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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Room TW-A325  
Washington, DC 20554

**Re: Special Access for Price Cap Local Exchange Carriers, WC Dkt. 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**

Dear Ms. Dortch:

Now that the Commission is about to undertake its long-anticipated review of data that will demonstrate the robust competitive environment for special access services, Birch Communications, BT Americas, and Level 3 Communications (the “Joint CLECs”) claim that the Commission would have “broad discretion” to regulate traditional special access (TDM) rates, and rates for IP-based services, regardless of what the data show.<sup>1</sup> That is baseless both from a procedural and substantive standpoint. From a procedural standpoint, subjecting IP-based services to price regulation would require reversing an eight-year old forbearance decision. Any such reversal could be effected, if at all, only after a notice of proposed rulemaking has proposed such reregulation, including the substance of the new regulations to be imposed. That has not occurred. The Commission has not sought comment on “unforbearance,” much less set forth for comment a new regulatory regime for packet-based Ethernet services.

Even if there were no procedural bar to the Joint CLECs’ proposals, they would be unlawful on substantive grounds. Eight years ago, the Commission found that “there are a myriad of providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC’s service territory,” including “many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers.”<sup>2</sup> For that reason, the Commission granted forbearance from dominant carrier tariff filing and cost support requirements, although it made

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<sup>1</sup> Letter from Thomas Jones, Counsel for Birch Communications, Inc., BT Americas Inc. and Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (Aug. 28, 2015) (“Joint CLEC Letter” or “Joint CLECs”).

<sup>2</sup> Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, 22 FCC Rcd. 18705, ¶ 22 (2007) (“AT&T Forbearance Order”). The D.C. Circuit affirmed. *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

clear that Sections 201 and 202 and the Section 208 complaint process would continue to apply.<sup>3</sup> As the Commission anticipated, that competition has become even more robust in the years since forbearance was granted. As shown below, publicly available data confirm that providers of all types are successfully competing in the marketplace: no Ethernet provider has a port share that exceeds one-fifth of the market; eight providers have port shares that exceed five percent (five of which are non-ILECs); the second largest provider in terms of port share is a CLEC; and numerous smaller providers together have a port share of more than 20 percent. Accordingly, the Commission would have no substantive basis for re-imposing rate regulation, and the short-cut benchmarks proposed by the Joint CLECs would be no substitute for the requirements of the Administrative Procedure Act.

The enormous success in the U.S. of IP-based services — with providers investing billions of dollars deploying fiber throughout the U.S.<sup>4</sup> — is due in large part to the historically light regulatory touch government agencies have exerted. To reverse those policies now would be directly contrary to the Commission’s broadband goals. As both the Department of Justice and NTIA have warned, “price regulation is likely to stifle investment in broadband infrastructure or to discourage broadband service innovation.”<sup>5</sup>

International comparisons bear that out. For example, Australia declined to ease regulatory burdens for fiber deployments ten years ago, resulting in such a dearth of private infrastructure investment that the *national government* is now installing fiber itself and, as of early 2014, had spent \$7.3 billion to expand fiber to only a quarter of a million premises.<sup>6</sup> And, studies show that the U.S. is far ahead of European Union countries in broadband deployment,<sup>7</sup> which are now attempting to catch up.<sup>8</sup> These studies confirm that a light regulatory touch in this space directly correlates with capital investment in fiber infrastructure. And, the reverse is

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<sup>3</sup> AT&T Forbearance Order, ¶¶ 17-51. The Commission also granted forbearance from its antiquated, BOC-specific *Computer Inquiry* rules, but it retained the non-BOC *Computer Inquiry* requirement that AT&T offer the underlying basic transmission to enhanced service providers on a nondiscriminatory basis. *Id.* ¶¶ 52-62.

<sup>4</sup> Sean Buckley, *VSG: Fiber penetration gap in U.S. business narrowed to under 60%*, FierceTelecom (April 1, 2015), available at <http://www.fiercetelecom.com/story/vsg-fiber-penetration-gap-us-businesses-narrowed-under-60/2015-04-01> (“fiber-based business services in the U.S. ‘nearly quadrupled between 2004 and 2014’ as service providers like AT&T, cable operators, and a host of competitive carriers equipped thousands of business sites with 20 or more employees with fiber over the course of this period”) (last checked 9/25/15).

<sup>5</sup> Letter from Lawrence E. Strickling, National Telecommunications and Information Administration (NTIA), to FCC Chairman Julius Genachowski, *National Broadband Plan for Our Future*, GN Docket No. 09-51, at 6 (Jan. 4, 2010) (“NTIA Letter”); *Ex Parte* Submission of United States Department of Justice, *National Broadband Plan for Our Future*, GN Docket No. 09-51, at 28 (Jan. 4, 2010).

<sup>6</sup> Jeffrey Eisenach, *Australia’s failed experiment in government-owned broadband*, TechPolicyDaily.com (March 6, 2014), available at <http://www.techpolicydaily.com/communications/australias-failed-experiment-government-owned-broadband>. (last checked 9/25/15).

<sup>7</sup> University of Pennsylvania Law School & Center for Technology, Innovation and Competition, *New University of Pennsylvania Analysis Finds U.S. is Far Ahead of Europe in Broadband Deployment, Access, Usage* see: <http://broadbandcountrydata.law.upenn.edu/upenn-analysis-us-is-far-ahead-of-europe/> (last checked 9/25/15); Fred B. Campbell, Jr., *Impact of “Title II” Regulation on Communications Investment*, iia – Internet Innovation Alliance, available at [http://internetinnovation.org/images/misc\\_content/Impact\\_of\\_Title\\_II.PDF](http://internetinnovation.org/images/misc_content/Impact_of_Title_II.PDF) (last checked 9/25/15).

<sup>8</sup> Speech by Günther H. Oettinger, European Commissioner for Energy, “Change and Innovation,” Cable Europe Annual Event, Dec. 3, 2014, available at [http://europa.eu/rapid/press-release\\_SPEECH-14-2350\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-2350_en.htm) (last checked 9/25/15).

also true — more intrusive regulation results in less capital investment, the antithesis of the Administration’s and the Commission’s worthy goal of expanding broadband-speed connectivity to all Americans.

### **The Commission Has No Authority to “Reverse” Forbearance for Packet-Based Ethernet Services in This Proceeding**

In this proceeding, the Commission is considering whether to modify its pricing flexibility rules, which apply to legacy TDM DS1 and DS3 special access services. The Joint CLECs’ letter, however, confirms once again that their request for rate regulation is aimed primarily at packet-based Ethernet services, even though the Commission granted forbearance from dominant carrier regulation for such services eight years ago.<sup>9</sup> Any request for regulation of such services would therefore require the Commission to take the unprecedented step of attempting to “reverse” a prior forbearance ruling, which Chairman Wheeler recently conceded would be a “high bar to hurdle.”<sup>10</sup> To the extent that the Commission might have authority to reverse forbearance, the Commission could not impose the new pricing regulations that petitioners seek without satisfying the rulemaking standards of the Communications Act and APA. Neither the pending “petition to reverse forbearance” nor the Further Notice in this proceeding provides a sufficient basis for such a course of action.

First, the Joint CLECs’ pending “petition to reverse forbearance” does not provide a sufficient procedural basis for the relief requested. Section 10 does not contemplate petitions to “reverse” an earlier forbearance order.<sup>11</sup> The plain terms of Section 10 provide only for an affirmative petition asking the Commission to exercise its forbearance authority, and they spell out the substantive standards and procedural requirements that govern such petitions. Section 10 makes no mention of any other type of petition, such as a petition to reverse forbearance.<sup>12</sup> Congress designed Section 10 forbearance this way to prevent lingering regulatory uncertainty

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<sup>9</sup> Joint CLEC Letter at 5-6 (arguing Commission has broad authority (and, in fact, the obligation) to “reverse the grants of forbearance from dominant carrier regulation” of ILEC Ethernet services and “impose rate regulation, including tariffing and price cap regulation” based on the record in this proceeding and the information submitted in response to the data collection).

<sup>10</sup> See Testimony of The Honorable Tom Wheeler, Chairman, Federal Communications Commission, Hearing: “Oversight of the Federal Communications Commission,” U.S. Senate Committee on Commerce, Science and Transportation (March 18, 2015) (“Chairman’s Testimony”). The official transcript from the Hearing has not yet been released, but the Hearing is archived on the Committee’s web site. The Chairman’s cited testimony can be found on the Archived Webcast at 2:00:25-2:02:25. See: [http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord\\_id=cdebb3c8-ffa1-4a4c-89d6-79db0dcc7f91&ContentType\\_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group\\_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=3&YearDisplay=2015](http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=cdebb3c8-ffa1-4a4c-89d6-79db0dcc7f91&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=3&YearDisplay=2015). (last checked 9/25/15).

<sup>11</sup> Notably, the Commission never has reversed a forbearance determination. Austin Schlick, General Counsel, FCC, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, at 9 (May 6, 2010), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-297945A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297945A1.pdf) (“Schlick Statement”) (“The difficulty of overcoming section 10’s deregulatory mandate and a prior agency finding in favor of forbearance is illustrated by the fact that the FCC has never reversed a forbearance determination made under section 10, nor one made for wireless under the similar criteria of section 332(c)(1).”) (last checked 9/25/15).

<sup>12</sup> When Congress wanted to grant such authority, it knew how to do so. Compare 47 U.S.C. § 271(d)(6) (expressly providing for suspension or revocation of BOC interLATA authority upon a showing that the original conditions for such authority are no longer met).

over forbearance decisions, because such uncertainty would stifle industry investment in broadband networks and innovation.<sup>13</sup> Forbearance thus is not an “on/off” switch that may be flipped willy-nilly. Once forbearance has been granted, the only statutory mechanism for imposing new regulation — and especially the type of sweeping and detailed rate regulation the Joint CLECs propose — is through the Commission’s general rulemaking and other regulatory authority under Section 201(b) and the APA.<sup>14</sup>

Chairman Wheeler conceded as much in his recent testimony before the Senate Commerce Committee in response to questions from Senator Schatz (D-HI):

Senator Schatz: And, has the Commission, in its history, undone a forbearance? I think people are calling it un-forbearing. [ ] There’s this concern that, well you may have forbore all of these, these provisions in the statute, but that doesn’t prevent a future FCC from doing, I mean, is there any evidence that a future FCC would do that in the future based on past actions?

Chairman Wheeler: That’s the right question. Here’s the issue. So, so Section 10 of the Act instructs us how we forbear and that we must forbear if certain things are, are met. Um, if you were to go and reverse that, there would have to be an on the record notice and comment proceeding that, that follows Section 10 and says here is the record that builds to de-forbear. So, so, technically you could, realistically there’s a lot that you have to go through.

Senator Schatz: You’re actually on my, on my next question now which is how procedurally and legally would you kind of do the evaluation and then on a, on an operational level, how would you forbear. But I guess my question is, in the FCC’s history, has it undertaken to undo a forbearance? Does it do that?

Chairman Wheeler: Not that I am aware of, sir. Um, and, and again, what you would have to do is. So for instance, let’s just hypothetically say five years from now, someone wants to come in and de-forebear on rate regulation, there’s going to be a serious test that has to be done to say what is it that has changed and that, of course, will be an appealable decision itself. And, it will be an open

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<sup>13</sup> Congress has repeatedly underscored the Commission’s duty to rely first on market forces to promote the deployment of advanced services to all Americans. In the preamble to the 1996 Act, Congress explained that the Act’s overarching purpose is “[t]o promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.” Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”) (emphasis added). In section 706 of the 1996 Act, Congress further directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability” by adopting a policy of “*regulatory forbearance*” and other measures to “*remove barriers to infrastructure investment.*” 47 U.S.C. § 1302(a) (emphasis added).

<sup>14</sup> Petitioners’ version of “reverse forbearance” is also inconsistent with Section 10’s “deemed granted” provision. The “deemed granted” provision could be rendered a nullity if the next day the Commission could simply reverse the grant of forbearance.

proceeding and it will have everybody in the country involved in it. And, so, I think, I think the ability to de-forebear, um, is going to be a, a high bar to hurdle.<sup>15</sup>

As Chairman Wheeler's comments confirm, the legal framework for revisiting forbearance is very different than what the Joint CLECs portray. Were the Commission to move forward with re-regulation here, the proponents of re-regulation would bear the heavy burden of demonstrating that regulatory intervention is affirmatively necessary in light of changed circumstances, and any such regulatory reversal would have to take place in the context of a notice and comment rulemaking proceeding teeing up that very issue. That would be true even if the Commission could simply flip a switch and re-impose, without change, ten year old regulations that were in place immediately prior to forbearance. But that would be infeasible and it is not what the Joint CLECs seek. Rather, they are necessarily asking the Commission to design new rules to establish rate levels and tariffing requirements for services that have been exempt from such rules for years.<sup>16</sup> Wholly apart from the need for a rulemaking to reverse a forbearance decision, the Commission could not possibly establish such a new regulatory regime without a rulemaking.<sup>17</sup>

Contrary to the Joint CLECs' claims, the Further Notice of Proposed Rulemaking in this proceeding<sup>18</sup> is no answer, because it does not place the possible re-regulation of packet-based Ethernet services at issue. In fact, it does not even mention those services in connection with its proposed rule changes.<sup>19</sup> Rather, the entire focus of the Further Notice, and the only issue on which it seeks comment, is whether or how the Commission should modify its pricing flexibility rules.<sup>20</sup> Since those rules apply only to legacy DS1 and DS3 services, and not to packet-based Ethernet services, there is no way to read the Further Notice as teeing up the possible re-regulation of packet-based Ethernet services. Indeed, the Commission specifically acknowledges that "as a result of a series of forbearance proceedings, the scope of services affected by the [earlier] *Special Access NPRM* narrowed considerably."<sup>21</sup>

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<sup>15</sup> See *Chairman's Testimony* at 2:00:27-2:02:25. Cf. Schlick Statement at 9 ("In order to overturn a grant of forbearance, the Commission would first have to compile substantial record evidence that the circumstances it previously identified as supporting forbearance had changed, and then survive judicial review under the Administrative Procedure Act's arbitrary-and-capricious standard.")

<sup>16</sup> See Joint CLEC Letter at 5. See also Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, et al., to Reverse Forbearance From Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 59 (Nov. 2, 2012) ("2012 CLEC Petition") (acknowledging that its proposals would require the Commission to adopt "pricing regulations to be implemented in tariffs").

<sup>17</sup> Even if the 2012 CLEC Petition were construed as a petition for rulemaking, the Commission would still have to issue a new notice of proposed rulemaking. See, e.g., Comments of AT&T, Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 14-19 (April 16, 2013) ("AT&T 2013 Comments") (neither 2012 CLEC Petition nor the Public Notice seeking comment on petition qualifies as a notice of proposed rulemaking).

<sup>18</sup> Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers, et al.*, 27 FCC Rcd. 16318 (2012) ("Further Notice").

<sup>19</sup> *Id.* ¶¶ 80-90.

<sup>20</sup> See *Id.* at 57 ("Once the data are collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility.")

<sup>21</sup> *Id.* ¶ 9.

## **The Joint CLECs' Other Proposed Legal Shortcuts to Support New Rate Regulation Would Be Unlawful**

The Joint CLECs also claim the Commission has “broad discretion” to adopt sweeping new rate regulation. Specifically, the Joint CLECs argue that the Commission has the “authority” and the “discretion” to (1) re-impose price caps on “Phase II price flex DSn services and packet-based special access services” whose rates are currently unregulated and have been for years, and then (2) make a one-time reduction in the price caps for past productivity gains and re-adopt an annual X-Factor adjustment to capture future productivity gains.<sup>22</sup> Any attempt to resurrect and justify the specifics of these long-defunct rate regulation regimes would be far more difficult than the Joint CLECs’ breezy assurances acknowledge.

*Re-imposition of Price Caps.* First, the Joint CLECs argue that the Commission has “both the authority and the discretion to bring special access services that are not currently subject to price caps (e.g., Phase II price flex DSn and packet-based special access services) within the price cap regime.”<sup>23</sup> The suggestion that the re-imposition of price caps would be a simple matter because price caps are not a prescription, however, misses the point. When the Commission originally adopted price caps (in 1990), it set those caps at the level of the then-existing rates, which had been determined in an old-fashioned rate-of-return rate case. The services here have not been subject to any rate regulation for many years; in the case of packet-based services, eight years, and in the case of some DSn services, almost 15 years.

Accordingly, contrary to Joint CLECs’ apparent belief, the Commission could not lawfully just select a rate from thin air for such services that it believes to be in the “zone of reasonableness” and force it on the ILECs in a price cap regime. Rather, to invoke the Commission’s authority to regulate competition and to impose new rate regulation under Sections 201 and 202, the Joint CLECs must clearly demonstrate that there is a market failure that requires a regulatory solution.<sup>24</sup> That would require the Commission to make an affirmative showing that the ILECs’ current rates are unjust and unreasonable — *i.e.*, completely outside the zone of reasonableness — before it could intervene, whether price caps technically constitute a prescription or not.<sup>25</sup> Indeed, the Commission has acknowledged that to impose interim special

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<sup>22</sup> Joint CLEC Letter at 3-9.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *See, e.g.*, Tentative Decision and Request for Further Comments, *Amendment of 47 CFR § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 FCC 2d 1019, ¶ 107 (1983) (acknowledging that the Commission “should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy”); Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987, ¶ 22 n.69 (2002) (absent a marketplace failure the Commission generally “rel[ies] on market forces, rather than regulation”); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, ¶ 173 (1994) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power”); *Cellco P’ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (the Commission may adopt regulations only “upon finding that they advance a legitimate regulatory objective”).

<sup>25</sup> Moreover, to re-impose regulation on services from which it previously granted forbearance, the Commission would have to support such regulation with “substantial evidence” relating to *current* marketplace conditions.

access rate prescriptions, here the “record would have to support the conclusion that *every* . . . rate [and practice for] *every* service for which pricing flexibility [or forbearance] has been granted violates Section 201.”<sup>26</sup>

The Commission could not possibly make any such predicate findings given the intense competition in today’s marketplace, especially for Ethernet services. Competition for broadband optical and Ethernet services has greatly intensified in the eight years since forbearance was granted, just as the Commission anticipated.<sup>27</sup> In 2014 the U.S. base of Ethernet port installations increased by 23 percent, following a 26 percent increase in 2013.<sup>28</sup> No provider has a port share that exceeds one-fifth of the market.<sup>29</sup> There are eight providers with port shares that exceed five percent, including three ILECs, two CLECs, and three of the nation’s largest cable companies.<sup>30</sup> And smaller providers — *i.e.*, those with port shares under four percent – together have a port share of more than twenty percent.<sup>31</sup> Further, new entry continues (*e.g.*, Zayo), and non-ILECs continue to vigorously compete and expand their IP-based offerings. For example, Comcast just announced a major interconnection deal with other cable companies across the country that will allow it to provide nationwide business-class services,<sup>32</sup> and cable companies are increasing their share of large businesses.<sup>33</sup> In fact, Level 3, one of the Joint CLECs here, has actually overtaken Verizon as the second largest Ethernet provider in the U.S. measured by port share,<sup>34</sup> underscoring the basic absurdity of the Joint CLECs’ claims.<sup>35</sup>

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*Comcast Corp. v. FCC*, 579 F.3d 1, 6 (D.C. Cir. 2009); *see also Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (agency cannot rely on “stale” evidence).

<sup>26</sup> Brief for Federal Communications Commission, *In re AT&T Corp., et al.*, No. 03-1397, 2004 WL 1895955, at \*23-24 (D.C. Cir. filed Aug. 23, 2004) (emphasis in original).

<sup>27</sup> *See, e.g.*, AT&T 2013 Comments, at 6, 27-32; Letter from Robert C. Barber, AT&T, to Marlene H. Dortch, Secretary, FCC, at 2-3 (Oct. 10, 2014).

<sup>28</sup> 2014 U.S. Carrier Ethernet Leaderboard; *Shakeup in rankings; Ports grew by 23% in 2014*, Vertical Systems Group, Feb. 19, 2015, <http://www.verticalsystems.com/vsglb/2014-u-s-carrier-ethernet-leaderboard> (“Vertical Systems 2014 Carrier Ethernet Leaderboard”)(*last checked 9/25/15*); *see also* Nav Chandler, Research Manager, Enterprise Telecom, “U.S. Carrier Ethernet Service 2015-2019 Forecast,” March 2015, *available at* <http://www.idc.com/getdoc.jsp?containerId=255002> (*last checked 9/25/15*).

<sup>29</sup> Vertical Systems Group, ENS Research Program, 2015.

<sup>30</sup> *Id.* Cable companies are increasingly important competitors: Comcast was recently named the fastest growing Ethernet provider on Vertical Systems Group’s U.S. Carrier Ethernet Leaderboard for the second consecutive year and “is well positioned in 2015 due to its extensive fiber network footprint.” Comcast, “The Fastest Growing Ethernet Provider, Two Years Running,” Feb. 25, 2015, <http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running> (*last checked 9/25/15*).

<sup>31</sup> *Id.*

<sup>32</sup> Shalini Ramachandran, *Comcast to Sell Data Services to Big Firms Nationwide*, The Wall Street Journal (Sept. 16, 2015), *available at* <http://www.wsj.com/articles/comcast-to-sell-data-services-to-big-firms-nationwide-1442376240> (*last checked 9/25/15*).

<sup>33</sup> Sean Buckley, “Cable operators taking greater share of large businesses, says analyst firm,” Fierce Telecom, September 21, 2015, *available at* [http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21?utm\\_campaign=AddThis&utm\\_medium=AddThis&utm\\_source=email#.VgmAtB-omyk.email](http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21?utm_campaign=AddThis&utm_medium=AddThis&utm_source=email#.VgmAtB-omyk.email) (among “businesses with over 100 employees during the past two years, . . . business spending on voice and data services from cable operators rose 38 percent, climbing from 12.2 percent to 16.9 percent”) (*last checked 9/25/15*).

<sup>34</sup> *See* Vertical Systems 2014 Carrier Ethernet Leaderboard.

Even if the Commission could lawfully conclude that the ILECs' current rates are unjust and unreasonable — which it could not — determining a defensible level for newly imposed price caps would require a proper rate proceeding. For example, the Joint CLECs admit that “[t]o bring incumbent LECs’ Phase II price flex DSn and packet-switched special access services within price caps, the Commission *will need to attribute prices* to those services for purposes of establishing the appropriate PCI for the special access basket.”<sup>36</sup> But the Joint CLECs’ only suggestion is that the Commission would have “wide discretion” to just pick benchmarks from other rates. Such a shortcut — with no rational and economic basis — would invite reversal. CLECs have shown no lawful basis upon which the Commission could conclude that the lawfulness of an ILEC rate is somehow linked to the rate charged by another carrier. There may be a whole range of reasons for price differences among carriers and the Commission has not even begun to assess those considerations. Indeed, the Commission has long recognized that CLECs may offer lower prices than incumbents because CLECs have complete control over where they provide service, and they will normally choose to do so in the highest-density, cheapest market segments.<sup>37</sup> The only defensible analysis of this market would have to account for the differences between ILECs’ and CLECs’ offerings — and thus there would be no avoiding some form of complex rate case. Indeed, other competitors in the marketplace, such as cable companies, must also be taken into consideration.

The same is true for legacy DSn services. The Commission could not simply borrow other price capped rates to set rates for DSn services, because the Commission cannot lawfully presume that the price cap rates are the “correct” rates for services that have been subject only to competitive forces for years. The existing price caps were flawed from the outset because they were based on rates that resulted from years of rate-of-return regulation,<sup>38</sup> and the caps since then have been reduced by X-Factors that were found to be arbitrary<sup>39</sup> and then arbitrarily reduced again in negotiations that led to the *CALLS Order*.<sup>40</sup> Given this quarter century history of

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<sup>35</sup> As explained above, these data show that there are no “incumbent” Ethernet providers. Each of these companies had to develop and deploy these “next generation” broadband services from scratch. ILEC and non-ILEC competitors alike have invested billions of dollars to deploy state-of-the-art broadband networks. This confirms the Commission’s conclusion that forbearance would promote the paramount federal policy of fostering deployment of advanced services. Indeed, these intensely competitive packet-based services represent the epicenter of the broadband investment that the Commission’s national broadband policies seek to promote and thus make Ethernet services among the least appropriate candidates for any sort of rate regulation.

<sup>36</sup> Joint CLEC Letter at 6 (emphasis added).

<sup>37</sup> Memorandum Opinion and Order, *In the Matter of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 95, and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, ¶ 92 (1999) (competition is typically introduced when “entrants attempt[] to win consumers’ business with lower prices and improved services, and [when] incumbents [a]re forced in turn to respond to the entrants or lose customers”); see also Seventh Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Access Charge Reform and Reform of Access Charges Imposed By Competitive Local Exchange Carriers*, 16 FCC Rcd. 9923, ¶ 37 (2001) (“it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering”).

<sup>38</sup> Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd. 6786 (1990).

<sup>39</sup> AT&T 2013 Comments, at 40-41; *USTA v. FCC*, 188 F.3d 521, 525-26 (D.C. Cir. 1999).

<sup>40</sup> See Sixth Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962,

arbitrary twists and turns, the Commission could not simply assume that price cap rates reflect the proper measure of the rates that should exist in today's competitive market.

*Productivity Adjustments.* The Joint CLECs' suggestion that the Commission could easily adopt productivity offsets with inadequate data is even more fanciful. The Commission has not even attempted to estimate a productivity offset, or X-Factor, since the 1990s, and the X-Factor has been set equal to inflation for almost 15 years. Accordingly, the Commission would have to start from scratch and conduct a massively complex proceeding to establish a new X-Factor. Not only would such an inquiry be an enormous waste of resources, but, the Joint CLECs are unduly dismissive of the endless difficulties the Commission had in its previous X-Factor proceedings. The Commission's first and only real attempt to measure productivity gains under price caps came in 1997 (based on data from the early 1990s), when the Commission adopted a 6.5% X-Factor after long and painstaking rulemaking proceeding. The D.C. Circuit vacated it as arbitrary.<sup>41</sup> Although the X-factor was re-adopted in 2000 in the *CALLS Order*, it was adopted not as an estimate of productivity gains but as a transitional mechanism to reach negotiated rate levels<sup>42</sup> — and *even then* the Fifth Circuit held that it was arbitrary.<sup>43</sup> If the Commission were to change the status quo by selecting a new X-Factor, it would have no choice but to open a new rulemaking proceeding to grapple with the numerous methodological productivity measurement questions that remain open under the D.C. Circuit's 1999 remand.<sup>44</sup> Any such proceeding would require a disproportionate amount of time and resources for all parties involved only to achieve dubious gains in the accuracy of the X-Factor and would likely result in intractable litigation with a high likelihood of judicial reversals.

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¶ 40 (2000) (“*CALLS Order*”) (the negotiated X-Factor is not a true “productivity estimate” but merely a “method to reduce rates to certain levels”).

<sup>41</sup> *USTA v. FCC*, 188 at 525-26.

<sup>42</sup> See Sixth Report and Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, ¶ 40 (2000) (“*CALLS Order*”) (the negotiated X-Factor is not a true “productivity estimate” but merely a “method to reduce rates to certain levels”).

<sup>43</sup> *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313, 328-29 (5th Cir. 2001) (“the FCC has failed to show a rational basis as to how it derived the 6.5 percent figure”).

<sup>44</sup> See Further Notice of Proposed Rulemaking, *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, 14 FCC Rcd. 19717, ¶¶ 20-39 (1999). Such proceedings would be even more difficult here because the Commission has never attempted to determine an X-Factor for a single service, nor has any proponent of re-regulation proposed a coherent method for doing so.

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In sum, the Joint CLECs have shown their hand — they are not concerned about the pricing of DS1s and DS3s. Rather, their proposals seek to sweep IP-based services into the existing rate regulation regime for TDM services. Their proposals to that end are both procedurally and substantively flawed, and should be rejected.

Sincerely,

*/s/ Keith M. Krom*

Keith M. Krom