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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	))))	WC Docket No. 15-247

CENTURYLINK WHITE PAPER ON DISCOUNT PLAN TERMS AND CONDITIONS

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EXECUTIVE SUMMARY

The two CenturyLink discount plans under investigation here – the Regional Commitment Program ("RCP") and Special Access Term Discount Plan ("TDP") – are just and reasonable, and thus lawful. Far from causing any competitive harm, these plans advance competition and promote the Commission's deployment goals in a marketplace that continues to diversify and flourish without regulatory intervention.

The Competitive Marketplace Obviates Any Concern Regarding Anticompetitive Behavior. These RCP and TDP must be evaluated against the extremely competitive high-capacity transmission market, which becomes more dynamic every month, and in which neither CenturyLink nor any other provider possesses market power. The data the Commission has collected regarding 2013 reflects a marketplace in which non-ILEC providers play a central role. Unsurprisingly, that marketplace has become even more highly contested since 2013. Competitive fiber providers such as XO, Windstream, and Level 3 (which acquired tw telecom in 2014) advertise ever-expanding long-haul and metro networks and highlight their leading positions serving the nation's enterprises. Cable providers are accelerating their propulsive advance into the high-capacity marketplace. Comcast has announced a new business unit tasked exclusively with selling enterprise services to Fortune 1000 companies on a nationwide basis, and boasts "the largest facilities-based last mile alternative to the phone company." Other cable companies likewise are being aggressive – Time Warner Cable, for example, has over 850,000 buildings on its network, serves about 718,000 business customers, and has singled out this segment as an "important strategic priority and growth area." In all, one analyst estimated the cable industry's 2014 annual growth rate in commercial services revenue to have been 25 percent, compared to a *reduction* of 2.7 percent for the Regional Bell Operating Companies. Increased activity by cable companies has dramatically expanded the availability of Ethernet access and fundamentally changed CenturyLink's experience as a purchaser of high-capacity transmission. In fact, as of November, CenturyLink purchased access from 29 cable companies. In this marketplace, no provider is in a position to behave anticompetitively.

The CenturyLink Plans at Issue Utilize Conventional Discounts and Are Not Exclusionary. The RCP and the TDP, which are offered only in the former Qwest and Embarq territories, respectively, contain standard terms that do not in any way foreclose competition. The RCP provides a 22 percent discount to customers that consume 95 percent or more of the quantity of service they decide to purchase at the start of their four-year contractual term, and allows customers to reduce their original commitment when migrating to higher-capacity services. Customers may shift services among locations, so long as they meet their revenue commitments. The RCP imposes no termination penalties – customers must simply pay the amount they committed to spend (less the 22 percent discount) – and no overage fees. The TDP provides discounts ranging from approximately 15 percent to 30 percent to customers that use 90 percent or more of the quantity they opted to purchase at the beginning of their three- or five-year contractual term. Like the RCP, the TDP allows customers to shift the circuits in use without penalty, and to reduce their commitments during the contract term by migrating to other services. TDP customers that purchase less than their agreed-to number of circuits for more than 90 days are assessed a termination fee for the unused circuits and have their commitment levels reduced; customers using more than 130 percent the agreed-to number of circuits may increase their commitment level, decrease the number of circuits purchased, or pay standard monthly rates for circuits exceeding the 130 percent threshold.

These plans do not establish exclusive dealing arrangements or otherwise undercut competition. To the contrary, they permit customers to purchase as much service as they wish from third-party suppliers without penalty. Both plans facilitate the customer's migration and upgrade of its services during the relevant term, and provide options the customer can employ to modify its commitment as demand levels change. Neither plan ties discounts to the extent of a customer's purchases from other providers. Courts and commentators have long agreed that such practices are procompetitive and lawful. They do not constitute anticompetitive foreclosure, even where the quantity the customer chooses to purchase fulfills a large portion of its total needs. Moreover, even if the RCP and TDP were deemed exclusive dealing arrangements, they would be lawful, because such arrangements are permissible except where the provider holds monopoly power, which CenturyLink clearly does not.

The valid business justifications underpinning the use of the plans' discounts further safeguard them from any allegation of unlawfulness. Indeed, longstanding precedent makes clear that even expressly exclusive arrangements offered by monopolists are lawful if they serve a valid business purpose, such as providing certainty, ensuring demand and supply, and protecting against price fluctuations. The RCP and TDP serve precisely these ends.

The Specific Practices At Issue Do Not Violate Sections 201 or 202. Finally, the specific provisions discussed in the *Designation Order*, as manifested in CenturyLink's agreements, do not violate the Communications Act.

Percentage Commitments. Unlike exclusive dealing agreements, the percentage commitments utilized in the RCP and TDP permit customers to purchase any proportion of their services from other providers. Before it enters into a plan, the customer has the option of switching a portion of its demand to other providers, which many customers have done. Percentage commitments reflect a mutual value proposition in which CenturyLink lowers the price to the customer in exchange for the customer's commitment to hold its purchases at a steady level over a period of time. CenturyLink structures its discounts this way because its customers asked its predecessor companies to do so, and courts have approved this approach. The RCP and TDP percentage commitments are lawful.

Shortfall Fees. As applied to the RCP and TDP, the term "shortfall fee" is a misnomer. Under the RCP, a customer is simply held to the full amount of its agreed-upon percentage revenue commitment for the term of the plan, and is not charged any additional fee for falling short. Under the TDP, if a customer falls below its percentage commitment for more than 90 days, its service commitment level is reduced and it is billed an early termination charge for the number of circuits it has fallen below its original commitment. It does not incur any additional fee. These provisions merely enforce the agreed-upon percentage commitments. In fact, CLECs have also used shortage or early termination fees in their term discount plans for years, demonstrating the validity of such provisions. The Commission has rejected claims that such provisions are unlawful.

Upper Percentage Thresholds. The RCP has no upper percentage threshold. Under the TDP, a customer receives discounts on all of the circuits covered by the plan as long as its volume remains between 90 percent and 130 percent of the commitment level. A customer that exceeds 130 percent of its commitment for 90 days can also choose to raise its commitment, or simply shift its purchase of additional capacity elsewhere. Thus, critics claiming that upper percentage thresholds force buyers to increase the quantity of service purchased from ILECs are wrong, at least with regard to CenturyLink. Nor is the TDP threshold discriminatory with respect to smaller customers – it is based only on how much the customer consumes relative to the amount it elected to purchase at the start of the term, not to the overall quantity of service purchased. The thresholds therefore are lawful.

Overage Penalties. Neither the RCP nor the TDP imposes overage penalties. If RCP purchases exceed the customer's commitment as of the annual review, the commitment for the following period is automatically increased to meet the higher service level, but CenturyLink imposes no penalty. Under the TDP, if the customer's volume remains above 130 percent of the commitment level for more than 90 days, it will pay month-to-month rates for the amounts above 130 percent unless the customer chooses to increase its service commitment (which it is always free to do) or reduce the number of circuits under the plan. If the customer chooses to increase its commitment level, the discount will apply to the new volume. If anything, the TDP's removal of the discount at levels above 130 percent of the customer's commitment provides an additional incentive to use a competitor's services. These provisions are lawful.

Long-Term Commitments. The RCP employs a four-year term and the TDP employs three- or five-year terms. Courts and commentators have made clear that long-term supply contracts *promote* competition and consumer interests by enhancing stability and certainty in the marketplace. Moreover, CLECs and other competitors also use long-term commitments in their pricing plans. In fact, as a customer of CLECs and other ILECs, CenturyLink generally has *requested* five-year terms. The RCP's and TDP's terms are lawful.

Early Termination Fees. CenturyLink applies early termination fees only in the case of a true termination of service by the customer. Such fees, which collect revenues associated with 50 percent of the remaining term of a contract, help ensure that at least a portion of the expected revenue stream on which CenturyLink's investment was premised will continue over the life of the customer's commitment. They have no anticompetitive effect. CLECs, too, have used early termination fees for years. Several of the largest CLECs from whom CenturyLink purchases service impose *100 percent* termination liability in year one of the agreement, and 50 percent or other decreasing percentages for each remaining year. CenturyLink's lower fees are lawful.

Commercial Agreements. CenturyLink has contract tariffs on file covering the tariffed services that it provisions alongside non-tariffed offerings via commercial agreements. Thus, concerns with respect to this issue do not apply to CenturyLink.

* * *

To find the pricing plans at issue here contrary to Sections 201 and/or 202, the Bureau would need to upend more than a century's worth of antitrust law and commentary, repudiating settled legal holdings that the practices under examination are lawful and procompetitive and indeed *further* competition. There is no basis on which it could do so. Thus, the Bureau should close the instant investigation and find that the CenturyLink tariff provisions under consideration are lawful.

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In response to the Wireline Competition Bureau's ("Bureau's") *Designation Order* in the above-referenced proceeding,[1] CenturyLink hereby sets forth its "positions with respect to the issues described" therein.[2]

The Bureau's investigation proceeds against a backdrop of tremendous and rapid change in the communications marketplace in general and the high-capacity transmission segment in particular. As the Commission well knows, the industry is in the midst of a transition from legacy copper-based telephone networks to all-purpose fiber networks carrying Internet Protocol

[1] *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, WC Docket No. 15-247, DA 15-1194 (WCB rel. Oct. 16, 2015) ("*Designation Order*").

[2] *Id.* ¶ 108.

("IP") services. Indeed, many of the Commission's recent actions and pending proceedings are aimed at facilitating that transition.[3]

In important ways, that shift is rendering the CenturyLink tariff discount plans at issue in this investigation increasingly moot. These tariff plans generally concern incumbent local exchange carriers' ("ILECs") legacy DS1 and DS3 facilities, which occupy a smaller and smaller share of the market. Both CenturyLink plans under investigation here were established in the mid-1990s. To be sure, competitive local exchange carriers ("CLECs") and wireless providers still purchase these services, and they are relevant to the broader ecosystem. But given the difficult deployment challenges facing providers and policy-makers alike – especially the critical task of ensuring that both ILECs and CLECs are able and willing to deploy fiber-optic facilities capable of competing with those of cable providers – the Bureau must be sure that its actions with regard to the shrinking legacy market segment do not undermine the Commission's forward-looking investment objectives.[4] The practices at issue in this investigation *promote* rather than undercut those interests, by providing the business certainty for ILECs, CLECs, and wireless providers that allows for rational network planning and sustained capital investment.

Even setting aside the imperative to promote deployment of next-generation facilities, there is no basis on which to invalidate the terms and conditions on which CenturyLink offers

[3] *See, e.g.*, *id.* ¶ 11 & n.29 (citing *Technology Transitions*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433 (2014)).

[4] The Commission's *2015 USTelecom Forbearance Order* repeatedly recognizes that mandates designed to regulate the shrinking legacy market can have adverse effects on the deployment of next-generation services. *See, e.g.*, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, FCC 15-166, ¶¶ 26, 55, 57, 58, 65 (Dec. 28, 2015) ("*2015 USTelecom Forbearance Order*").

these discounts. As CenturyLink will show, the data submitted reveal that the 2013 marketplace was highly competitive.[5] Since then, the marketplace has become even more dynamic, with ILECs' competitors – in particular, but not exclusively, cable operators – capturing increasing market share and growing with breakneck speed. The strength and diversity of ILECs' competitors in the high-capacity transmission marketplace simply foreclose any prospect of anticompetitive activity.

In any case, courts and commentators have long made clear that the terms and conditions used here are *not* anticompetitive – indeed, they generally have been adjudicated to be *procompetitive* under the nation's antitrust laws. The two CenturyLink discount plans under investigation – the Regional Commitment Program ("RCP") and Special Access Term Discount Plan ("TDP") – promote use of CenturyLink's offerings, do not foreclose the use of competitors' offerings, and serve valid business purposes. They do not in any way require (or inevitably result in *de facto*) exclusivity. Courts have time and again held that terms such as those used in the RCP and TDP promote rather than undermine competition. Moreover, many (if not all) of the contract terms contained in the RCP and TDP are also used by CenturyLink's competitors themselves, eviscerating any claim that these provisions are the product of untamed market power.

This investigation therefore should lead to a final resolution of the Commission's long-running examination of the terms and conditions used in ILEC discount plans, and allow both the industry and the agency to return their attention to the future. CenturyLink hopes that, once the

[5] The timeframe under which parties were granted access to the data precluded CenturyLink from setting out its analysis with its opening case.

investigation is concluded, the Bureau will acknowledge what should already be apparent – that none of the cited practices raises any competitive concerns, and that there is no basis for finding that those terms, long deemed *procompetitive* by the courts and others, could be considered *anticompetitive* and unlawful under the Communications Act.

DISCUSSION

I. THE HIGH-CAPACITY TRANSMISSION MARKETPLACE IS EVEN MORE DYNAMIC AND COMPETITIVE THAN REFLECTED BY THE COMMISSION'S 2013 DATA SET

Contrary to the sepia-tinged images evoked by the very term "special access," the high-capacity transmission marketplace is one of the most dynamic and competitive sectors of the communications marketplace. As CenturyLink has explained before, ILEC services face aggressive competition from CLECs, fixed wireless, and cable providers in the provision of high-capacity transmission, and the marketplace is shifting away from the services at issue here and toward higher-capacity fiber Ethernet services. Even since 2013 – the year for which the Commission has collected a broad data set for examination in the ongoing rulemaking – competitive providers have advanced substantially. The attached declaration from Carla Stewart underscores the wide variety of options of which CenturyLink can and does avail itself as an out-of-region access purchaser, illustrating the dramatic shift in the wholesale marketplace that has occurred since the last data collection.[6] In January 2014, CenturyLink had access to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** commercial

[6] *See generally* Declaration of Carla Stewart, attached hereto as an Exhibit.

buildings or addresses through non-ILEC providers.[7] As of November 2015, that number had grown to over **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** commercial buildings or addresses through non-ILEC providers, an increase of more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent since January 2014.[8] Thus, concepts such as "market power" and "bottleneck facilities" may be found in abundance in certain parties' pleadings, but they are absent from the marketplace itself.

Although the *Designation Order* acknowledges at times that competition in the high-capacity service marketplace is increasing,[9] it understates both the extent and the significance of that trend. Not only does the *Designation Order* single out legacy, TDM-based, ILEC-provisioned special access services without accounting for the burgeoning supply of Ethernet and other broadband alternatives from intermodal competitors, but it then also relies on outdated data to assess this shrinking slice of the marketplace in isolation.[10] The fact that TDM-based services constitute the market "subset" subject to the pricing plans at issue does not relieve the Commission of its responsibility to consider the entire competitive landscape.[11] Rather, as CenturyLink has explained, the Commission has stated, and courts have held, bedrock principles

[7] Some providers identify the number of standalone commercial buildings in which they offer access services, while others identify those locations by street address.

[8] *See Designation Order* ¶ 3.

[9] *See, e.g., id.* ¶ 4 (stating that "competitors continue to expand their market presence by building IP-based facilities or extending TDM[-]based facilities to additional buildings"); *id.* ¶ 10 (conceding that "competitive LECs have had success in obtaining a significant share of the market for Ethernet services").

[10] *See, e.g., id.* ¶¶ 3, 14 (citing data from and before 2013).

[11] *Id.* ¶ 2.

of competitive analysis compel consideration of all substitutes, including intermodal alternatives.[12] Moreover, as the Department of Justice and Federal Trade Commission have made clear, such analysis must account for incipient competition as well as already-existing competition.[13]

When the full range of competitive alternatives are properly taken into account, it should be clear that even if ILECs *did* historically play a unique role in the provision of TDM-based special access services such as DS1 and DS3 channel terminations, that "fact" would be beside the point.[14] What matters for present purposes is that ILECs provide such services within a broader high-capacity transmission marketplace in which they are steadily losing market share to other providers – including those competitors whose claims prompted this investigation – and thus are in no position to engage in the sort of anticompetitive practices alleged.

The Commission already has compiled a record to support a finding of robust competition, but certain aspects of that evidence warrant emphasis and updating. There can be

[12] *See, e.g.*, Comments of CenturyLink, WC Docket No. 05-25, at 12-13 (filed Feb. 11, 2013) (citing Areeda & Hovenkamp, Antitrust Law 369 ¶ 562 (3d ed. 2007) (a product market "includes (1) identical products, (2) products with such negligible physical or brand differences that buyers regard them as the same product, and (3) other products that buyers regard as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other") (internal citations omitted)); Comments of Qwest Commc'ns Int'l, Inc. WC Docket No. 05-25, at 5-6 (filed Aug. 8, 2007) ("The Commission's analysis of the market must account not only for traditional dedicated wireline facilities, but also for point-to-point services offered via other platforms and for the xDSL offerings that are increasingly relied on by small enterprise customers. As the Commission and the courts have emphasized, this analytical framework best reflects the wide array of options presented to the sophisticated users that purchase special access services.") (internal citations omitted)). *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999).

[13] U.S. DOJ & FTC, *Horizontal Merger Guidelines* § 5.1, at 15-16 (Aug. 19, 2010).

[14] *Designation Order* ¶ 3.

no meaningful dispute that – as even the *Designation Order* acknowledges[15] – customers continue to migrate rapidly from ILEC legacy services to Ethernet and other broadband offerings provisioned by competitive providers over fiber and hybrid coaxial facilities. Sprint's successful migration of its wireless backhaul needs to competitive Ethernet providers serves as merely one illustration of the extent to which legacy services are being phased out.[16] Indeed, in an era characterized by demand for speeds of 100 Mbps to 1 Gbps, it should be no surprise that DS1 and DS3 links, which top out at 1.544 Mbps and 44.736 Mbps, respectively, are being displaced by faster Ethernet services.[17] These Ethernet services are much better suited to today's marketplace not only because they accommodate more data than legacy DS1s and DS3s, but also because they offer quality-of-service options allowing the customer to govern its voice, data, and video offerings – options not offered over traditional transmission facilities. These capabilities facilitate expeditious deployment and upgrades once an Ethernet-based service has been deployed to a customer.

Customers enjoy substantial choice among Ethernet providers, and the options are in no way limited to ILECs. Notwithstanding aggressive investment in their networks,[18] ILECs

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[15] *Id.*

[16] Letter from Keith M. Krom, Gen. Atty. & Assoc. Gen. Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 6 & n.34 (filed Oct. 13, 2015).) ("AT&T Oct. 13 Letter").

[17] Comments of CenturyLink, WC Docket No. 05-25, at 15 (filed Feb. 11, 2013).

[18] CenturyLink alone devotes $3 billion annually to capital investment expenditures, adding to the $37 billion of invested property, plant, and equipment already on its books.

constitute a *minority* of the top eight Ethernet providers.[19] That list currently includes two CLECs whose complaints about competition pepper the *Designation Order* – Level 3 (the second-largest provider of Ethernet services, following a series of acquisitions between 2011 and 2014), and XO (which actually climbed a spot in the rankings during a six-month span this year)[20] – as well as three of the largest cable companies in the country. And no provider on the list – including the ILECs – has a port share exceeding one-fifth of the market.[21] Meanwhile, several dozen smaller providers together have an aggregate market share of more than twenty percent.[22]

Competitive Fiber Providers. Many competitive fiber providers – generally CLECs – offer service on a national basis and within a footprint equivalent in reach to that of large ILECs. For instance, XO's Ethernet private line service offers a "[b]road nationwide reach to more than 85 major metro markets," "more than 1 million fiber miles," and the "[u]se of multiple Ethernet access technologies to reach over 10 million business locations."[23] XO's nationwide, intercity long haul network is designed to handle high-capacity traffic from DS1 (1.544 Mbps) to 100

[19] CenturyLink Reply Comments, PS Docket No. 14-174 *et al.*, at 6 (filed Mar. 9, 2015); Vertical Systems Group: *Mid-Year 2015 U.S. Carrier Ethernet Leaderboard* (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[20] Vertical Systems Group: *2014 U.S. Carrier Ethernet Leaderboard* (Feb. 19, 2015), http://www.verticalsystems.com/vsglb/2014-u-s-carrier-ethernet-leaderboard/.

[21] AT&T Oct. 13 Letter at 2 (citing Vertical Systems Group, ENS Research Program, 2015).

[22] *Id.*

[23] XO Communications, Ethernet Private Line, http://www.xo.com/network-services/ethernet-services/private-line/ (last visited Dec. 17, 2015).

Gbps.[24] Similarly, Level 3 (which completed its acquisition of tw telecom in 2014) offers a range of enterprise broadband services, including Private Line, Ethernet Private Line, and Ethernet Virtual Private Line, among others.[25] Level 3 recently reported 55,000 route miles of fiber in metropolitan markets, with roughly 33,300 buildings on-net in North America and over 100,000 enterprise buildings near its fiber net.[26] And Windstream provides comparable services over its own nationwide network, offering Ethernet at speeds of up to 1 Gbps with "the same reliability and performance of a traditional T1."[27] Windstream boasts that it is the "provider of choice for four out of five Fortune 500 companies for data, voice, network and cloud solutions."[28]

This is just a sampling of the CLEC offerings available in this marketplace. Given their individual and collective successes, it is implausible for these providers to suggest that ILECs have somehow held back their progress. Even companies with smaller market share still have a full or nearly nationwide presence. For instance, Birch Communications has an Ethernet port share of less than 1 percent, but its national IP network is capable of supporting 1 Gbps+ data transmission rates, with over 500 points of presence in 22 states, and its optical transport network

[24] XO Communications, Network Assets, http://www.xo.com/why/the-right-network/assets/ (last visited Dec. 17, 2015).

[25] Level 3 Communications, Inc., *Second Quarter 2015 Results*, at 13 (July 29, 2015), http://investors.level3.com/files/doc_downloads/2Q15-Earnings/2Q15-External-Earnings-Presentation_Final-PDF.pdf.

[26] *Id.* (reporting approximately 42,200 total on-net buildings, 79 percent of which are in North America).

[27] Windstream, Ethernet Internet, http://www.windstreambusiness.com/products/enterprise-network-services/dedicated-internet-services/ethernet-internet. (last visited Dec. 17, 2015)

[28] Windstream Business, Why Windstream?, http://www.windstreambusiness.com/why-windstream (last visited Dec. 17, 2015).

spans 31,000 fiber route miles.[29] EarthLink is in the same market share category, with just as large a footprint.[30]

Cable Providers. Perhaps the greatest transformation in this space is due to the relentless efforts of cable companies, which in just a short time moved on from their strong position serving residences and small/medium-sized businesses to become major national competitors for large enterprise customers. CenturyLink's own experience demonstrates that increased activity by cable operators since 2013 has been a primary driver behind the rapidly expanding availability of wholesale alternatives to ILEC offerings – as a buyer of access, CenturyLink has entered into various arrangements with these companies and has, during that timeframe, increased greatly the volume of access it acquires from them.[31] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[29] Birch Communications, *The Birch Nationwide Network: Our Data and Internet Network*, http://www.birch.com/about/service-areas/maps/data-and-network (last visited Dec. 17, 2015).

[30] EarthLink, *EarthLink Business Interactive Network Map*, http://www.earthlinkbusiness.com/support/network-map.xea (last visited Dec. 17, 2015).

[31] Stewart Decl. ¶ 4.

[redacted] **[END HIGHLY CONFIDENTIAL]**[32]

Cable's ascent in this space is highlighted by Comcast Corporation's ("Comcast's") recent announcement of a new business unit created specifically to market and sell enterprise services to Fortune 1000 companies on a nationwide basis.[33] Soon after that announcement, Comcast emphasized that it is targeting "large enterprises that have 300 locations or more" and that it provides managed services "to more than 20 large enterprise companies and ha[s] already signed multiple eight figure deals."[34]

Even before that announcement, Comcast was reporting substantial success in connection with its business services. Indeed, Comcast Business already had signed "large customers from

[32] *Id.*

[33] Press Release, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises*, (Sept. 16, 2015), http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises ("Comcast Fortune 1000 Press Release"). *See also* Letter from Jonathan Banks and Diane Griffin Holland, US Telecom, to Marlene H. Dortch, Sec'y, FCC, WC Docket No. 05-25, RM-10593 (Sept. 18, 2015).

[34] Thomson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript, at 14 (Oct. 27, 2015) ("*Comcast Q3 Earnings*") (quoting Neil Smit, Senior EVP Comcast Corp., President & CEO of Comcast Cable Communications).

multiple industries," ranging from financial services firms to banks to hospitality chains to retailers.[35] Comcast Business offers "the largest facilities-based last mile alternative to the phone company," with over 141 national route miles of fiber and the first and largest fully 40G backbone.[36] Comcast's first quarter revenue from business services in 2015 grew 21.4 percent from the previous year, to over $1.1 billion.[37] In fact, Comcast's business services have been "the second-largest contributor to overall cable revenue growth for 18 of the last 19 quarters with third-quarter revenue increasing 19.5% to $1.2 billion."[38]

Meanwhile, Charter Communications, Inc. ("Charter") has explained that a core piece of the rationale for its transaction with Time Warner Cable Inc. ("TWC") is that the combined company's post-merger footprint would "offer[] us greater ability to develop products and to serve medium and large . . . commercial customers" and give it "incentives to expand our . . . base footprint of optical networks to serve the medium and large business services marketplace."[39] Charter plans to invest $2.5 billion into serving commercial areas within its

[35] Comcast Fortune 1000 Press Release.

[36] Comcast Business: The Comcast Network (2014), http://i.crn.com/custom/The-Comcast-Network-Overview.pdf.

[37] TheStreet, *Comcast Earnings Report: Q1 2015 Conference Call Transcript* (May 4, 2015), http://www.thestreet.com/story/13137080/4/comcast-cmcsa-earnings-report-q1-2015-conference-call-transcript.html.

[38] *Comcast Q3 Earnings* at 5 (quoting Mike Cavanaugh, Senior EVP & CFO of Comcast Corp.).

[39] Thomson Reuters StreetEvents, *CHTR – Charter Announces Transactions with Time Warner Cable and Bright House Networks M&A Call*, Edited Transcript, at 3 (May 26, 2015), http://ir.charter.com/mobile.view?c=112298&v=202&d=3&id=aHR0cDovL2FwaS50ZW5rd216YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTEwMjk5NTYyJkRTRVE9MCZTRVE9MCZTUURFU0M9U0VDVElPTl9FTlRJUkUmc3Vic2lkPTU3.

footprint if the merger is approved.[40] But Charter is not waiting for approval before expanding its business offerings. In the second quarter of 2015 alone, Charter added 31,000 commercial primary service units, a significant increase over the 19,000 added in the second quarter of 2014, and its second-quarter commercial revenue grew by 14 percent from 2014 to 2015.[41] Charter had more than 10,000 fiber-lit buildings in early 2014; it currently claims to have "12,000+ fiber lit buildings and 3,800 lit cell towers" and "44,000+ near net buildings."[42] As a result of this investment, "business services has been one of the fastest growing areas within Charter," with year-over-year revenue growth averaging just under 20 percent.[43]

Charter's current proposed transaction partner, TWC, likewise has enjoyed ongoing success in connection with enterprise services. TWC proclaims itself to be "the largest multi-system operator provider of Ethernet services."[44] TWC recently stated in response to information requests in the Charter transaction that "[t]he business services segment has been and continues to be an important strategic priority and growth area for TWC," and that it offers an array of services to the enterprise segment (defined as customers with more than 500

[40] The Street, *Charter Communications (CHTR) Earnings Report: Q2 2015 Conference Call Transcript* at 4 (Aug. 4, 2015), http://s.t.st/media/xtranscript/2015/Q3/13243727.pdf.

[41] *Id.* at 5. In the first quarter of 2015, Charter added 21,000 commercial primary service units. Kamran Asaf, *Cable Commercial Revenue Growth Continues Hot Streak in Q1*, SNL Kagan Multichannel Market Trends, at 2 (June 10, 2015) ("*Q1 Growth Report*").

[42] Charter, Spectrum Business, *Carrier Solutions*, https://business.spectrum.com/content/carrier (last visited Dec. 17, 2015).

[43] Charter-TWC Public Interest Statement at 18 (June 25, 2015).

[44] *Id.* at 12.

employees, often across multiple sites).[45] Specifically, TWC has reported that it has over 850,000 buildings on its network,[46] including 58,000 lit by its fiber network,[47] and its business division serves about 718,000 business customers.[48] TWC continues to grow this segment – it added 32,000 commercial buildings to its network in the first half of 2015 and considers the addition of commercial buildings and cell tower locations to its network to be "fundamentally important" to its growth strategy.[49]

Other cable operators are following suit. For example, Cox Communications ("Cox") is seeking to expand its last-mile service to cell towers, small cells, schools, and mid-sized to large local businesses within its cable footprint.[50] In early 2014, Cox was reported to have "a mix of 28,000 fiber lit buildings, 400,000 fiber near-net buildings, and over 300,000 HFC serviceable

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[45] TWC Response to the Information and Data Requests Issued on Sept. 21, 2015 by the FCC, at 1-2, attached to Letter from Matthew A. Brill, Counsel for TWC, to Marlene H. Dortch, Sec'y, FCC, MB Docket No. 15-149 (Nov. 19, 2015) ("TWC 11/19/15 Response").

[46] Verizon, Profiles of Selected Competitive Enterprise Broadband Providers at 4 & n.30, filed as an Appendix to Letter from Curtis L. Groves, Asst. Gen. Counsel, Fed. Reg. Affairs and Legal Affairs, Verizon, to Marlene H. Dortch, Sec'y, FCC, WC Docket No. 05-25, RM-10593 (Sep. 24, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001325010 ("*Profiles*") (citing Time Warner Cable Inc. at Morgan Stanley Technology, Media & Telecom Conference – Final, FD (Fair Disclosure) Wire, Transcript 030514a5305838.738 (Mar. 5, 2014) (statement by Time Warner Cable Inc. EVP and CFO Artie Minson)).

[47] Sean Buckley, *U.S. Fiber Penetration Reaches 39.3% of Buildings, Says VSG*, Fierce Telecom (Apr. 14, 2014), http://www.fiercetelecom.com/story/us-fiber-penetration-reaches-393-percent-buildings-says-vsg/2014-04-04 ("*Fiber Penetration Report*").

[48] Time Warner Cable Inc., Quarterly Report (SEC Form 10-Q), at 3 (filed July 30, 2015), https://www.sec.gov/Archives/edgar/data/1377013/000119312515269291/d146752d10q.htm

[49] Kamran Asaf, *Cable Commercial Segment Sustains Momentum in Q2*, SNL Kagan Multichannel Market Trends, at 1 (Oct. 2, 2015) ("*Q2 Growth Report*"); *see also* TWC 11/19/15 Response at 3; Charter-TWC Public Interest Statement at 11.

[50] Carol Wilson, *Cox Biz Looks Beyond SMBs*, Light Reading, (Dec. 4, 2014), http://www.lightreading.com/cable-video/cable-business-services/cox-biz-looks-beyond-smbs/d/d-id/712419.

buildings."[51] Meanwhile, Cablevision's Lightpath unit serves some 7,400 buildings on-net, with a "nearly ubiquitous footprint" in the New York metropolitan area,[52] and is poised to enjoy even greater scale and financial backing if the Commission approves its acquisition by Altice N.V.[53]

Cable companies have been able to make major strides by relying on inter-company agreements to expand and enhance their reach. Coincident with its announcement noted above, Comcast stated that it had entered into wholesale agreements that would allow it to provide services to businesses outside of its traditional footprint, using the facilities of Cox, TWC, Charter, Cablevision, and Mediacom.[54] Such carrier agreements are common among cable companies. Charter, for instance, has explained that it employs such agreements as a "relatively routine matter" in order "to provide business services to larger enterprise customers," and has been a party to a national account agreement with Comcast since November 2014.[55] Moreover,

[51] *Fiber Penetration Report*.

[52] Cablevision Systems Corp., Annual Report (SEC Form 10-K), at 6 (filed Feb. 25, 2015), http://www.sec.gov/Archives/edgar/data/784681/000162828015001010/cvc-12312014x10k.htm; *Profiles* at 10 & nn.85-86 (Q1 2014 Cablevision Systems Corp Earnings Call – Final, FD (Fair Disclosure) Wire, Transcript 022515a5609074.774 (Feb. 25, 2015) (statement by Cablevision Systems Corporation Vice Chairman and CEO Gregg Seibert)).

[53] *See, e.g., Application of Altice N.V., Transferee, and Cablevision Systems Corp., Transferor, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Domestic and International Section 214 Authorizations*, WC Docket No. 15-257, at 6 (filed Oct. 14, 2015) ("Cablevision subscribers, in turn, will benefit from Altice's global scale, access to capital, and fresh perspective, all of which will be brought to bear in Cablevision's already fierce daily contest against much larger rivals such as Verizon, AT&T/DIRECTV, and DISH in the New York Metro area, the nation's most competitive market.").

[54] Shalini Ramachandran, *Comcast to Sell Data Services to Big Firms Nationwide*, WALL ST. J., Sept. 16, 2015.

[55] Charter Response at 129-30 (response to Request 22).

CLECs can use their backbone networks to stitch together the franchise areas of individual cable companies to offer seamless Ethernet services to locations across the country.[56]

In the aggregate, these concerted efforts by cable companies have propelled that industry's growth in commercial services sales. The third quarter of 2014 was the sixth consecutive quarter in which commercial service revenues grew more than 4 percent.[57] Earlier this year, an SNL Kagan analyst estimated the 2014 annual growth rate in commercial services revenue for the cable industry as a whole to be 25 percent.[58] In contrast, the Regional Bell Operating Companies' 2014 commercial service revenue was *down* 2.7 percent.[59] The growth trend for cable industry commercial revenue has continued. Cable commercial service revenue grew 18 percent year-over-year in the first quarter of 2015,[60] and 17 percent in the second quarter.[61] Comcast leads the cable industry in year-over-year commercial revenue growth, with 21.5 percent in the first quarter, 20.3 percent in the second quarter, and 19.5 percent in the third quarter, for a total growth of 20.4 percent in 2015 over the first three quarters of 2014.[62]

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[56] *See* Stewart Decl. ¶ 6.

[57] Kamran Asaf, *Commercial Services Revenue Clocks over 4% Quarterly Growth for 6th Consecutive Period*, SNL Kagan Multichannel Market Trends, at 1 (Dec. 5, 2014).

[58] Ian Olgeirson, SNL Kagan Multichannel Market Trends, *Cable Commercial Services Produce Mid-Market Gains, Forecast Points to slowing on Low End*, SNL Kagan Multichannel Market Trends, at 1, 2 (Mar. 19, 2015).

[59] Chris Young, SNL Kagan Multichannel Market Trends, *Telco Commercial Revenue Declines, Competition for Cable Business Heats Up*, at 1 (Mar. 25, 2015).

[60] *Q1 Growth Report* at 1.

[61] *Id.*

[62] *Id.*; *Q2 Growth Report*; Press Release, Comcast, *Comcast Reports 3rd Quarter 2015 Results* at 1, 3 (Oct. 27, 2015), http://files.shareholder.com/downloads/CMCSA/1147612904x0x856642/C83D4F35-35F2-446F-B005-5E309CDD97E4/3Q15_Earnings_Release_with_Tables.pdf. In contrast, CenturyLink reported in August 2015

Notably, all of the above developments post-date the Commission's last data collection in 2013. To the extent the Bureau relies solely on the data collected in the ongoing rulemaking, it will be evaluating a marketplace that no longer exists. Needless to say, the two-plus years that have passed since then is a very long time in today's marketplace. While the 2013 data reveal an extremely competitive market, the ecosystem has become even *more* competitive since the period covered by that data, a core fact that must guide the Bureau's inquiry in this investigation, as well as in the broader special access proceeding.

II. COMMITMENT PLANS SUCH AS THE RCP AND TDP ARE LAWFUL AND PROCOMPETITIVE

The highly competitive state of the high-capacity service marketplace should provide the Commission with considerable comfort that no provider is in a position to behave anticompetitively, and certainly not in the systemic manner suggested in the *Designation Order*. That conclusion follows as a matter of both law and policy. Before turning to the issues presented in the *Designation Order*, CenturyLink provides a brief summary of the two plans at issue here.

The RCP. The RCP was developed by one of CenturyLink's predecessor companies, US WEST Communications Corporation ("USWCC"), and is available only in the former local territory of USWCC. As a customer establishes a new RCP term, it reviews its need for services, determines the amount it wants to purchase from CenturyLink, and grooms the remainder to its own or third-party networks. In this way, an RCP customer chooses whatever quantity of service

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that its business segment revenues in the second quarter of 2015 had declined "$81 million, or 14%," year-over-year. The Street, *CenturyLink (CTL) Earnings Report: Q2 2015 Conference Call Transcript* at 6 (Aug. 5, 2015).

it wishes to purchase during the plan's four-year term. That level is then defined by a specific monthly revenue threshold or volume commitment. The customer's purchase commitment is set at 95 percent of the revenue associated with its aggregate DS1 (or DS3) circuits with CenturyLink at the start of the four-year term. The customer has flexibility to replace circuits without penalty, and all circuits above the commitment level may be purchased through another discount plan or no discount plan. The customer then receives a 22 percent discount on its service purchased through the RCP so long as it continues to remain at or above its selected purchase commitment level during the term.[63]

The RCP allows a purchaser to reduce its volume commitment, and avoid early termination liability, when it migrates from DS1s or DS3s to Ethernet or other CenturyLink QC-provided service (including migrations from DS1s to DS3s), as long as the total value of the new service is equal to or greater than 115 percent of the remaining value of the existing pricing plan service and the customer agrees to a new pricing plan for the new service.

The RCP does not impose a "portability fee," and does not require that the upgraded service be provided to the same end user customer or service address as the existing service. If a customer falls below 95 percent of the monthly revenue threshold, the customer is not penalized, but is required to pay the sum it originally committed to purchase (i.e., its purchase commitment minus the 22 percent discount).

The RCP does not include an upper percentage threshold, and does not impose overage penalty charges. Any revenue in the plan—including that above the original commitment

[63] Some customers are grandfathered into an earlier version of the plan, which requires that the customer maintain only 90 percent of the selected circuit threshold in order to continue to enjoy the discount.

level—is subject to the 22 percent discount. At the time of an annual review, if the customer's revenue in the plan exceeds its original commitment level, the plan is adjusted to reflect the customer's current revenue.

The TDP. The TDP was developed by Sprint before that company spun off its ILEC business to form Embarq.[64] The TDP is available only in the former Embarq territory. Under the TDP, a customer chooses whatever quantity of service it wishes to purchase during the plan's three- or five-year term. That level is defined by a specific number of circuits. The customer then receives discounts ranging from approximately 15 percent to 30 percent so long as it continues to purchase 90 percent or more of that volume during the term.

Like the RCP, the TDP allows customers to reduce their volume commitment and avoid early termination liability when they migrate from a DS1/DS3 to Ethernet services. The TDP does not does not impose a "portability fee" and does not require that the upgraded service be provided to the same end user customer or service address as the existing service.

If a TDP customer remains at a purchase commitment level below 90 percent of its chosen commitment level for more than 90 days, it will be billed a termination charge for the number of circuits by which it is short of that 90 percent threshold, and its purchase commitment level will be decreased to 110 percent of its current in-service level. If a customer purchases and maintains services amounting to more than 130 percent of the commitment level for more than 90 days, it must either (1) increase its commitment level going forward, (2) pay standard month-

[64] Sprint spun off Embarq in 2006. In 2009, CenturyTel purchased Embarq and the combined company became CenturyLink. During the reporting period, approximately **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** percent of the DS1 and DS3 special access services provisioned by CenturyLink within the Embarq territory were sold pursuant to the TDP.

to-month rates for services above the 130 percent threshold, or (3) remove circuits in order to return to below the revenue threshold.

As discussed below, the terms under scrutiny here – which stimulate demand for one provider's services but not at the expense of another's – are not the type of exclusionary contracts that have drawn concern from antitrust courts and commentators. Moreover, any lingering doubt about the reasonableness of these practices should quickly be extinguished by the fact that even the complaining competitors rely on similar provisions in their capacity as sellers of business-grade services. Given the lack of dominance by any provider and the use of similar contractual terms by many of them, regardless of platform, there is no reason for the Commission to break from longstanding precedent or to invalidate established business arrangements. Rather, the only logical outcome is for the Bureau to find that the practices in question continue to benefit consumers and competition, serve legitimate business considerations, and are fully consistent with Sections 201 and 202.[65]

[65] Indeed, there would be no basis for the Commission to determine that Sections 201 and 202 embody more aggressive competition-policy requirements than laws such as the Sherman Act, which were designed specifically to address anticompetitive practices. As Supreme Court has made clear, the Communications Act cannot support antitrust-like claims that go beyond the demands of the antitrust laws themselves. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("[J]ust as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards ...."); *see also Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 449-50 (2009) (dismissing the portion of a suit challenging AT&T's wholesale rates, because the Telecommunications Act does not provide an antitrust cause of action exceeding what is otherwise available under the Sherman Act). There certainly can be no serious claim that the Bureau is authorized to do so. *See* 47 C.F.R. § 0.291(a)(2) ("The Chief, Wireline Competition Bureau shall not have authority to" address matters that "present novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines.").

A. The RCP and TDP Are Not Exclusive Dealing Arrangements and Present No Competitive Threat.

Courts and commentators have long agreed that the terms utilized by the RCP and TDP serve valid business purposes, do not foreclose the use of competitors' offerings, and accordingly are both procompetitive and lawful.

As an initial matter, there is no question that basic term and volume discounts are procompetitive and lawful. In the Supreme Court's words: "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved."[66] The Commission itself has noted that "linking a price discount to a contractual term is a reasonable, accepted commercial practice, both inside and outside the telecommunications industry."[67] The *Designation Order* recognizes that the Commission is guided by antitrust precedent and economic literature in determining whether particular pricing and other practices are anticompetitive.[68] Based on antitrust case law and economic analyses, the Commission first recognized the benefits of term and volume discounts over 30 years ago, when

[66] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (internal quotes and citations omitted).

[67] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17403 ¶ 698 (2003), *vacated and remanded in part on other grounds sub nom. United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004).

[68] *Designation Order* ¶ 19.

the industry was much more concentrated and far less competitive than it is now.[69] It has observed, to this end, that there is "a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory" and are perfectly compatible with Section 201(b) and 202(a) of the Act.[70]

Indeed, volume, market share and term discount plans are a common, legitimate method of competing aggressively throughout the economy. Courts have consistently held that "discounts are pervasive" and "transcend market boundaries."[71] They are "a common feature of our current economic system."[72] As antitrust commentators Areeda and Hovenkamp state, "above-cost discounts on single products should be regarded as lawful."[73] And, as noted by the First Circuit, "a . . . rule of law that prevents a firm from unilaterally cutting its prices risk[s] interference with one of the Sherman Act's most basic objectives: the low price levels that one would find in well-functioning competitive markets"[74] Similarly as the Sixth Circuit concluded, the fact "[t]hat [a defendant] offer[s] greater discounts, though still non-predatory discounts, to

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[69] *Private Line Rate Structure and Volume Discount Practices*, 97 FCC2d 923, 945-48 ¶¶ 36-40 (1984).

[70] *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, 13 FCC Rcd 16857, 16871 ¶ 29 (1998).

[71] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894-95 (9th Cir. 2008).

[72] *Id.* at 895 n.5.

[73] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law at ¶ 768b.4 (4th ed. 2015) ("Antitrust Law"). To CenturyLink's knowledge, no party has complained that the discounts at issue result in predatory below-cost prices.

[74] *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231 (1st Cir. 1983) (Breyer, J.) (rejecting Sherman Act claim that volume discounts foreclosed competition).

win . . . business does not offend the antitrust laws, much less undermine the competitive environment those laws were designed to foster."[75] In short, "[d]iscounting in response to competitive pressures is exactly the sort of behavior we *hope* antitrust law will engender."[76]

The *Designation Order* suggests that the discounts provided by CenturyLink's pricing plans raise the type of market-foreclosure dangers implicated by exclusive dealing contracts.[77]

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[75] *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452-53 (6th Cir. 2007).

[76] Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, Antitrust Symposium, 72 U. Chi. L. Rev. 27, 43 (2005). State authorities have also approved volume and term discounts in a variety of circumstances. *See, e.g., Northwestern Bell Tel. Co.'s Private Line Transport Services Tariff Filing*, Order Modifying Offer of Settlement and Adopting Offer of Settlement as Modified, 1989 Minn. PUC LEXIS 1 at *16-17 (Minn. PUC 1989) (approving proposed volume discount tariff). In a complaint case, the Pennsylvania PUC dismissed AT&T's complaint challenging a proposed Bell Atlantic pricing plan offering discounts for three and five year contracts, stating that "we agree with Bell that 'volume and term discounts are standard marketing devices that the Commission has routinely approved for use by a variety of companies.'" *Pennsylvania PUC v. Bell Atlantic-PA, Inc.*, Opinion and Order, 1995 Pa. PUC LEXIS 175 at *19 (Pa. PUC 1995). The PUC also rejected AT&T's "allegation that Bell's proposal would effectively 'lock in' [affected] business customers from competition during the three to five year contract term," noting that these subscribers, "if they choose, have the option to buy the service on a month-to-month basis" and that they are "business customers with sophisticated data requirements" who "undoubtedly understand their future data needs." *Id.* at *21-22. In *Globalcom, Inc. v. Ill. Comm. Comm'n.*, 806 N.E.2d 1194 (Ill. App. 1st 2004), *appeal denied*, 823 N.E.2d 964 (Ill. 2004), an Illinois court partly reversed an Illinois Commerce Commission order holding that an ILEC knowingly engaged in anticompetitive conduct by charging early termination fees due to a CLEC's premature cancellation of the parties' contract for special access services when the CLEC converted to enhanced extended loop ("EEL") access. The court explained that "termination charges 'true-up' the revenue received before the termination date to correct for the fact that those revenues reflected a discount to which the customer, by virtue of its early termination, was not entitled. . . . [W]e do not think that these fees discourage the purchase of EELs, as a termination charge only affects the price paid for access services, regardless of whether a CLEC decides to purchase an EEL. This finding is in accordance with FCC's determination that the assessment of termination charges does not inhibit access to UNEs or to competition." *Id.* at 1205 (citing *Joint Application by BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9133 ¶ 200 (2002)).

[77] *Designation Order* ¶ 31.

But this is flatly incorrect. As detailed above, the discounts set forth in the RCP and TDP do not require a customer to commit a certain portion of its overall demand to CenturyLink, nor do they tie customers to their prior purchase volumes (or any proportion thereof). Rather, they provide significant discounts to customers that in fact consume a quantity of service close to the volume they initially opted to purchase. The agreed minimum level of service may or may not – at the customer's option – approximate the customer's estimated needs during the term of the agreement. The level of service to be provided is left to the customer's discretion, and the discount does not depend on what proportion of its needs the purchaser chooses to obtain from CenturyLink. Likewise, neither plan ties discounts in any way to the extent of a customer's purchases from other providers.

Discounts of the type set out in the RCP and TDP (sometimes known as "loyalty pricing" discounts) do not raise any antitrust issues unless they expressly require a customer to purchase *all* of its needs from the party offering the discounts. The RCP and TDP include nothing close to such mandates. Rather, the loyalty pricing frameworks at issue here affect competition only in the sense that a lower price tends to attract more business, leaving less for competitors. That result, of course, does not constitute anticompetitive foreclosure. Indeed, the only "foreclosure" at issue here is the type that exists whenever a customer agrees to purchase service from one supplier rather than another. As now-Justice Breyer observed while serving on the First Circuit, "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought."[78]

[78] *Barry Wright*, 724 F.2d at 236 (rejecting Sherman Act claim that volume discounts foreclosed competition).

Moreover, courts have regularly held that discount programs are *not* tantamount to exclusivity arrangements. In *Concord Boat*, for example, the Eighth Circuit held that market share discount programs that provided discounts to customers purchasing up to 80 percent of their needs from a seller with 75 percent of the market, but did not impose exclusive purchase obligations on customers, were not exclusionary or anticompetitive.[79] In *Western Parcel*, the Ninth Circuit held that "[b]ecause the [volume discount] contracts [under consideration] do not preclude consumers from using other delivery services, they are not exclusive dealings contracts that preclude competition in violation of the Sherman Antitrust Act."[80]

Furthermore, "[a]n agreement affecting less than all [of a buyer's] purchases does not amount to true exclusive dealing" under the antitrust laws, even where the fixed amount is a large portion of a customer's requirements.[81] In *Barry Wright*, the First Circuit addressed a claim under the Sherman Act that a supplier maintained its undisputed monopoly position against the threat of competitive entry by offering steep discounts that were negated in the event of cancellation by the customer.[82] Writing for the court, then-Judge Breyer held that the

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[79] *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059-60, 1063 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000). *See also, e.g., Southeast Mo. Hospital v. C.R. Bard, Inc.*, 642 F.3d 608, 612 (8th Cir. 2011) (market share discounts that did not require exclusivity were not anticompetitive, citing *Concord Boat*).

[80] *Western Parcel Express v. UPS of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999). *See also Novell v. Microsoft*, 699 F. Supp.2d 730, 754 (D. Md. 2010) (discounts that increased with increased purchases but did not "hing[e] on exclusivity or anything close to it" were not anticompetitive), *rev'd on other grounds*, 429 Fed. Appx. 254 (4th Cir. 2011).

[81] *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 110 n.24 (3rd Cir. 1992). *See also id.* at 104 (no exclusive dealing even where buyers agreed to purchase manufacturer's products "wherever legally permissible to do so" and contracts were designed "to shut ou[t] competitors").

[82] *Barry Wright*, 724 F.2d at 230.

agreement was not the type of requirements contract raising concern under the antitrust laws, because the buyer "did not actually promise to buy all its requirements from [the monopoly supplier]; it entered into" contracts "for . . . fixed dollar amount[s]"[83] – amounts that the buyer predicted would account for all of its needs for two years and over 70 percent of its needs in a third year.[84] Judge Breyer explained:

> A true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others any excess amount that he may want. This flexibility is important here, for it left [the buyer] the legal power to buy small (and then . . . larger) amounts from [a competitor] should they have become available.[85]

Thus, the contract at issue was "not 'exclusionary'" under the Sherman Act.[86] The Seventh Circuit, likewise, has held that contracts to purchase specific quantities that were "intended to approximate [buyer's] requirements," but which ultimately supplied about two-thirds of its total requirements, were not exclusive dealing contracts.[87]

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[83] *Id.* at 237.

[84] *Id.* at 229, 237.

[85] *Id.* at 237.

[86] *Id.* at 238. Similarly, in *W.H. Brady Co. v. Lem Products, Inc.*, 659 F. Supp. 1355, 1374 (N.D. Ill. 1987), the court found that distribution contracts under which "the annual amount to be ordered" was "set . . . at a level estimated to be the customer's annual need," were not unreasonable requirements contracts under the Sherman Act. "[Plaintiff] failed to show that there actually was any type of restraint, reasonable or unreasonable, involved in the . . . contracts. . . . [T]he . . . contracts did not expressly prohibit . . . customers from buying . . . from other manufacturers during the term of the contract. The contracts only required that . . . customers buy a certain amount . . . during the contract term."

[87] *Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 200-01 & n.11 (7th Cir. 1979), *cert. denied*, 444 U.S. 916 (1979) (cited in *Barry Wright*, 724 F.2d at 236). *See also White & White v.*

Even where a customer chooses to buy a quantity of service that it estimates will meet its total *needs*, that does not somehow transform a lawful loyalty pricing plan into an unlawful exclusive-dealing arrangement. "There is," as the Sixth Circuit explained in *Tampa Electric*, "an important difference between a 'requirements' contract and a contract which" (like the RCP and TDP) "calls for the purchase of a definite quantity over a period of time."[88] This is so even when "the buyer estimates [the quantity purchased] to be sufficient to meet his requirements."[89] The court noted:

> [W]hen a dealer agrees to take a specific amount of a product, there is a likelihood that he may, by reason of unexpected shortages or increased demands, use competitive products, and competitors thus will have the opportunity of putting their products into competitive use by the buyer, with the ultimate result of inducing the buyer to handle their products. Under a 'requirements' contract for a long period of time this chance is, for all practical purposes, cut off.[90]

These precedents clearly place the RCP and TDP plans within the category of procompetitive contracts. The customer is "free to purchase from others any excess amount that

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Am. Hosp. Supply Corp., 540 F. Supp. 951, 1032 (W.D. Mich. 1982) (purchase agreements supplying 65 percent and 75 percent of customers' needs "fall decidedly short of actual exclusive dealing") (cited in *Barry Wright*, 724 F.2d at 236); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, 493 F. Supp. 320, 324-25 (S.D.N.Y. 1980) ("A record of threats and enforcement of minimum purchase requirements alone, with no showing that [buyer] was ever forced to deal exclusively in [supplier's products], cannot support an exclusive dealing claim.").

[88] *Tampa Electric Co. v. Nashville Coal Co.*, 276 F.2d 766, 771 (6th Cir. 1960), *rev'd on other grounds*, 365 U.S. 320 (1961).

[89] *Id.*

[90] *Id.*

he may want."[91] And CenturyLink's special access customers *are* taking increasing proportions of their special access service needs from competitive providers. In fact, CenturyLink has seen a steady exodus from the RCP and TDP, belying claims that these plans "lock up" customer demand. Thus, the RCP and TDP cannot be viewed as exclusive dealing or otherwise unreasonable exclusionary contracts in violation of Sections 201 and/or 202, irrespective of the degree of concentration in the special access market, barriers to entry, or CenturyLink's alleged market power or absence thereof. To find otherwise, the Bureau would need to effectively overturn decades' worth of antitrust jurisprudence and read into Sections 201 and 202 a Congressional intent to define as anticompetitive under the Communications Act that which the legislature deemed procompetitive under the Sherman Act and related statutes. Even the Commission could not plausibly do so. The Bureau surely cannot.

B. Even if They Were Exclusive Dealing Arrangements (Which They Are Not), the RCP and TDP Would Be Lawful Because CenturyLink is Not a Monopoly Provider of High-Capacity Transmission.

Even if the pricing plans under investigation could be considered *de facto* exclusive dealing contracts – which, for the reasons discussed here, they cannot – "exclusive dealing arrangements" violate the antitrust laws only "when used by a dominant firm to maintain its *monopoly*."[92] Otherwise, "no presumption against such agreements exists today."[93] Moreover,

[91] *Barry Wright*, 724 F.2d at 237.

[92] *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir. 2015) (emphasis added), *motion to file pet. for cert. granted*, 2015 US LEXIS 7475 (Nov. 30, 2015).

[93] *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011) (internal quotes omitted). *See also Church & Dwight Co. v. Mayer Labs., Inc.*, 868 F. Supp.2d 876, 890 (N.D. Cal. 2012) (for plaintiff to state claim based on "exclusive dealing agreement," seller must

"[i]f entry barriers to new firms are not significant, it may be difficult for even a monopoly company to control prices through some type of exclusive dealing arrangement because a new firm or firms easily can enter the market to challenge it."[94]

As discussed above, CenturyLink lacks monopoly power – or even significant market power – in the high-capacity transmission market. The accelerating entry of new competitors and their success in grabbing increasing shares of the market demonstrate both the competitiveness of that sector and the absence of significant barriers to entry. Thus, even if its tariff pricing plans were viewed as exclusive dealing contracts, which they are not, those plans would not be anticompetitive.

C. The Valid Business Justifications for the Practices At Issue Further Demonstrate Their Lawfulness.

The courts have recognized that the business justifications for exclusive dealing and similar contracts must be considered in assessing claims of anticompetitive behavior.[95] Thus, while the RCP and TDP do not constitute exclusive-dealing arrangements, and while even exclusive arrangements are lawful in the absence of monopoly power, case law makes clear that even those conditions will not render an arrangement unlawful if it serves a valid business purposes.

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possess "market power"), *vacated in part on other grounds*, 2012 US Dist. LEXIS 68681 (N.D. Cal. May 16, 2012).

[94] *Concord Boat*, 207 F.3d at 1059.

[95] *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334-35 (1961); *Barr Laboratories*, 978 F.2d at 111 ("The existence of legitimate business justifications for the contracts . . . supports [their] legality.").

Courts have established formal and informal frameworks for considering the seller's business rationale even after complaining parties have made a prima *facie case* that a practice is anticompetitive. Under one procedural approach, once "anticompetitive harm" is demonstrated, "the burden then shifts to the defendant to present procompetitive justifications for the exclusive conduct. . . . If the court accepts the defendant's proffered justifications, it must then decide whether the conduct's procompetitive effects outweigh its anticompetitive effects."[96] Under another approach, courts discuss business justifications as a factor in determining whether exclusive dealing arrangements harm competition in the first place.[97] In *Concord Boat*, the Eighth Circuit stated that "[a] . . . defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits."[98] It found that "[defendant's] business justification in this case is that it was trying to sell its product," and that "[defendant's] competitors also cut prices in order to attract additional business, confirming that such a practice was a normal competitive tool within the . . . industry."[99]

As indicated above, the principal business purpose behind the RCP's and TDP's discounts, and the terms used to ensure that each party upholds its part of the bargain, it to provide predictability with respect to supply (for the buyer), demand (for CenturyLink), and

[96] *McWane*, 783 F.3d at 833 (citations omitted).

[97] *See Sterling Merch.*, 656 F.3d at 123.

[98] *Concord Boat*, 207 F.3d at 1062.

[99] *Id. See also Barr Laboratories*, 978 F.2d at 111 ("The existence of legitimate business justifications for the contracts . . . supports [their] legality.").

price (for both). By offering a discount and then applying terms designed to encourage customers to use a quantity of service roughly equivalent to the amount it elected to purchase at the beginning of the term, CenturyLink essentially "purchases" a degree of certainty that allows it to marshal network resources to accommodate anticipated demand, plan informed network expansion, and reduce marketing and other transaction costs that it would incur in the absence of customer commitments. These are *precisely* the valid business purposes that the Supreme Court has held determinative in approving even those arrangements that otherwise would be deemed unlawful: "In the case of the buyer [a percentage commitment] may assure supply, while on the part of the seller it may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market."[100]

The validity, lawfulness, and procompetitive nature of the practices at issue here are further cemented by the fact that CenturyLink's competitors employ many of the very same terms and conditions in *their* high-capacity transmission contracts. As the Sixth Circuit has noted, "the antitrust laws do not protect" a competitor claiming that the defendant's use of the type of exclusive dealing arrangements also used by the competitor was anticompetitive.[101] Similarly, the First Circuit has rejected antitrust claims based on exclusive dealing contracts where competitors also used such contracts, plaintiff's market share grew, and there was

[100] *Tampa Electric*, 365 U.S. at 334 (internal quotes and citations omitted). *See also Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38 (rejecting claim that volume discount agreements that provided buyer "a stable source of supply" and a "stable, favorable price" were exclusionary).

[101] *NicSand*, 507 F.3d at 454. *See also Kolon Indus. v. E.I. Dupont de Nemours & Co.*, 748 F.3d 160, 178 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 437 (2014) (exclusive dealing contracts not exclusionary where supplier's competitors also used such arrangements).

additional competitive entry during the relevant period, all of which demonstrated an absence of any "adverse effect on competition."[102] All of these factors, of course, are salient here. As discussed below, CLECs and other competitors use long-term discounted service contracts (*e.g.*, with a three-year term) to offer special access services. Moreover, as highlighted above, CenturyLink and other "incumbents" are losing market share, and there has been extensive new competitive entry while the contracts at issue have been in place. These factors demonstrate the validity and procompetitive purposes behind the terms under investigation.

Thus, even if not for CenturyLink's lack of market power or the procompetitive nature of its practices, the plans under consideration here would be lawful because they advance legitimate business interests.

III. THE CONTRACT TERMS DESCRIBED IN THE DESIGNATION ORDER DO NOT VIOLATE SECTIONS 201 OR 202

To find the pricing plans at issue here contrary to Sections 201 and/or 202, the Bureau would need to upend more than a century's worth of antitrust law and commentary, repudiating settled legal holdings that the practices under examination are lawful and procompetitive, and indeed *further* competition. This it cannot do.

A. The Percentage Commitments in CenturyLink's Tariff Pricing Plans Are Lawful.

Unlike exclusive dealing agreements or requirements contracts, the percentage commitments utilized in the RCP and TDP plans permit customers to purchase additional services from other providers. Before it enters into either of these plans, the customer has the option of switching some or all of its demand to one or more other providers. Special access

[102] *Sterling Merch.*, 656 F.3d at 124.

customers have frequently done just this. The customer thus has the benefit of a discount on its purchases under the plan, as well as the freedom to take additional services elsewhere without losing the discount during the term. This flexibility for customers is also procompetitive because purchases from other providers do not "increase[e] the price the customer pays for its purchases from" CenturyLink.[103] The customer also receives the benefit of a guaranteed supply and favorable price for the period of the plan, thereby facilitating its business planning.

CenturyLink, of course, benefits from these arrangements as well, in procompetitive and lawful ways. As discussed above, these plans provide CenturyLink with the benefits of revenue predictability for an agreed period of time, allowing it to recover its costs over the life of the plan. The predictability and stability of revenue facilitates CenturyLink's business and investment planning, generating efficiencies and savings, which it can share with the customer in the form of a discounted rate

Revenue predictability is especially important for CenturyLink under these plans because they offer customers the flexibility of circuit portability. Customers are free under these plans to disconnect and move circuits during the commitment period without incurring early termination or other penalty charges, as long as they continue to meet the overall percentage service level commitment during the term. Because customers' use of particular circuits is so unpredictable under these plans, it is crucial for business planning that CenturyLink be able to count on overall revenue (for the RCP) or circuit level usage (for the TDP) in order to devote the necessary resources to the work involved in disconnecting and moving circuits. The plans thus reflect a mutual value proposition in which CenturyLink finds value in lowering the price to the customer

[103] Daniel A. Crane, *Bargaining Over Loyalty*, 92 Tex. L. Rev. 253, 288 (2013) ("*Bargaining*").

in exchange for the customer's commitment to hold its purchases at a steady level over a period of time. Without an equal exchange of value, neither CenturyLink nor the customer would enter into the agreement.

Contrary to criticisms that percentage commitments "keep[] demand for these services captive,"[104] plans like the RCP and TDP allow customers to enjoy discounts even while purchasing any portion of their services from third parties.[105] Such plans are "not 'exclusionary,'" because they allow the customer "to buy small (and then . . . larger) amounts from [a competitor]."[106] Once a customer meets its purchase commitment, it may purchase additional services (including newer services such as Ethernet) from any other provider.[107] These plans also facilitate the ongoing technology transition through the service upgrade provisions, which permit customers to disconnect DS1 or DS3 circuits without incurring an early termination fee and reduce their service level commitment accordingly, as long as they upgrade

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[104] *Designation Order* ¶ 41.

[105] As discussed above, the RCP and TDP are *not* requirements contracts – *i.e.*, their discounts are *not* based on how much of a customer's total requirements from *all providers* are purchased from CenturyLink. "A true requirements contract flatly eliminates the buyer from the market for its duration," whereas "a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment," and "he is free to purchase from others any excess amount that he may want." *Barry Wright*, 724 F.2d at 237. Because the practices under investigation here base discount levels only on meeting an agreed percentage commitment, they do not raise the foreclosure concerns presented by requirements contracts.

[106] *Barry Wright*, 724 F.2d at 237-38. *See also Barr Laboratories*, 978 F.2d at 110 n.24; *W.H. Brady*, 659 F. Supp. at 1374.

[107] *See also Applied Med. Res. Corp. v. Ethicon Inc.*, 2006 US Dist. LEXIS 12845 at *12 (C.D. Cal. Feb. 6, 2006) (carve out of certain categories of products from scope of market share discount contracts, thereby allowing purchase of products from competitors without losing discount, removed any exclusionary effect).

to a higher-capacity service meeting certain revenue requirements and meet other easily achieved conditions similar to those in typical competitor transmission contracts.

The D.C. Circuit affirmed the validity of such pricing plans in the 2006 *BellSouth* decision, which reversed a Commission order holding that BellSouth had violated the Act by adopting a similar discount tariff provision for customers who maintained a level of purchases of at least 90 percent of their prior purchases from BellSouth.[108] The court concluded that such discount plans are "most naturally viewed as a bargain containing terms that both benefit and burden subscribers" and expressed doubt that Section 272 could be read to require the "inefficiencies" of "frustrating [the] Bell Operating Companies' attempts to maintain stable utilization rates on their networks or to lower their prices."[109]

The history of CenturyLink's percentage commitment plans confirms their validity. Prior to the rollout of the RCP and TDP in the 1990's, CenturyLink's predecessors offered (and CenturyLink still offers) circuit-specific discount plans. The drawback of circuit-specific plans, from the customer's perspective, is their lack of portability or flexibility. If, for example, a customer disconnects a DS1 circuit before the end of the term under such a plan, it would face early termination charges, even if it has leased other DS1 circuits in the meantime. Also, each circuit technically was subject to a separate discount plan, which was unwieldy and complicated for both parties.

In order to overcome these problems, CenturyLink's predecessor, US West, established the RCP in response to "[c]ustomers" that "have requested a time commitment plan which is not

[108] *BellSouth Telecommunications Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

[109] *Id.* at 1056-60.

circuit specific but is instead based on a service commitment level."[110] US West also explained that the four-year RCP would allow customers to move individual circuits within its service territory, without incurring early termination fees. This framework offered more flexibility, while retaining a substantial discount similar to that previously provided under the circuit-specific plans.[111] The RCP thus allowed a customer to consolidate all of its circuits for each service – DS1s, for example – in one consolidated discount term plan, rather than many separate plans with different start and end dates. CenturyLink has tweaked the RCP and TDP over the past two decades in response to market changes, often to prevent unintended consequences, but the basic structure has remained the same.

Percentage service commitments thus are a textbook example of discount plans that allow customers flexibility in purchasing additional needs from competitors without losing the discounts. The business justifications for this practice confirm its validity.[112] CenturyLink would have no incentive to discount month-to-month rates absent the certainty provided by a

[110] US West Communications Access Service, Tariff F.C.C. No 5, Description and Justification, Private Line Transport, Regional Commitment Program at 1-1 (Sept. 22, 1995) ("US West D&J").

[111] *Id.*

[112] *See, e.g.*, *Tampa Electric*, 365 U.S. at 334-35; *McWane*, 783 F.3d at 833; *Sterling Merch.*, 656 F.3d at 123-24; *Concord Boat*, 207 F.3d at 1062; *Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38.

customer's percentage and/or term commitment.[113] Moreover, unlike straight volume discounts, percentage commitments treat all customers alike.[114]

The fact that the customers of CenturyLink's predecessor *requested* long-term discount plans "based on a service commitment level"[115] confirms their validity under the antitrust laws.[116] So too does the fact that CenturyLink's high-capacity transmission competitors also utilize percentage commitments as a means for their customers to obtain discounts.[117] As in *Kolon*, these plans cannot be considered anticompetitive or without business justification where competitors "use" the "same practice," "and . . . customers requested them."[118]

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[113] As noted above, *see supra* Part II.C, percentage commitments benefit both the provider and the purchaser of service, mitigating cost and risk without harming competition. *See, e.g., Barry Wright*, 724 F.2d at 237-38.

[114] *See, e.g.*, Antitrust Law ¶ 768b.4 (stating that "[q]uantity discounts tend to discriminate against smaller buyers whose purchases are not large enough to qualify for the largest discounts," whereas discounts not tied to overall volume "apply to large and small rivals alike and tend to facilitate greater competitiveness in the downstream market").

[115] US West D&J.

[116] *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 77-83 (3rd Cir. 2010) (affirming rejection of antitrust challenge to exclusive dealing arrangement sought by standards-setting organization purchasing tires from defendant); *NicSand*, 507 F.3d at 452-54 (exclusive dealing contracts with deep discounts sought by customers not anticompetitive).

[117] *See Kolon*, 748 F.3d at 178 (exclusive dealing contracts not exclusionary where competitors also used such arrangements); *Sterling Merch*, 656 F.3d at 124 (no adverse effect on competition where, *inter alia*, similar exclusive agreements used by competitors in the market for years); *NicSand*, 507 F.3d at 454 ("antitrust laws do not protect" competitor that used the same type of exclusive dealing arrangements used by defendant); *Concord Boat* , 207 F.3d at 1062 ("[C]ompetitors also cut prices in order to attract additional business, confirming that such a practice was a normal competitive tool.").

[118] *Kolon*, 748 F.3d at 178.

B. So-Called "Shortfall Fees" in CenturyLink's Tariff Pricing Plans Are Lawful.

As an initial matter, the term "shortfall fee," at least as applied to CenturyLink's RCP and TDP, is a misnomer. Under the RCP, a customer is simply held to the full amount of its agreed-upon percentage revenue commitment for the term of the plan, enabling CenturyLink to recoup its up-front investment in the facilities projected to be used to fulfill the customer's needs and related maintenance costs. It is not subject to any additional fee or charge. For example, if an RCP customer's DS1 volume revenue commitment is $1 million, its purchase commitment (reflecting the 95 percent minimum) is $950,000 and its actual minimum payment is $741,000 after the 22 percent discount. If the customer uses only $900,000 of DS1 service during the period, it still receives the full benefit of the 22 percent discount, but has to pay the discounted $741,000. This is, of course, far less than the $900,000 worth of service it took.

The TDP likewise lacks any shortfall fee. If a TDP customer falls below its percentage commitment for more than 90 days, its service commitment level is reduced, and it is billed an early termination charge for the number of circuits it has fallen below its original commitment. Again, there is nothing in this approach that reduces a customer's ability to take additional services from a competitor. The termination charge merely enforces the agreed-upon minimum commitments and thus is lawful for the same reasons as the commitments themselves. Without it, purchasers would always opt in to commitments and reap the benefits of the discount, knowing that there would be no consequences for failure to meet their end of the bargain. The provider, of course, could not afford to provide the benefit of the discount unless it could hold customers to their commitments. Thus, absent the termination fee (or some similar mechanism), minimum purchase commitment discounts would disappear, along with the customer-friendly circuit portability in these plans. These business considerations more than justify shortfall fees under applicable precedents.[119] In fact, CLECs have themselves used shortage fees in their high-capacity term discount plans for years,[120] demonstrating the validity of such provisions.[121]

In 2003's *Ryder Communications, Inc. v. AT&T Corp.*, the Commission rejected a claim that an early termination provision similar to the RCP shortfall provision was unreasonable under Section 201(b). There, it explained:

> The Commission has consistently allowed carriers to include provisions in their tariffs that impose early termination charges on customers who discontinue service before the expiration of a long-term discount rate plan containing minimum volume commitments. Many of these provisions required individual customers . . . to pay charges similar, if not equivalent to, the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments. In approving these provisions, the Commission recognized implicitly that they were a valid *quid pro quo* for the rate reductions included in long-term plans. The Commission has acknowledged that, because carriers must make investments and other commitments associated with a particular customer's expected level of service for an expected period of time, carriers will incur costs if those expectations are not met, and carriers must be allowed a reasonable means to recover such costs. In other words, the Commission has allowed carriers to use early service termination provisions to allocate the risk of investments associated with long term service arrangements with their customers.[122]

[119] *See, e.g., Tampa Electric*, 365 U.S. at 334-35; *McWane*, 783 F.3d at 833; *Sterling Merch.*, 656 F.3d at 123-24; *Concord Boat*, 207 F.3d at 1062; *Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38.

[120] *See* Reply Comments at 28.

[121] *See supra* note 117.

[122] *Ryder Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603, 13617 ¶ 33 (2003).

The Commission cited instances of "shortfall charges" as examples of the type of provision it was endorsing,[123] requiring payment of "the charges that the customers would have paid had they continued service and fulfilled their minimum volume commitments."[124] Furthermore, a reasonable termination provision also "is not, from an antitrust perspective, unreasonable."[125] It must be concluded that the RCP shortfall provision is reasonable under Section 201(b) and raises no competitive issues.

C. The TDP's Upper Percentage Threshold Is Lawful.

Under the upper percentage threshold in the TDP, a customer receives discounts on all of the circuits covered by the plan as long as its volume remains, for the term of the plan, between 90 percent and 130 percent of the commitment level.[126] A customer that exceeds 130 percent of its commitment for 90 days can choose to purchase the excess capacity from CenturyLink without the discount, raise its commitment, or simply purchase additional capacity elsewhere. Because the upper percentage threshold in the TDP only affects application of discounts to the

[123] *Id.* at 13617 ¶ 33 n.92.

[124] *Id.* at 13617 ¶ 33.

[125] *Barry Wright*, 724 F.2d at 239.

[126] The RCP does not employ an upper percentage threshold, as the *Designation Order* appears to recognize. *See Designation Order* ¶ 79 n.225 (identifying ILEC plans with upper percentage thresholds but omitting the RCP). Under the RCP, any revenue during the term of the plan – including revenue exceeding the original commitment level – is subject to the RCP discount. The customer's usage is reviewed annually. If its usage has risen above its original commitment, the commitment is automatically increased prospectively to meet the higher actual usage (which, as discussed above, enables CenturyLink to plan ahead and manage its infrastructure investments). Thus, there is no upper limit on a customer's usage under the RCP at any given point in time. If the customer's revenue in the plan exceeds the commitment level between annual reviews but not at the annual review, no change is made to the customer's commitment level (while the revenue above the commitment level earns the RCP discount).

customer's purchases from CenturyLink, it has no impact whatsoever on the customer's purchases from other providers. Indeed, to the extent the threshold removes the discount for services purchased beyond the 130 percent threshold, it *encourages* purchases from third parties, and can have no anticompetitive effect.

Under the TDP, purchasers may choose to have their commitment levels increase automatically if they exceed the 130 percent threshold.[127] If a customer does not choose this option, then its commitment level will remain as 90 to 130 percent of its initial commitment. Within that range, the customer may install and/or disconnect circuits to accommodate changes in business needs over the commitment period.

If, on a monthly basis, a customer happens to go over the upper threshold, the customer is notified and has 90 days to react to the situation by increasing its commitment level, reducing the number of circuits purchased under the TDP, or moving excess circuits to month-to-month billing. In any case, CenturyLink's billing department works closely with customers to determine their best options. Until a customer removes circuits from the plan, it will receive the TDP discounts even on the circuits above the 130 percent threshold.[128]

The *Designation Order* notes CLEC arguments that upper percentage thresholds tend to force purchasers to "'increase . . . commitment level[s] as . . . requirements increase, which then has the effect of reducing the size of the market available to incumbent LEC rivals in subsequent

[127] *See* CenturyLink Operating Companies, Access Service Tariff F.C.C. No. 9 § 7.4.11(F) (TDP customers may request that Embarq "automatically increase the customer's TDP commitment level when the 130% commitment threshold, as set forth in 7.4.11(B) preceding, is exceeded").

[128] If the customer's circuit count drops below the upper threshold within 90 days, no further action is taken, allowing for normal aberrations in demand.

periods.'"[129] This argument is simply incorrect. As discussed above, the percentage commitment mechanism, unlike an exclusive dealing arrangement, leaves significant room for purchases from competitive providers, an opportunity that many RCP and TDP customers have exercised.[130] Upper percentage thresholds thus are reasonable for the same reasons that percentage commitments are reasonable.

Critics also argue that, like the percentage commitments, upper percentage thresholds are discriminatory because they apply similarly to large and small volumes of use.[131] As discussed above, however, the discounts associated with percentage commitments and upper percentage thresholds "apply to large and small rivals alike and tend to facilitate greater competitiveness in the downstream market" (i.e., among customers), because they enhance predictability for buyer and seller alike.[132]

Not only does the TDP's upper percentage threshold pose no risk of competitive harm, but there are also significant business justifications for its use. Upper percentage thresholds encourage customers to predict their future needs more accurately, thereby reducing the risks and costs of providing special access services, which ultimately reduces consumers' costs. In the absence of such protections, a customer could get the benefit of a discount without making a corresponding commitment. For example, a customer would have no rational incentive to

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[129] *Designation Order* ¶ 79.

[130] *See, e.g.*, *Barr Laboratories*, 978 F.2d at 110 n.24; *Barry Wright*, 724 F.2d at 237-38; *Magnus*, 599 F.2d at 200-01 & n.11;; *W.H. Brady*, 659 F. Supp. at 1374; *White & White*, 540 F. Supp. at 1032. *See also Applied Med. Res. Corp.*, 2006 US Dist. LEXIS 12845 at *12.

[131] *Designation Order* ¶ 79.

[132] Antitrust Law ¶ 768b.4.

commit to more than 10 circuits, even if it were planning on purchasing 10,000 circuits, depriving CenturyLink of any ability to plan for network usage. Still worse, the purchaser could vastly expand the number of circuits in the first year of the plan and then, if it later encountered a decline in demand, could simply disconnect most of the new circuits with no consequences, preventing CenturyLink from recovering its investment in the new circuits and related maintenance costs. CenturyLink has found that the upper percentage threshold, combined with the 90-day grace period, creates a workable management solution for customers as they connect and disconnect circuits in response to their changing needs. Taken together, all of these business planning factors strongly support the legitimacy of the TDP upper percentage threshold.[133]

D. CenturyLink's Tariff Pricing Plans Do Not Contain Unlawful Overage Penalties.

CenturyLink does not impose overage penalties to enforce ceilings on the purchase of services covered by the RCP and TDP. Under the TDP, if the customer's volume remains above 130 percent of the commitment level for more than 90 days, it will pay month-to-month rates for the amounts above 130 percent unless the customer chooses to increase its service commitment (which it is always free to do) or reduce the number of circuits under the plan.[134] If the customer chooses to increase its commitment level, the discount will apply to the new volume. As mentioned above, if RCP purchases exceed the RCP percentage commitment as of the annual

[133] *See, e.g., Tampa Electric*, 365 U.S. at 334-35; *McWane*, 783 F.3d at 833; *Sterling Merch.*, 656 F.3d at 123-24; *Concord Boat*, 207 F.3d at 1062; *Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38. In addition to the considerations discussed in the text, market realities are mooting this issue, as demand for legacy special access services fall and the likelihood of a particular customer substantially exceeding its original commitment declines.

[134] As noted, if the customer's "overage" lasts for fewer than 90 days, it receives the TDP discount on those circuits without any change in its commitment level.

review, the commitment for the following period is automatically increased to meet the higher service level.

Although the *Designation Order* appears to treat such month-to-month requirements and automatic increases in commitment levels as *de facto* overage penalties,[135] they are nothing of the sort. Indeed, they provide only mild incentives for customers to conform to the TDP upper percentage threshold or to maintain a reasonable RCP commitment level. Of the approximately 300 monthly overage occurrences CenturyLink reported during the 2012-14 reporting period, only 12 resulted in a commitment increase or month-to-month billing. Accordingly, the same principles that support the upper percentage threshold and the RCP percentage commitment, discussed above, can be applied to the month-to-month billing requirement and the automatic increase in the RCP commitment level.

The application of month-to-month rates for CenturyLink service at volumes in excess of 130 percent of the amount ordered does not impinge on a customer's purchases of competitors' services; if anything, as noted, the removal of the discount at those levels provides a customer with *additional incentive* to use a competitor's services. It is very rare for a customer's circuit count to remain exactly the same month to month. The flexibility in the upper percentage threshold mechanism thus provides the customer the freedom it needs to manage the ups and downs that are inherent in the business. Moreover, there are strong business justifications for

[135] *See Designation Order* at ¶ 82. *But see id.* at Table VII Instructions (Variable Upper_Percentage_Threshold) (defining an "overage penalty" as a fee assessed on a customer for exceeding an upper percentage threshold).

these mechanisms, including the need to prevent unintended consequences that would increase risk and costs and, ultimately, consumer costs.[136]

E. Long-Term Commitments in CenturyLink's Pricing Plans Are Lawful.

Long-term supply contracts are not inherently anticompetitive.[137] As the Sixth Circuit held in affirming the dismissal of an antitrust complaint challenging multi-year exclusive dealing discount contracts:

> From the perspective of a retailer, multi-year agreements permit the retailer to insist that the supplier charge lower prices. Committing to a multi-year agreement, indeed, is no different from buying in bulk. From the perspective of a supplier, multi-year agreements ease an aspiring entrant's ability to clear existing market barriers. . . . It is far easier for a market entrant to clear . . . barriers when it is given several years, rather than just one, to recoup this investment. *See* 2 Areeda & Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 348c ("[A] temporary purchase commitment that overcomes an entry barrier increases rather than reduces competition.").
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> . . . .
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> Why not enter a multi-year contract for a steep discount on the prices [seller] was charging? That helps the retailers and bodes well for consumers to boot.[138]

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[136] *See, e.g., Tampa Electric*, 365 U.S. at 334-35; *McWane*, 783 F.3d at 833; *Sterling Merch.*, 656 F.3d at 123-24; *Concord Boat*, 207 F.3d at 1062; *Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38.

[137] *See Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972 (6th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001) (competitor shut out by 5-10 year exclusive energy supply contracts failed to allege requisite injury to competition); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2005 US App. LEXIS 6227 at *3 (9th Cir. 2005) (Ticketmaster's average 6 year exclusive venue contracts, renewable through competitive bidding, were not anticompetitive; "Tickets.com has not shown that contract length is inherently unreasonable or that competitive entry is unduly difficult."); *Ferguson v. Greater Pocatello Chamber of Commerce, Inc.*, 848 F.2d 976, 982 (9th Cir. 1988) (six-year lease term not excessive; "an opportunity for free competition shall presumably arise again at the end of the six-year lease").

[138] *NicSand*, 507 F.3d at 453, 457.

The term commitments in the RCP and TDP thus do not alter the competitive analysis discussed above or the analysis of each practice. To the contrary, long-term commitments are crucial to the business justifications for each of the practices discussed above, which turn on CenturyLink's need to recoup its investment and maintain the facilities used to meet customer service level commitments and to make those facilities available at discounted rates. Accordingly, the competitive analyses and business justifications discussed above in Part III.A-D apply to the long-term commitments provided in the RCP and TDP.

Critically, competitors also use long-term commitments in their special access pricing plans. Many of the contracts to which CenturyLink is a party as a purchaser have a three-year term,[139] conclusively demonstrating the procompetitive nature of those term provisions in special access pricing plans.[140] In fact, as an out-of-region customer of the CLECs and ILECs, CenturyLink generally has *requested* five-year terms when available. And as an ILEC provider, CenturyLink generally employs a four-year term in the RCP and a three- or five-year term in the TDP, consistent with these industry practices. The "long-term" nature of the RCP and TDP does not make the commitments and requirements discussed in Part III.A-D above any less procompetitive or undermine the justifications for those practices.

[139] Given applicable confidentiality restrictions, CenturyLink is not attaching to this White Paper the specific CLEC contracts at issue, nor is it quoting specific contractual language. CenturyLink will, however, submit these materials, subject to appropriate protections, if required to do so by the Bureau or the Commission.

[140] *See supra* note 117.

F. Early Termination Fees in CenturyLink's Tariff Pricing Plans Are Lawful.

Early termination fees only apply in the case of termination of service by the customer. Such fees, which amount to 50 percent of the remaining term of a contract, are justified by the same considerations as the long-term commitments they support. When a customer breaks such a commitment, the savings that CenturyLink had shared with the customer in the form of discounted rates are lost, and CenturyLink is at risk of being unable to recoup its investment and maintenance costs. Early termination fees help ensure that at least a portion of the expected revenue stream on which CenturyLink's investment was premised will continue over the life of the customer's commitment, and to provide some compensation to CenturyLink if it does not. In an industry where fixed costs are well understood to be far greater than incremental costs, a requirement that a customer pay 50 percent of the remaining contract, even though costs almost surely will not drop by half, is more than reasonable and has no anticompetitive effect.

Under the RCP, if a customer terminates a service as part of a service upgrade, resulting in total revenues (including from new services not covered by the plan) of at least 115 percent of the customer's remaining commitment, no early termination fee is charged, and the customer's commitment level for services within the plan is reduced accordingly. Under the TDP, the customer will similarly avoid an early termination fee in connection with a migration upgrade, with a corresponding reduction in its commitment level under the plan, as long as the upgraded service has a term as long as or longer than the TDP term. Moreover, customers may move circuits from one location to another without incurring early termination fees.

Competitors have used early termination fees for years.[141] For instance, several of those contracts impose on CenturyLink's CLEC affiliate a 100 percent termination liability in year one of the agreement, as opposed to the 50 percent charge in the CenturyLink tariff plans, followed by 50 percent or other decreasing percentages for each remaining year.[142] *Ryder* confirms the reasonableness of CenturyLink's relatively low early termination fee,[143] and thus its reasonableness under the antitrust laws.[144] Competitors' use of early termination fee provisions in their special access contracts also confirms the procompetitive nature of CenturyLink's less stringent early termination provisions.[145]

G. CenturyLink Has Contract Tariffs in Place Covering the Services in its Special Access Commercial Agreements.

In response to the *Designation Order*, CenturyLink is filing its special access commercial agreements.[146] That said, because CenturyLink has a corresponding contract tariff on file

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[141] *See* Reply Comments at 28-29 (describing and citing Level 3 and tw telecom tariffs applying termination liability charges).

[142] As noted above, CenturyLink is not providing these contracts or quoting the relevant language here in light of applicable confidentiality provisions, but it will do so if required, pursuant to appropriate protections.

[143] *Ryder*, 18 FCC Rcd at 13617 ¶ 33.

[144] *See Barry Wright*, 724 F.2d at 239.

[145] *See supra* note 117.

[146] Several of these commercial agreements involve CLECs that have taken issue with the tariff discount plans under investigation in this docket. Those same CLECs fail to mention that, contrary to their advocacy in this and other dockets, they were not "locked-in" to the RCP or TDP. Rather, prior to the expiration of the term of their RCP and/or TDP agreements, the CLECs negotiated new commercial arrangements with CenturyLink, to replace those RCP and/or TDP agreements. The new agreements include mutually beneficial terms and address the CLECs' individual service needs. As a result of such replacement agreements, as well as the

covering the special access services in those agreements, any concerns in this area do not apply to CenturyLink.

IV. CONCLUSION

For the reasons described herein, the Bureau should close the instant investigation and find that the CenturyLink tariff provisions under consideration are lawful.

Respectfully submitted,

CENTURYLINK

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ongoing migration to Ethernet services, the RCP and TDP have both seen a decline in demand. CenturyLink remains poised to negotiate with any customer that approaches it with a need for a commercial agreement to address its specific needs.