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**REDACTED – FOR PUBLIC INSPECTION**

**EX PARTE**

October 13, 2015

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 – PUBLIC VERSION**

Dear Ms. Dortch:

On behalf of AT&T and pursuant to the Modified Protective Order and Second Protective Order adopted in the above-referenced proceedings,<sup>1</sup> please find enclosed two copies of the redacted version of an AT&T letter to be filed in the above-captioned proceeding.

Also pursuant to the Modified Protective Order and Second Protective Order, one copy of the highly confidential version of the attached letter will be filed with the Secretary's Office, two copies of the highly confidential version will be delivered to Marvin Sacks of the Wireline Competition Bureau, and one copy of the redacted version of this letter will be filed with the Commission via ECFS.

Respectfully submitted,

*/s/ Keith M. Krom*  
Keith M. Krom

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<sup>1</sup> Modified Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2075 (rel. Oct. 28, 2010) ("Modified Protective Order"); Second Protective Order, *In re Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2419 (rel. Dec. 27, 2010) ("Second Protective Order").



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Dear Ms. Dortch:

AT&T submits this letter in response to recent *ex parte* letters submitted by certain special access competitors that are seeking to have the Commission grant radical ‘immediate’ relief related to the terms and conditions under which AT&T and other incumbent local exchange carriers offer special access services.<sup>1</sup> The arguments raised by these carriers are nothing new;<sup>2</sup> in fact, they are the very same claims the Commission previously concluded it could not address because it lacked sufficient information to make an informed decision about the full extent of competitive alternatives to ILEC special access services.<sup>3</sup> That has not changed. The Commission has not completed its review of the special access data, and it has

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<sup>1</sup> Letter from Thomas Cohen (representing XO Communications, LLC) to Marlene H. Dortch, (Federal Communications Commission) (Sept. 23, 2015) (“XO 9/23/15 *Ex Parte*”); Letter from Thomas Jones (representing Level 3 Communications, LLC) to Marlene H. Dortch (FCC) (Sept. 23, 2015) (“Level 3 9/23/15 *Ex Parte*”); Letter from Paul Margie (representing Sprint Corporation) to Marlene H. Dortch (FCC) (Sept. 23, 2015) (“Sprint 9/23/15 *Ex Parte*”); and Letter from John Nakahata (representing Windstream Services, LLC) to Marlene H. Dortch, (FCC) (Sept. 24, 2015) (“Windstream 9/24/15 *Ex Parte*”).

<sup>2</sup> Letter from Karen Reidy (representing COMPTTEL) to Marlene H. Dortch (FCC) (Sept. 24, 2014); *see* Letter from Angie Kronenberg (representing COMPTTEL) to Marlene H. Dortch (FCC) (Sept. 10, 2014); Letter from Thomas Cohen (representing XO Communications) to Marlene H. Dortch (FCC) (Sept. 17, 2014); Letter from Thomas Jones (representing BT Americas, Inc. *et al.*) to Marlene H. Dortch (FCC) (Sept. 11, 2014).

<sup>3</sup> Report and Order, *Special Access for Price Cap Local Exchange Carriers, et al.*, 27 FCC Rcd. 10557, ¶¶ 3, 6, 7, 50, 52 (2012); *see also* Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers, et al.*, 27 FCC Rcd. 16318, ¶¶ 66-71 (2012).

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only just made that data available for review by authorized parties.<sup>4</sup> In all events, the complaining carriers have not even accurately described the terms and conditions to which they purportedly object. Nor do they acknowledge the steps AT&T has been taking to assist its customers in migrating from TDM to IP-based services in a manner that allows them to *avoid* early termination fees (“ETFs”) and shortfall charges. Instead, they continue to mischaracterize these terms and conditions, as well as the effect on competition. It is not surprising that some carriers would like the Commission to increase their profit margins by rewriting their special access contracts; it’s a nice benefit if you can get it. But there are substantive and procedural requirements that must be met before any such action could lawfully be taken, and those requirements have not been met.

The complaining carriers have a good reason for trying to jump the gun on the Commission’s review of the special access data: the real-world data will show that they have many alternatives to price cap LEC offerings. The shift from legacy TDM services to Ethernet continues to accelerate. Indeed, evidence abounds that special access competition has become even more intense since the carriers last raised these arguments. In 2014 the U.S. base of Ethernet port installations increased by 23 percent, following a 26 percent increase in 2013.<sup>5</sup> No provider has a port share that exceeds one-fifth of the market.<sup>6</sup> Eight providers have port shares that exceed five percent, including three ILECs, two CLECs, and three of the nation’s largest cable companies.<sup>7</sup> And smaller providers — *i.e.*, those with port shares under four percent — together have a port share of more than twenty percent.<sup>8</sup> Further, new entry continues (*e.g.*,

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<sup>4</sup> See FCC, Press Release, “FCC Takes Major Step in Review of Competition in \$40 Billion Special Access Market,” Sept. 17, 2015, [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-335352A1.docx](https://apps.fcc.gov/edocs_public/attachmatch/DOC-335352A1.docx) (*last checked 10/13/15*). The Commission has long-recognized that it needed data on the status of competition in the market before it could consider making changes to the rules governing the ILEC provision of special access services. See Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTTEL, et al.*, D.C. Cir. No. 11-1262, at 15, 19 (filed Oct. 6, 2011) (emphasis added) (The Commission “appropriately recognized that it should make no decisions about revising its special access rules before it ha[d] compiled *and analyzed* an adequate evidentiary record.” It would make no sense, and indeed would be indefensible, now that that data has been collected and is in the process of being reviewed, for the Commission to be lulled into the complaining carriers’ arguments and order some rash — and surely harmful — interim relief abrogating valid contractual relationships.

<sup>5</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 10/13/15*); see also Nav Chandler, Research Manager, Enterprise Telecom, “U.S. Carrier Ethernet Service 2015-2019 Forecast,” IDC, March 2015, *available at* <http://www.idc.com/getdoc.jsp?containerId=255002> (*last checked 10/13/15*).

<sup>6</sup> Vertical Systems Group, ENS Research Program, 2015.

<sup>7</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 10/13/15*).

<sup>8</sup> *Id.*

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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>9</sup> and cable companies are increasing their share of large businesses.<sup>10</sup> In fact, Level 3, one of the complaining CLECs here, has actually overtaken Verizon as the second largest Ethernet provider in the U.S. measured by port share,<sup>11</sup> underscoring the basic absurdity of the CLECs' claims.<sup>12</sup>

Notwithstanding this vigorous competition, the complaining CLECs maintain that they are foreclosed by special access terms and conditions from obtaining service from alternative providers.<sup>13</sup> As usual, these arguments are long on rhetoric but short on facts. As before, the one alleged example of an AT&T "loyalty" contract that any of these CLECs cite is AT&T's SWBT Tariff No. 73 and its term payment plan ("TPP").<sup>14</sup> As explained on numerous occasions before, AT&T's tariff is not a "loyalty" contract; it is merely a simple term plan.<sup>15</sup> This tariff contains *no volume discounts at all*. Customers can purchase individual circuits for one of six terms:

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<sup>9</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 10/13/15).

<sup>10</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.emai](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.emai) (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 10/13/15).

<sup>11</sup> See Vertical Systems 2014 Carrier Ethernet Leaderboard.

<sup>12</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>13</sup> XO 9/23/15 *Ex Parte* at 3-4; Level 3 9/23/15 *Ex Parte* at 2-4. Although several of the carriers allege that ILEC special access tariffs are "loyalty" commitments, a true *loyalty* contract, in the economic sense, is a contract that requires either "exclusive dealing or a volume commitment referencing the customer's total purchases *including* those from rivals." See Reply Comments of AT&T, Carlton-Shampine Reply Declaration (filed March 12, 2013) ("Carlton-Shampine Reply Decl.") ¶ 8 (emphasis in original). See also Reply Comments of AT&T (filed March 12, 2013) at 27 (A "classic" loyalty contract is one that requires a customer to buy a certain percentage of all of its inputs from the seller or pay a higher price for the inputs, or conditions the availability of a discount on the purchase of a certain percentage of all inputs from the seller).

<sup>14</sup> Level 3 9/23/15 *Ex Parte* at 2-3 (citing the SWBT Tariff and its Pacific Bell counterpart).

<sup>15</sup> See e.g., Reply Comments of AT&T, Casto Reply Declaration (filed March 12, 2013) ("Casto Reply Decl."); Carlton-Shampine Reply Decl.; Letter from Robert Barber (representing AT&T) to Marlene H. Dortch (FCC) (Oct. 10, 2014) ("AT&T 10/10/14 Letter"); Letter from David L. Lawson (representing AT&T) to Marlene H. Dortch (FCC) (Aug. 8, 2012) ("AT&T 8/8/12 Letter").

month-to-month, 1-year, 2-year, 3-year, 5-year, and 7-year terms, and, as is the case with any term plan, AT&T offers lower rates in exchange for the benefits of longer terms. A customer can buy as much or little from AT&T as it wants and can choose the term length it wants.<sup>16</sup> Thus, contrary to the claims of the complaining carriers,<sup>17</sup> customers can obtain the maximum discounts under this tariff no matter how many circuits they choose to purchase. These term discounts naturally include liability for early termination – without sufficient ETFs, customers could sign up for the 7-year discount but cancel after just 1 year, thus gaining the discount and denying AT&T its benefit of the bargain.<sup>18</sup> Under the TPP, however, the term liability is only a fraction (40 percent) of the remaining monthly charges for the circuit.<sup>19</sup> Moreover, AT&T waives ETF's for customers who migrate DSn circuits to AT&T Switched Ethernet Service.<sup>20</sup>

The TPP also contains a “portability” *option*, but that option does not constitute a “loyalty” commitment.<sup>21</sup> The TPP portability option allows a customer to move as many DS1 circuits from one location to another as it wants without incurring ETFs.<sup>22</sup> The volume commitment for the portability feature is set by reference only to the customer's DS1 channel termination volumes *with AT&T* – not with rivals, so customers can buy as much service from AT&T's competitors as they choose.<sup>23</sup> Moreover, customers are not required to maintain their initial volumes; rather a customer can disconnect up to 20 percent of its initial DS1 circuit commitment (including disconnects made to move them to another carrier) over the term of the portability plan without paying any ETFs.<sup>24</sup> Any customer that chooses the portability option thus retains substantial flexibility: the initial commitment under the TPP portability option does not include service the customer has purchased from other access suppliers,<sup>25</sup> and the customer

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<sup>16</sup> Casto Reply Decl. ¶ 3.

<sup>17</sup> See e.g., XO 9/23/15 *Ex Parte* at 4-5; Sprint 9/23/15 *Ex Parte* at 2.

<sup>18</sup> Casto Reply Decl. ¶ 4; Carlton-Shampine Reply Decl. ¶¶ 24-25.

<sup>19</sup> Casto Reply Decl. ¶ 4 & n.2. Notably, in many circumstances, AT&T's TPP tariff does not impose an ETF where the CLEC transfers one end of the circuit to another location in the same LATA as the existing customer. *Id.* ¶ 13 & n.5.

<sup>20</sup> Interstate Access Guidebook, Part 5, Section 4.4(J) (Conversion of DS1 and DS3 Services to AT&T Switched Access Service); AT&T Switched Ethernet Service Guide, Part 1, Section 4(8).

<sup>21</sup> Carlton-Shampine Reply Decl. ¶ 11.

<sup>22</sup> Casto Reply Decl. ¶ 5.

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

<sup>24</sup> *Id.* XO is wrong in its claim that AT&T does not have a portability option for DS3s. See XO 9/23/15 *Ex Parte* at 4. AT&T has a tariffed portability plan in the SWBT region. See Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, available at <http://cpr.bellsouth.com/pdf/fcc-swbt/fcc-swbt4.htm> (last checked 10/13/15). Generally speaking, however, portability for DS3 circuits is provided through individualized negotiation and the contract tariff process. See Casto Reply Decl. ¶ 5 n.3.

<sup>25</sup> *Id.* ¶ 5.

remains free to purchase service from other carriers during the term of the plan – as well as disconnecting or buying from other suppliers up to 20 percent of its existing circuit commitment with AT&T – without incurring an ETF or shortfall.<sup>26</sup>

Beyond that, AT&T has modified its generally available offerings so that AT&T now waives ETFs as a matter of course for customers who migrate DS<sub>n</sub> circuits to AT&T Switched Ethernet Service.<sup>27</sup> **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION]** The CLECs have provided no reason to believe that the parties cannot continue to find mutually beneficial solutions to these issues through the negotiation process, just as they have for the last decade as competition for Ethernet services has exploded.

In the face of these facts, the CLEC rhetoric rings hollow. For example, XO’s claims that “as a consequence of the minimum [volume] commitments, XO is often unable to serve customers using its own facilities — either new or existing — or by purchasing competitive offerings from other providers” and that it “does not have a practicable opportunity to migrate any material number of circuits to other providers when a Commitment Plan expires in order to avoid the lock-up provisions”<sup>28</sup> are false.<sup>29</sup> And Sprint’s argument is even more indefensible. Sprint contends that unspecified ILEC terms and conditions are preventing migration to IP services, but these arguments are belied by its own experience. In 2006, Sprint argued that more than 90 percent of the backhaul circuits for its wireless business were purchased from ILECs and that ILEC terms and conditions impeded Sprint’s ability to migrate those circuits to competitor offerings.<sup>30</sup> Shortly thereafter, Sprint sought competitive bids for its DS<sub>n</sub> wireless backhaul

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<sup>26</sup> *Id.* In fact, several of the complaining carriers that have actually elected the TPP portability option are purchasing at levels well above the minimum TPP portability option commitment level – which means that they have the headroom and the flexibility today to transfer those circuits to another provider without incurring any additional charge, and yet have chosen not to do so. The presence of this ‘portable’ demand, which can be shifted without incurring ETFs, is fatal to the complaining carriers’ claims.

<sup>27</sup> Interstate Access Guidebook, Part 5, Section 4.4(J) (Conversion of DS1 and DS3 Services to AT&T Switched Access Service); AT&T Switched Ethernet Service Guide, Part 1, Section 4(8).

<sup>28</sup> XO 9/23/15 *Ex Parte* at 5, 7.

<sup>29</sup> Similarly, Sprint mischaracterizes AT&T’s tariffs in its claim that “once a commitment is established, special access purchasers like Sprint cannot reduce their purchase levels in favor of a competitor’s service without suffering significant penalties.” Sprint 9/23/15 *Ex Parte* at 4.

<sup>30</sup> Reply Comments of Sprint Nextel Corporation (filed Aug. 15, 2007) at 12 (“Sprint Nextel purchase[s] nearly all of its wireless backhaul from incumbent LECs”); Comments of Sprint Nextel Corporation (filed Aug. 8, 2007) at 30

circuits, received bids from a wide variety of competitors, including CLECs, cable companies and fixed wireless providers,<sup>31</sup> and has now transitioned nearly all of those circuits to Ethernet while reporting dramatic cost reductions and efficiency gains to its investors.<sup>32</sup> In the face of these facts, all Sprint can say is that its successful migration to Ethernet “does not reflect the reality of the special access market”<sup>33</sup> – as if its marketplace experience is not a marketplace reality. The truth is that Sprint’s wireless backhaul migration is a good example of how marketplace competition and the negotiating process are addressing the sorts of issues the CLECs raise without Commission intervention.<sup>34</sup>

Level 3 asserts that the only reason it is not switching to competitors’ services is to avoid ILEC shortfall or early termination fees, but, even if true, this argument proves nothing. Level 3 has been purchasing special access services for many years. As its contracts expire, it always has the option to migrate circuits to competitors without incurring early termination fees or shortfalls. And if Level 3 wishes to maintain the flexibility to switch to competitors, it can always purchase circuits under plans with shorter terms and not purchase under portability offerings. The fact that it chose, instead, to sign up for a five-year term does not demonstrate the existence of a market problem that requires Commission intervention.

Relatedly, Level 3’s claim that retail customers might switch to Level 3 if they were not taking service under ILEC plans fares no better. It is, of course, *always* true that when a customer signs up for a term plan, that customer has a contractual obligation to fulfill its commitment. That is true of CLECs’ term plan customers as well. The fact that there are ILEC customers who are currently subject to term plans proves nothing.

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(“Overall, for both its wireline and wireless businesses, Sprint Nextel relied on incumbent LECs’ special access services for 96.4% of all DS1 and DS3 customer terminating circuits”).

<sup>31</sup> According to Sprint, it sought bids for the provision of these services and apparently correctly predicted that it would end up “with 25 to 30 significant backhaul providers that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers.” Carol Wilson, *Sprint to Reveal Backhaul Contract Winners Friday*, Light Reading Oct. 5, 2011, available at <http://www.lightreading.com/ethernet-ip/sprint-to-reveal-backhaul-contract-winners-friday/d-d-id/690452> (internal quotations omitted) (*last checked 10/13/15*). Indeed, Verizon has stated “Sprint had awarded Verizon the backhaul business at only [a very small percentage] of the total number of [Sprint’s cell] sites in the Verizon incumbent footprint.” Letter from Kathleen Grillo (representing Verizon) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593 at 2 (September 12, 2012) (“Verizon Letter”).

<sup>32</sup> See, e.g., Sue Marek, *Sprint: Ethernet backhaul gives us 20 times more bandwidth*, FierceWirelessTech, Aug. 15, 2012, available at <http://www.fiercewireless.com/tech/story/sprint-ethernet-backhaul-gives-us-20-times-more-bandwidth/2012-08-15> (*last checked 10/13/15*).

<sup>33</sup> Sprint 9/23/15 *Ex Parte* at 6, n.8.

<sup>34</sup> Sprint complains that its transition to backhaul Ethernet required it to break its term commitments for some DS<sub>n</sub> services and pay ETFs. See Sprint 9/23/15 *Ex Parte* at 6. But for perspective, Sprint’s total operating costs are nearly \$2.4 billion and its overall backhaul costs *declined*. See Sprint Quarterly Investor Update, Fiscal 1Q15, at 8 (August 4, 2015), available at [http://investors.sprint.com/files/doc\\_financials/quarterly/2015/1500074513.PDF](http://investors.sprint.com/files/doc_financials/quarterly/2015/1500074513.PDF) (*last checked 10/13/15*).

Level 3 further argues that ILEC rates are higher than competitor's rates. But again, Level 3 provides no supporting evidence.<sup>35</sup> According to Level 3, there is an unnamed CLEC that charges \$120 for a circuit that would cost \$302.50 if purchased from AT&T.<sup>36</sup> Even assuming that this phantom CLEC exists, it is not at all clear that it is an apples-to-apples comparison. Indeed, it is highly unlikely that this \$120 circuit is a valid or representative substitute for AT&T's special access services, (which for example are subject to service level agreements), given Level 3's own assertions earlier in its letter that it would save 17 percent by switching to CLECs, not 66 percent (as implied by the \$120 circuit).

At the end of the day, the CLEC claims cannot be squared with market realities. If there were any merit to these "lock-in" theories, one would expect to see decreased entry and a contraction of competitive offerings during the past decade. And one would have expected Sprint to be stalled in its effort to migrate its backhaul circuits to Ethernet. The opposite has occurred: as noted above, many non-ILEC Ethernet providers have entered the marketplace and have collectively won the lion's share of the customers. And Sprint has been able to boast about its backhaul savings as a result of its successful Ethernet migration. At the same time, AT&T has documented that its sales of DS1s to both wireless and wireline customers are declining,<sup>37</sup> and those trends are continuing.

This proceeding is thus not about anticompetitive lock-in provisions. What the complaining carriers really want is a windfall. They want the Commission to rewrite the contracts that they, as sophisticated purchasers of special access, have negotiated with incumbent LECs.<sup>38</sup> Any such action would be unlawful.

First, the Commission could not prescribe new terms for any individual ILEC tariff without complying with the requirements of Section 205.<sup>39</sup> The complaining carriers are clearly

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<sup>35</sup> It is worth remembering that, on previous occasions when CLECs attempted to show that their rates were lower than ILECs, the evidence they actually provided established the opposite. *See, e.g.*, Letter from David L. Lawson (representing AT&T) to Marlene H. Dortch (FCC) (March 3, 2008).

<sup>36</sup> Level 3 9/23/15 *Ex Parte* at 5-6.

<sup>37</sup> Casto Reply Decl. ¶¶ 28-29 (from March 2011 to December 2012, the number of DS1 special access circuits AT&T provided to wireless providers had dropped by more than 30 percent, and AT&T's sales of DS1 circuits to wireline customers had likewise begun to decline). In addition, in the period from March 2011 to August 2014, the number of DS1 special access circuits AT&T provided to wireless providers in its incumbent territories dropped by more than 60 percent. Although in some instances AT&T was able to win the provider's Ethernet business, in many instances the wireless provider selected an alternative Ethernet provider for its backhaul needs.

<sup>38</sup> Sprint brazenly asks the Commission to "eliminate anticompetitive terms and conditions for TDM and Ethernet special access, and . . . reduce rates to just and reasonable levels." Sprint 9/23/15 *Ex Parte* at 3; *see also id.* at 8-9. And, while the other complaining carriers have not set out the specifics of their requested relief, they are urging the Commission to act promptly to address their complaints. *See e.g.*, Level 3 9/23/15 *Ex Parte* at 6; Windstream 9/24/15 *Ex Parte* at 1; XO 9/23/15 *Ex Parte* at 1.

<sup>39</sup> 47 U.S.C. § 205.

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seeking a prescription (and abrogation of existing contracts), because they baldly ask the Commission to rewrite the ILECs' contracts to retain the terms that the complaining carriers like (the discounts) while excising the *quid pro quo* to which they agreed.<sup>40</sup> Once carrier-initiated tariffs take effect, however, Section 205 provides that the Commission may order a carrier to change the rates or terms of its offer only after it has conducted a hearing and (1) made definitive findings that the carrier's existing charge or practice "is or will be in violation of the Act" and (2) determined "what will be the just and reasonable" charge or practice "to be thereafter followed."<sup>41</sup> Here, the Commission has already specifically found that it did not yet have an adequate record to make such findings, and therefore under both Section 205 and the Administrative Procedure Act it must "leave the matter of prescription for resolution on an adequate record after further proceedings."<sup>42</sup>

But even if the Commission followed the procedural requirements of Section 205, it could not meet the high standard necessary to rewrite privately negotiated contracts. Under the *Sierra-Mobile* doctrine,<sup>43</sup> the Commission may "abrogate existing contracts only where the public interest 'imperatively demands' such action."<sup>44</sup> That high standard has not been met here. To the contrary, as the Commission previously held, "[t]here is simply no justification for allowing [a party] . . . to negotiate for concessions on price, to sign a contract containing customized provisions that are the product of voluntary agreement, and then to run to the Commission to have the Commission reform a provision of the contract that was an integral part of the *quid pro quo* bargain but which subsequently produces hardship to the customer."<sup>45</sup>

Rewriting the terms and conditions of special access contracts would be all the more unwarranted given that the Commission has previously found that the type of terms and conditions attacked by complaining carriers are common both in the telecommunications

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<sup>40</sup> See, e.g., *Sprint 9/23/15 Ex Parte* at 3, 8-9.

<sup>41</sup> *AT&T Co. v. FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973) (a "full opportunity for hearing" and express Commission findings that the carrier-initiated rate is unjust and unreasonable and the prescribed rate is just and reasonable "are essential to any exercise by the Commission of its authority" to prescribe rates); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995).

<sup>42</sup> See *AT&T Co. v. FCC*, 449 F.2d 439, 451 (2d Cir. 1971) (striking down interim prescription; since record was insufficient, "§ 205(a) required the Commission to leave the matter of prescription for resolution on an adequate record"); *American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, 86 FCC 2d 820, ¶ 88 (1981) (rejecting "interim phase-in" proposal, because "we now have no record on which to base such a prescription").

<sup>43</sup> *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

<sup>44</sup> *Union Pacific Fuels, Inc. v. FERC*, 129 F.3d 157, 161 (D.C. Cir. 1997) (quoting *Metropolitan Edison Co. v. F.E.R.C.*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979)).

<sup>45</sup> Memorandum Opinion and Order, *Ryder Commc'ns, Inc. v. AT&T Corp.*, 18 FCC Rcd. 13603, ¶ 28 (2003) (internal quotation marks omitted).

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industry and in competitive industries throughout the country.<sup>46</sup> Indeed, notwithstanding their generalized denials that they do not utilize similar terms and conditions in their contracts,<sup>47</sup> CLECs themselves provide lower rates for term commitments, impose early termination fees for circuits terminated prior to the end of the commitment, and have negotiated portability arrangements.<sup>48</sup> There is no basis for a sweeping ruling that tariff provisions that are widely used and similar to what the complaining carriers themselves offer are *per se* unjust and unreasonable.

For the foregoing reasons, the Commission should not be distracted by the complaining carriers' misguided arguments but rather continue with the task at hand and move forward with the review and analysis of the special access data responses.

Respectfully submitted,

*/s/ Keith M. Krom*  
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<sup>46</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 698 (2003), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *see also* Carlton-Shampine Reply Decl. ¶ 26.

<sup>47</sup> *See e.g.*, XO 9/23/15 *Ex Parte* at 9-11; Level 3 9/23/15 *Ex Parte* at 5-6

<sup>48</sup> *See* AT&T 8/8/12 Letter at 10-12. Indeed, XO admits as much: “that is not to say that XO never negotiates larger discounts as a customer’s overall [usage] volume increases or for longer terms” and “to get the prices they negotiated, XO’s customers must make the purchases for which they bargained.” XO 9/23/15 *Ex Parte* at 10.