans poses a continuing threat to competition and business customers.

2. The Commission Should Establish a Rebuttable Presumption That Incumbent LECs Must Seek Approval Prior to Eliminating a Term Discount Plan and Adopt Several Related Requirements.

Under current rules, the Commission's only process for reviewing the impact of an incumbent LEC elimination of a term discount plan is the tariff review process. This process puts incumbent LECs in the driver's seat and provides the Commission with little time, data, or guidance to evaluate potential harm to competition or business customers. Incumbent LECs generally file their tariff changes on a streamlined basis under Section 204(a)(3) of the Act so that the changes are "deemed lawful" after an accelerated review period of 7 or 15 days, as AT&T did in 2013.[49] Incumbent LECs also assert that they are not required to submit data demonstrating compliance with the applicable price caps and pricing bands with these proposed tariff changes, even when elimination of a term discount plan would cause customers to pay much more for the price cap services at issue.[50] In part because AT&T withdrew its proposed tariff changes before the Commission could conduct its investigation, there is no clear precedent regarding this or other issues implicated by this process.

As more incumbent LECs seek to eliminate term discount plans, it will be critical for the Commission to have a more effective and predictable framework in place to govern this process.

Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Order, 28 FCC Rcd 16525 (2013) ("*AT&T Tariff Suspension Order*").

[49] 47 U.S.C. § 204(a)(3).

[50] Reply of AT&T Services Inc. to Petitions to Suspend and Investigate, at 13-16 (filed Dec. 6, 2013).

Indeed, while the *NPRM* focuses largely on the need for Commission review of incumbent LEC proposals to discontinue legacy services,[51] an incumbent LEC does not need to stop offering a wholesale service entirely in order to harm competitive LECs' retail customers. Eliminating a term discount plan for such a service that is widely relied upon by competitors would have this effect as well. As explained above, term discounts plans are often the only economically viable means of obtaining wholesale inputs necessary to compete. Thus, elimination of such a plan would inhibit competitors' ability to serve downstream retail business customers, potentially reducing the number of competitive choices available to those customers. Just as ceasing to offer a wholesale service would "discontinue, reduce, or impair service to a community or part of a community" (*i.e.*, the competitive LEC's retail customers), so too would eliminating a widely relied upon term discount plan. Accordingly, the Commission should adopt a rebuttable presumption that incumbent LECs must seek approval prior to eliminating a tariffed term discount plan.

An incumbent LEC seeking to rebut this presumption should be required to prepare a certification explaining why elimination of the term discount plan does not (1) result in discontinuance, reduction, or impairment of the competitors' services to a community or part of a community or (2) otherwise pose a threat to competition and the technology transitions. Such a certification should be filed with the Commission and served on all wholesale customers at least six months prior to the proposed discontinuance, and interested parties should be given the chance to comment on the certification.

The Commission should evaluate these certifications seeking to rebut the presumption that prior approval is required to discontinue a term discount plan using the same standard

[51] *See, e.g., NPRM* ¶¶ 102-103.

discussed in Part II.B above for evaluating an incumbent LEC's rebuttal of the presumption that prior approval is required to discontinue a wholesale service. That is, the incumbent LEC should be required to show that its wholesale customers' retail service offerings will not be discontinued, reduced, or impaired as a result of a significant change in the rates, terms, and conditions of the wholesale offering. For example, where a wholesale customer would incur significantly higher input costs as a result of the elimination of the term discount plan, the wholesale customer's retail offering should itself be deemed to be discontinued, reduced, or impaired where the wholesale customer determines that it would likely need to (1) pass those higher costs through as higher retail rates, (2) materially reduce the number and/or type of customers to which it markets retail services, or (3) materially alter the features, functions, or characteristics of the retail services it offers.

Where the presumption of prior approval is not rebutted, the incumbent LEC should be required to file an application demonstrating that elimination of the term discount plan is in the public interest. The Commission should adopt requirements governing discontinuance of such plans that are similar to the requirements governing wholesale service discontinuance discussed in Part II.B above. *First*, the Commission should require the incumbent LEC to offer either (1) the legacy services at issue (*e.g.*, DS1 and/or DS3 special access services) under its remaining term discount plans on rates, terms and conditions that are at least as favorable as those that have been applicable under the plan to be eliminated, or (2) equivalent wholesale access as discussed above.[52] *Second*, incumbent LECs should be required to provide at least 12 months of notice prior to filing an application to eliminate a term discount plan to all customers purchasing service under the term discount plan. *Third*, incumbent LECs should be required to grandfather the term

[52] *See supra* Part II.C.

discount plan for circuits previously purchased thereunder for the longer of 36 months from the grant of the discontinuance application or the remaining duration of the term applicable to a circuit. These requirements would help to minimize the harms to competition and business customers posed by the elimination of term discount plans.

F. The Commission Has Ample Authority To Adopt These Requirements.

The Commission could rely on its authority under at least three provisions of the Act to adopt the requirements discussed herein governing the discontinuance of incumbent LEC wholesale services (*e.g.*, DSn special access services) and tariffed term discount plans. *First*, the Commission could rely on Section 214(a) because discontinuance of a wholesale service or elimination of a tariffed term discount plan for such a service would "discontinue, reduce, or impair service to a community or part of a community."[53] As the Commission explained when BOCs sought to discontinue dark fiber service to their carrier customers, "where the technical or financial impact on the carrier customer is such that it would lead to discontinuance or impairment of service to its customers, such considerations may establish that Section 214 authorization is required."[54] In that case, because "the BOCs [had] not made a showing that a reduction of service to the using public will not occur," the Commission found that Section 214 authorization was required.[55]

Similarly, discontinuance of a wholesale service or elimination of a term discount plan for such a service would result in the "discontinuance, reduction or impairment of service" to

[53] 47 U.S.C. § 214(a).

[54] *Southwestern Bell Telephone Company, et al.*, Memorandum Opinion and Order, 8 FCC Rcd 2589, ¶ 48 (1993) ("*Dark Fiber Order*"), *remanded on other grounds*, *Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994).

[55] *Dark Fiber Order* ¶ 49.

competitive carriers' retail customers. In the *NPRM*, the Commission recognized that "competitive LECs play a vital role in serving the enterprise market," and "[w]here an incumbent LEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with service, this can also be expected to affect the competitive LECs' retail customers."[56] Indeed, if an incumbent LEC were to stop offering a crucial wholesale input such as a DS1 or DS3 special access service without offering an equivalent replacement service, a competitive LEC that had relied on the service being discontinued may well have no way to continue serving its customers. Further, as explained above, term discounts plans often provide competitive carriers with the only economically viable means of obtaining the wholesale inputs necessary to offer service. Thus, even if an incumbent LEC continued offering the service after eliminating a term discount plan, this would nonetheless would inhibit competitors' ability to serve downstream retail business customers, potentially reducing the number of competitive choices available to those customers.

Nor is the Commission bound by past decisions in which it chose not to require carriers seeking to increase their rates to file Section 214 applications, as those decisions did not arise in the context of the industry-spanning competitive concerns implicated by the technology transitions and the elimination of term discount plans. For example, the Commission's 1977 decision that AT&T was not required to file a Section 214 discontinuance application when it eliminated its "TELPAK" bulk discount offering for private line services is readily distinguishable.[57] Because competitors had not relied on TELPAK as a wholesale input,

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[56] *NPRM* ¶ 102.

[57] *See American Tel. and Tel. Co., Long Lines Department, Revisions to Tariff FCC Nos. 258 and 260 (Series 5000) – Termination of TelPak Service, Transmittal No. 12714*, Memorandum Opinion and Order, 64 FCC 2d 959 (1977).

AT&T's elimination of this offering did not affect other carriers' ability to serve downstream end users and thus did not result in the "discontinuance, reduction or impairment" of service to those end users.[58] In addition, when AT&T eliminated TELPAK, its retail customers were not subject to an effective rate increase. This is because AT&T simultaneously *reduced its non-TELPAK rates* in order "to mitigate the impact of the elimination of all bulk rate offerings on TELPAK customers."[59] Notably, AT&T did not propose a similar rate reduction for its competitors when it sought to eliminate its term discount plans in 2013.

Moreover, the fact that the D.C. Circuit affirmed the Commission's order in the TELPAK case is no impediment to the Commission using a different approach here. In reaching its holding, the court explained that "[o]n a question of statutory interpretation like that involving Section 214, this court must show 'great deference to the interpretation given the statute by the officers or agency charged with its administration.'"[60] Adopting a rebuttable presumption that an incumbent LEC must seek approval prior to discontinuing a wholesale service or eliminating a term discount plan due to the competitive concerns implicated by the technology transitions would be well within the Commission's discretion to interpret and administer Section 214.

Second, the Commission could rely on Section 201(b) of the Act, which prohibits carriers from engaging in any unjust or unreasonable practice.[61] Unlike Section 214, relying on this provision would not require the Commission to find that discontinuance of a wholesale service or

[58] In fact, AT&T sought to eliminate this offering in part to *avoid* allowing it to be used as a wholesale input. According to AT&T, "TELPAK [could not] exist in a resale and sharing environment." *Id.* ¶ 6 (internal quotation omitted).

[59] *See id.*

[60] *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980).

[61] 47 U.S.C. § 201(b).

elimination of a term discount plan would result in the "discontinuance, reduction or impairment of service" to competitive LECs' retail customers. Rather, Section 201(b) provides the Commission with a flexible grant of authority to combat conduct that "impede[s] the pro-competitive purposes of the 1996 Act" and "confer[s] no substantial countervailing public benefits."[62] The Commission has used this prohibition to prevent carriers from engaging in practices that impose "significant competitive disadvantages" on other carriers while "giving certain advantages" to the carrier engaging in the practice.[63]

Discontinuing a critical wholesale service without offering an equivalent replacement would unquestionably undermine competition, and only the incumbent LEC—not the "public"—would stand to "benefit" from such discontinuance. In addition, eliminating a tariffed term discount plan that is widely relied upon by competitive carriers would impose "significant competitive disadvantages" on these competitors by subjecting them to an effective rate increase and squeezing their margins. This would advantage incumbent LECs by limiting their competitors' ability to compete. In 2013, the Commission suspended AT&T's proposed tariff changes after petitioners argued that AT&T's proposed elimination of term discount plans longer than three years would constitute an unjust and unreasonable practice.[64] Likewise, the Commission could hold that discontinuing a wholesale service or eliminating a tariffed term discount plan without complying with protections necessary to avoid harm to competition and business customers would constitute an unjust or unreasonable practice as well.

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[62] *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, 15 FCC Rcd. 22983, ¶ 35 (2000).

[63] *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech—Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596, ¶ 35 (1995).

[64] *See AT&T Tariff Suspension Order* ¶ 2.

Third, the Commission could rely on Section 706 of the 1996 Act, which directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[65] As with Section 201(b), reliance on this provision would not require the Commission to find that a change would result in the "discontinuance, reduction or impairment of service" to end users.

Adopting a rebuttable presumption that incumbent LECs must seek approval prior to discontinuing a wholesale service or eliminating a tariffed term discount plan would plainly constitute a "measure[] that promote[s] competition in the local telecommunications market"—one of the regulating methods specifically authorized by Section 706(a). Such a requirement would encourage the deployment of advanced telecommunications services by ensuring that competitive LECs are able to continue deploying such services (*e.g.*, Ethernet) to downstream retail business customers. This, in turn, would maintain the competitive incentive for incumbent LECs to deploy advanced telecommunications services of their own. As Chairman Wheeler has explained, "[t]he simple lesson of history is that competition drives deployment and network innovation. That was true yesterday and it will be true tomorrow."[66]

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[65] 47 U.S.C. § 1302(a); *see also id.* § 1302(b); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (affirming the Commission's authority to adopt regulations pursuant to Section 706 and holding that the Commission's interpretation of this provision is entitled to deference).

[66] Prepared Remarks of FCC Chairman Tom Wheeler "The Facts and Future of Broadband Competition," 1776 Headquarters, Washington, D.C., at 3 (Sept. 4, 2014); *see also* Remarks of FCC Chairman Tom Wheeler, COMPTEL Fall Convention & Expo, Dallas, Texas, at 5 (Oct. 6, 2014) ("More competition will mean more private investment and better services for American businesses, nonprofit institutions, and other enterprises of all sizes—and in turn, for the public they serve.").

III. THE COMMISSION SHOULD ADOPT REGULATIONS THAT LIMIT THE HARM TO COMPETITION AND BUSINESS CUSTOMERS CAUSED BY THE DEGRADATION AND REMOVAL OF COPPER.

A. The Commission Must Ensure That Competitive Carriers Have Access to the Inputs Needed to Provide Affordable Ethernet Services to Small and Medium-Sized Businesses.

As the Commission recognizes in the *NPRM*,[67] competitive carriers have combined unbundled copper loops with their own network equipment to deploy innovative and affordable business broadband services to America's small and medium-sized businesses ("SMBs"). In particular, the Ethernet-over-copper services that Integra, Birch, and other competitive carriers offer SMBs enable those customers to realize many of the same efficiencies of Ethernet technology as enterprise customers.[68] These efficiencies include, among others, (1) the delivery of higher bandwidth at significantly lower cost per bit than T1 services; (2) scalability to easily increase bandwidth without the need to deploy new equipment; and (3) the ability to converge voice, data, and cloud services over a single connection that is simpler and less costly to manage.[69]

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[67] *NPRM* ¶ 22.

[68] *See, e.g.*, "Integra Telecom covers its retail, wholesale bases with EoC and EoFiber," *FierceTelecom*, May 3, 2011, *available at* http://www.fiercetelecom.com/special-reports/competitive-carriers-hone-their-ethernet-over-copper-skills/integra-telecom-covers-i (explaining how Integra leverages Ethernet-over-copper "to provide the same level of service that we're providing to enterprise customers at attractive price points and similar functionality to the SMB marketplace as well") (internal quotations omitted).

[69] *See, e.g.*, Press Release, Integra Telecom, "Integra Telecom Expands Ethernet Over Copper Network to Deliver Enterprise-Grade Services," May 30, 2012, *available at* http://www.integratelecom.com/about/news/Pages/Integra-Telecom-Expands-Ethernet-Over-Copper-Network-to-Deliver.aspx; MegaPath, "The Advantages of Business Ethernet for Business Customers," *available at* http://www.megapath.com/megapath/assets/File/PDF/WhitePapers/WP_BusinessEthernet.pdf; Comments of XO Communications, LLC, WC Dkt. No. 10-188, at 3-4 (filed Oct. 15, 2010).

Access to existing copper infrastructure has enabled competitive carriers to bring these benefits to the many business customer locations in the country that are not served by fiber.[70] Indeed, competitive carriers have invested in central office upgrades to deliver Ethernet-over-copper services to hundreds of thousands of business customer locations that are not within reach of their fiber networks.[71]

Competitors' investment and leveraging of existing copper infrastructure has spurred competition in the provision of business broadband services to SMBs. In fact, just as incumbent LECs eventually responded to competitive LECs' DSL offerings with their own DSL offerings,[72]

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[70] *See, e.g.*, Letter from Jeff Reedy, Overture Networks, Inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-47 *et al.* & RM-11358, at 2 (filed Dec. 7, 2012) (stating that, according to Vertical Systems Group, in 2011, fiber had been deployed to only approximately 32 percent of buildings in the country with 20 or more employees).

[71] *See, e.g.*, Press Release, Integra Telecom, "Integra Increases Ethernet over Copper Access More Than 25 Percent," Feb. 4, 2014, *available at* http://www.integratelecom.com/about/news/pages/integra-increases-ethernet-over-copper-access-more-than-25-percent.aspx (stating that Integra has expanded its Ethernet-over copper network footprint to reach a total of 187 on-network Local Service Offices ("LSOs"), "reaching more than 460,000 businesses in over 140,000 commercial buildings"); Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51 *et al.*, Attachment at 3 (filed Feb. 25, 2013) (stating that MegaPath has "700 CO's [sic] enabled for Ethernet [over copper] access"); Letter from Thomas Cohen, Counsel for XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, Attachment, at 2 (filed Nov. 7, 2014) (stating that XO has enabled approximately 500 LSOs covering approximately 600,000 buildings for Ethernet-over-copper access).

[72] *See, e.g.*, Robert D. Willig, "Investment is Appropriately Stimulated by TELRIC," at 6 (Dec. 2003), *attached to* Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 03-173 (filed Dec. 5, 2003) ("With the advent of competitive cable modem technology in the late '90s and the ability of CLECs to use UNEs to provision their own competitive DSL services, ILEC investment in DSL technology exploded in response.").

incumbent LECs such as CenturyLink have responded to competitors' Ethernet-over-copper services with their own such offerings.[73]

This investment, innovation, and competition in business broadband services—and the resulting benefits for American businesses—are being threatened by incumbent LECs' removal and degradation of copper loops. The reason is simple: where incumbent LECs remove or fail to maintain "home run" copper loops, subloops, or copper feeder,[74] competitive carriers generally cannot offer Ethernet-over-copper services. And given the extremely high barriers to competitive deployment of fiber loops, the SMB customers at these locations no longer have multiple Ethernet providers from which to choose. Instead, these customers are forced to rely on the incumbent LEC (or, in some locations, the incumbent LEC and the incumbent cable company) to meet their Ethernet needs. This elimination of competitive providers would

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[73] *See, e.g.*, "For CenturyLink, EoC breeds business opportunities," *FierceTelecom*, Feb. 7, 2012, *available at* http://www.fiercetelecom.com/special-reports/stepping-eoc-plate-incumbent-telcos-take-swing/centurylink-eoc-breeds-business-oppor ("To better target small to medium business (SMB) clients with lower speed Ethernet services, the ILEC has expanded its Ethernet over Copper (EoC) rollout to about 334 new COs in the Qwest markets."); *id.* ("As CenturyLink looks to strengthen its presence in its legacy Qwest markets where it has to contend with growing competition from aggressive CLECs like Integra Telecom and cable operators like Cox Business, the service provider will likely use EoC as a [sic] option to upsell existing customers or new customers that want higher speed data services.").

[74] It is worth noting that incumbent LECs' retirement of copper feeder has the same practical effect on competitors' ability to provide Ethernet-over-copper services as incumbent LECs' retirement of home run copper loops. This is because even where only copper feeder is retired and the copper subloop remains, competitive carriers generally cannot afford to access such subloops via collocation at the remote terminal. *See, e.g.*, QSI Consulting, Inc., *Viability of Broadband Competition in Business Markets: An Analysis of Broadband Network Unbundling Policies and CLEC Broadband Competition*, at 12 (Jan. 21, 2010), attached as Exhibit A to Comments of Covad Communications Company, WC Dkt. No. 09-223 (filed Jan. 22, 2010); *see also* Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Company and tw telecom inc., WC Dkt. No. 10-188, at 27 (Oct. 15, 2010) ("Integra has also found that the TELRIC rates for access to remote terminals are uneconomically and unrealistically high.").

undoubtedly leave the SMBs vulnerable to increased prices[75] as well as a potential degradation in service quality. This would of course undermine the technology transition for business broadband.

Thus, the retirement of copper serving business customers threatens the Commission's goal of maintaining competition through the technology transitions in essentially the same way that discontinuance of DSn special access services does. The Commission must take action to ensure that competitive LECs have access to the inputs needed to offer affordable Ethernet services to SMBs. Specifically, an incumbent LEC should not be permitted to retire copper loops that are or could be used to serve business customer locations prior to the conclusion of the special access rulemaking unless and until the incumbent provides equivalent substitutes for unbundled copper loops used to provide Ethernet service. The Commission can implement this proposal in several different ways. For example, the Commission could establish a moratorium on the retirement of copper loops to business customer locations and require incumbent LECs to continue offering unbundled access to those copper loops until the agency adopts final rules in the special access rulemaking proceeding.

Alternatively, the Commission could require incumbent LECs to provide competitors with access to substitutes for unbundled copper loops used to provide Ethernet service as a precondition for retiring[76] copper loops to business customer locations. For instance, the Commission could require incumbent LECs to provide access to wholesale Ethernet transmission that is equivalent to the transmission that could have been offered as Ethernet-over-copper

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[75] As the Commission has recognized, supracompetitive pricing is more likely in markets with only two or a few firms. *See Phoenix Order* ¶¶ 29-31.

[76] As discussed in Part III.B below, the Commission should define copper "retirement" as proposed in the *NPRM*.

service over the retired loop. The price for this wholesale Ethernet transmission would be no higher than either (1) the charge for the (retired) unbundled copper loop plus a pro-rata share of the cost of deploying Ethernet electronics, or (2) the per-Mbps charge for DSn special access services offered by the incumbent LEC at the location in question. Or, the Commission could require incumbent LECs to provide competitors with access to (1) home run dark fiber loops where they have been deployed, and (2) wholesale Ethernet transmission where home run dark fiber loops have not been deployed. In all events, these requirements need only be interim in nature and should be superseded by final rules adopted in the special access rulemaking.

The Commission has ample authority to adopt the Joint Commenters' proposal. For example, the Commission could require incumbent LECs to continue providing unbundled access to copper loops on an interim basis pursuant to Section 251(c)(3) of the Act[77] because the Commission has already found that competitors are impaired without access to such loops.[78] The Commission could also establish the requirement that incumbent LECs provide competitors with access to substitutes for unbundled copper loops used to provide Ethernet service as a precondition for retiring copper loops to business customer locations pursuant to Sections 201 and 202 of the Act. Section 201(a) requires that incumbent LECs offer common carrier Ethernet services "upon reasonable request,"[79] and the Commission could deem a request by a wholesale customer for a service to replace unbundled copper to be presumptively reasonable. Moreover,

[77] 47 U.S.C. § 251(c)(3).

[78] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶ 236 (2003) ("*TRO*") (subsequent history omitted).

[79] 47 U.S.C. § 201(a).

Sections 201(b) and 202(a) require that the service provided by the incumbent LEC in response to a reasonable request be provided on just and reasonable and not unjustly or unreasonably discriminatory rates, terms, and conditions.[80] These provisions therefore give the Commission the authority to adopt the regulations governing rates, terms, and conditions discussed above.

Finally, the Commission could rely further on Section 706 of the 1996 Act to adopt these requirements. That provision grants the Commission authority to adopt requirements needed to promote the deployment of broadband,[81] and requiring incumbent LECs to provide competitors with substitutes for inputs used to provide Ethernet service would clearly promote broadband deployment.

B. The Commission Should Update Its Definition of Copper Retirement to Better Facilitate Competition.

In the *NPRM*, the Commission appropriately recognizes that its rules "do not define 'copper retirement,' either with respect to the facilities or the actions involved."[82] In particular, "copper retirement" does not clearly encompass (1) an incumbent LEC's replacement of the feeder portion of copper loop facilities with fiber, or (2) an incumbent LEC's failure to maintain copper loop facilities. As a result, incumbent LECs are able to avoid the Commission's network change notification requirements in these two circumstances, even where doing so precludes competitors from utilizing those facilities to provide service to businesses. This outcome is contrary to Section 251(c)(5) of the Act, which the Commission has held requires incumbent

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[80] *Id.* §§ 201(b), 202(a).

[81] *Id.* § 1302(a); *see also id.* § 1302(b).

[82] *NPRM* ¶ 50 (internal citation omitted).

LECs to disclose information about a network change if it affects a competitive carriers' performance or ability to provide service.[83]

Lack of a clear definition of "copper retirement" is also problematic for another reason. If the Commission adopts the Joint Commenters' proposed requirement that incumbent LECs provide sufficient substitutes when they "retire" unbundled copper loops that can be used to provide Ethernet-over-copper service to businesses, incumbent LECs would be able to avoid that requirement when they replace copper feeder with fiber or when they fail to maintain copper facilities. Such a result would undermine the goal of the Joint Commenters' proposed requirement—to ensure that competitors can deliver the benefits of Ethernet service to existing and new SMB customers regardless of the retirement or degradation of copper.

Accordingly, the Commission should properly define "copper retirement." *First*, the Commission should adopt its proposal to include the feeder portion of copper loop facilities within its definition of copper retirement.[84] Replacement of copper feeder can have the same harmful consequences as removal or replacement of home run copper loops and subloops, which are expressly encompassed by the current copper retirement rules.[85] Specifically, as noted in Part III.A above, while competitive carriers can theoretically still provide Ethernet-over-copper if copper feeder is replaced with fiber, the practical difficulty of obtaining access to the subloop

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[83] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, ¶ 171 (1996), *vacated in part on other grounds*, *California v. FCC*, 124 F.3d 934 (8th Cir. 1997), *rev'd in part on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *see also* 47 C.F.R. § 51.325(a)(1).

[84] *NPRM* ¶ 51.

[85] 47 C.F.R. § 51.325(a)(4).

often precludes competitive carriers from providing that service.[86] The Commission's copper retirement rules should be triggered in such situations.

Second, the Commission should adopt its proposal to define the actions that constitute copper retirement as the "removing or disabling of" copper loops, subloops, and the feeder portion of loops.[87] As proposed in the *NPRM*, "'removing'" should be defined as the physical removal of copper[88] (including the replacement of copper with fiber). Consistent with the *NPRM*, "'disabling'" should mean that the copper facility can no longer be used to provide a service (such as Ethernet-over-copper service), either because of affirmative action taken by the incumbent LEC or the incumbent LEC's failure to maintain the facility.[89]

To assist the Commission in determining whether a copper facility has been "disabled," and thus "retired," the agency should create a form on which competitive carriers could indicate that specific copper facilities cannot be used to provide a service (such as Ethernet-over-copper) in accordance with industry standards for the service. Where a competitive carrier makes this filing, the Commission should deem the copper "disabled" (and thus "retired") unless the incumbent LEC can rebut the competitive carrier's evidence with proof that it has successfully used the facility or facilities in question to provide the service at issue (*e.g.*, Ethernet-over-copper service).

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[86] *See supra* note 74; *see also NPRM* ¶ 51 ("'[I]f the feeder portion of the loop is unavailable for unbundled access, the practical difficulty of obtaining access to the remaining portion of the loop forecloses competitive access to the customer.'") (quoting Petition of BridgeCom International, Inc. *et al.* for Rulemaking and Clarification of the Policies and rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358, at 12 (filed Jan. 18, 2007)).

[87] *NPRM* ¶ 52.

[88] *Id.*

[89] *See id.* ¶¶ 52-53.

C. The Commission Should Establish Appropriate Procedures Governing Copper Retirement.

In the *NPRM*, the Commission proposes revising its network change notification rules to "ensure that competitive LECs are fully informed about the impact that copper retirements will have on their businesses."[90] Given the potential harmful effects of copper retirement on competition and business customers, the Joint Commenters agree that incumbent LECs should be required to provide additional information about planned copper retirements.[91] Therefore, consistent with the proposals in the *NPRM*, the Commission should require each incumbent LEC to provide competitive carriers that purchase UNEs, special access, or that interconnect with the incumbent LEC information about any changes in rates, terms, or conditions applicable to the wholesale inputs (including UNEs and special access) currently available at the locations where retirement is planned.[92]

Importantly, incumbent LECs should be required to provide notifications containing this and other information about their planned copper retirements on more than the 90 days' notice required under the Commission's current rules.[93] This is because competitive carriers need more than three months to plan when copper that is being used or could be used to serve business customers—most of whom purchase service under multi-year contracts—is going to be retired. Accordingly, the Joint Commenters submit that an incumbent LEC should be required to provide

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[90] *Id.* ¶ 57.

[91] *Id.*

[92] And if the Commission adopts the Joint Commenters' proposal to require incumbent LECs to provide competitors with access to substitutes for unbundled copper loops used to provide Ethernet service as a precondition for retiring copper loops to business customer locations (*see supra* Part III.A), then the incumbent LEC would provide information on the rates, terms, and conditions of its substitute wholesale Ethernet transmission offering.

[93] *NPRM* ¶ 59 (internal citation omitted).

notifications to competitive carriers at least 12 months in advance of a planned copper retirement. In addition, the notifications must be complete. Specifically, they should encompass all of the locations that will be subject to the retirement. In the event that the incumbent LEC subsequently adds new locations to be retired, it should be required to provide notice at least 12 months in advance of the additional retirement.

The Commission should establish a uniform format for planned copper retirement notifications.[94] The notifications should be sent directly to competitive carriers as well as posted on the incumbent LEC's website. Additionally, as proposed in the *NPRM*, the Commission should require incumbent LECs to certify their compliance with the aforementioned notification rules.[95] Consistent with the Commission's proposal to require incumbent LECs to submit a copy of the written notice provided to retail customers with their certifications,[96] the Commission should also require incumbent LECs to submit a copy of the written notice provided to competitive carriers.

The Commission has ample statutory authority to adopt these notification requirements. The notifications provided pursuant to these requirements comprise "reasonable public notice of changes in the information necessary for the transmission and routing of services using [the incumbent LEC's] facilities" in Section 251(c)(5) of the Act.[97] The proposed requirements are also necessary to ensure that an incumbent LEC's practices are just and reasonable under Section

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[94] *Id.* ¶ 57.

[95] *Id.* ¶ 80.

[96] *Id.* ¶ 82.

[97] 47 U.S.C. § 251(c)(5).

201(b) of the Act[98] and not unjustly or unreasonably discriminatory under Section 202(a).[99] Finally, these requirements are necessary to ensure that competitive carriers can adjust their business broadband service offerings to account for copper retirement. The Commission therefore can also adopt the notification requirements pursuant to its authority to promote the deployment of advanced services under Section 706 of the 1996 Act.[100]

IV. THE COMMISSION SHOULD ENSURE THAT INCUMBENT LECs CONTINUE TO PROVIDE UNBUNDLED ACCESS TO DS0, DS1, AND DS3 CAPACITY LOOPS DURING AND AFTER THE TECHNOLOGY TRANSITIONS.

In the *NPRM*, the Commission recognizes that "[t]echnology transitions must not harm or undermine competition."[101] For this reason, as Windstream explains in its petition for declaratory ruling, the Commission should ensure that incumbent LECs provide unbundled access to DS1 and DS3 capacity loops where impairment exists regardless of the technology transitions.[102] Otherwise, competitive carriers' input costs to serve business customers currently served using UNEs will increase significantly. That is, if incumbent LECs cease providing UNEs at these locations, competitive carriers will likely have no choice but to purchase the incumbent LECs' special access inputs, often at rates that far exceed those for comparable UNEs.[103] The result will be higher prices and/or less choices for business customers at these

[98] *Id.* § 201(b).

[99] *Id.* § 202(a).

[100] 47 U.S.C. § 1302.

[101] *NPRM* ¶ 110.

[102] *See generally* Petition for Declaratory Ruling of Windstream Corporation, WC Dkt. No. 15-1 & GN Dkt. No. 13-5 (filed Dec. 29, 2014) ("Windstream Petition").

[103] If incumbent LECs discontinue DS1 and DS3 special access services, replace them with packet-based Replacement Services, and offer the Replacement Services at rates equivalent to those for the discontinued DS1 and DS3 special access services, then the Replacement Service

locations. Accordingly, the Commission should grant Windstream's petition. As Windstream has explained, the Commission found that competitive carriers generally cannot economically self-deploy DS1 and DS3 capacity loops[104] and this impairment finding does not change when the incumbent LEC chooses to replace copper with fiber or TDM electronics with packet-based electronics.[105]

For similar reasons, the Commission should also ensure that incumbent LECs continue to provide unbundled access to DS0 capacity loops during and after the technology transitions. Incumbent LECs are required to provide unbundled access to DS0 loops or their voice-grade equivalent at the vast majority of business customer locations because competitors are impaired without such access at those locations.[106] Competitive carriers should not be forced to incur

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rates will often far exceed UNE rates. This is because incumbent LECs' DS1 and DS3 special access rates often far exceed the rates for comparable circuits purchased as UNEs. Competitive carriers demonstrated this point most recently in mid-2012, when Verizon sought to increase certain Phase II pricing flexibility rates for DS1 and DS3 special access services that were already far above Verizon's rates for comparable UNEs. *See, e.g.*, Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, Verizon Transmittal No. 1187 (filed May 8, 2012) (showing that Verizon's Phase II special access DS1 channel termination rates in certain price bands in four states were anywhere from approximately 66 percent to approximately 204 percent higher than the comparable UNE rates).

[104] *TRO* ¶¶ 320, 325.

[105] Windstream Petition at 16-17.

[106] *See, e.g.*, *TRO* ¶ 248 (requiring incumbent LECs to provide unbundled access to copper loops, including DS0 loops); *id.* ¶ 296 (requiring incumbent LECs to provide requesting carriers seeking access to hybrid loops for the provision of narrowband services with unbundled access to either "an entire non-packetized transmission path capable of voice-grade service (*i.e.,* a circuit equivalent to a DS0 circuit) between the central office and customer's premises" or "a homerun copper loop"); *id.* ¶ 277 (requiring incumbent LECs that deploy FTTH loops in overbuild or so-called brownfield situations to ensure narrowband access by providing unbundled access to either (1) the existing copper loop connected to the customer location after deploying the FTTH loop, or (2) a 64 kbps transmission path over the FTTH loop); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.,* Order on Reconsideration, 19 FCC Rcd. 15856, ¶ 8 (2004) (declining to apply the prohibition on unbundled access to FTTH

increased costs for this last-mile access simply because incumbent LECs are replacing copper with fiber or changing the transmission protocol they use to provide service.

V. CONCLUSION

For all of the foregoing reasons, the Commission should adopt the proposals discussed herein by the Joint Commenters.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Nirali Patel
Matthew Jones
WILLKIE FARR & GALLAGHER LLP
1875 K Street, NW
Washington, DC 20006
(202) 303-1000

Counsel for Birch, Integra, and Level 3

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loops in new build or so-called greenfield situations to predominantly commercial multiunit premises).