

Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local	)	WC Docket No. 05-25
Exchange Carrier	)	
	)	
AT&T Corp. Petition for Rulemaking to	)	RM-10593
Regulation of Incumbent Local Exchange	)	
Carrier Rates for Interstate Special Access	)	
Services	)	

**COMMENTS OF INCOMPAS**

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INCOMPAS respectfully submits these comments in response the Commission’s Further Notice of Proposed Rulemaking in the above referenced proceedings.<sup>1</sup>

**INTRODUCTION AND SUMMARY**

INCOMPAS applauds the Commission’s commitment to review the special access market and its policies “to ensure that they reflect the state of competition today and promote competition, investment, and access to dedicated communications services businesses across the country rely on every day to deliver their products and services to American consumers.”<sup>2</sup> Facts in this record demonstrate market failure. INCOMPAS member companies are providing in-depth market analyses, based on economic studies of the most extensive data collection the

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<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012).

<sup>2</sup> *Id.* at ¶ 1.

Commission has undertaken, and are proposing remedies for where competition is not sufficient to discipline the marketplace. INCOMPAS files these brief initial comments separately to stress the importance of Commission action to investment, including by non-carrier entities, and to underscore the need for comprehensive reform to include all forms of dedicated services, including packet-based special access services.

**I. Policies that Promote Reasonable Access to Dedicated Broadband Services Benefit the Economy as a Whole.**

Special access service (*i.e.*, dedicated service)<sup>3</sup> is a \$40 billion market<sup>4</sup> impacting a significant number of businesses and non-profit entities in industries spanning the entire U.S. economy. Special access services are dedicated transmission services, of various bandwidths (and can be TDM or packet-based services), between two or more designated points that are critical in the provisioning of broadband services to businesses of all sizes and number of locations (including, for example, enterprises with multi-locations), schools, libraries, and local, state, and federal government agencies, as well as the provisioning of competitive mobile broadband services. Any failure to ensure just and reasonable rates, terms, and conditions for special access services has a significant negative impact on the economy as a whole. As the Commission has recognized, its policy framework for special access services affects competition

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<sup>3</sup> This service should not be confused with broadband Internet access service that was the subject of the Open Internet Order (which tends to be “best efforts”). Internet access service (point-to-Internet) provisioned for best efforts connectivity is not a substitute for customers that need dedicated business broadband services or backhaul (point-to-point(s)).

<sup>4</sup> Order initiating investigation and designating issues For investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, DA 15-1194, ¶ 2 (2015) (“Designation Order”).

and investment in the downstream markets for retail business broadband services provided to small businesses, mobile customers, non-profits, and enterprise customers.<sup>5</sup>

While the large incumbents would like the Commission to focus solely on the incumbents' *allegations* on how they are negatively impacted by pro-competitive policies, in fact, there is far more at stake than just the incumbents. The ability of a vast number American businesses and non-profits to grow and create jobs is affected by the cost of their broadband services. Moreover, excessive pricing and unreasonable terms for special access services—that serve as a critical input for a significant portion of competitive services—reduce competitors' ability to invest in and expand their own networks. This in turn negates the incumbents' incentives to invest and innovate. One report estimated the cost of inaction by the Commission in adopting pro-competitive policies in the wireline telecommunications sector to be a loss of as many as 300,000 existing jobs and a reduction in investment by as much as \$30 billion per year.<sup>6</sup> Competitive reform in the special access market, in contrast, will promote a “virtuous cycle” of investment and development, because—as the Commission has also found—competition spurs network innovations, which drive end-user demand for more advanced broadband services, which in turn stimulates competition among providers to further invest in broadband network and the services offered over those networks.<sup>7</sup>

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<sup>5</sup> Federal Communications Commission, Connection America: The National Broadband Plan at 47, available at: <http://www.broadband.gov/download-plan/> (“National Broadband Plan”).

<sup>6</sup> See Susan M. Gately and Helen E. Golding, S.M. Gately Consulting LLC, *The Benefits of a Competitive Business Broadband Market*, at iv 16 (April 2013), available at <http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf> (“*The Benefits of a Competitive Business Broadband Market*”).

<sup>7</sup> See *Preserving the Open Internet, et al*, GN Docket No. 09-191, *et al*, FCC 10-201, Report and Order, ¶ 14 (2001).

A. Competition promotes investment and growth from businesses and non-profits

Reforming special access is about promoting competition to the benefit of *all* consumers. Robust competition encourages providers to address the unique needs, circumstances, and problems faced by individual businesses or non-profit entities, thereby enabling them to grow their businesses and, as a result, expand their broadband demand in the future—generating more innovation and investment by all providers. The Commission has recognized that contributions by competitors that use special access services as wholesale input services include “lower prices, higher output, and increased innovation and quality.”<sup>8</sup> Policies that ensure reasonably priced special access services are critical to ensuring that end-user customers get the innovation and affordability they need to invest and grow their businesses or public service institutions.

Among the state-of-the art solutions competitors deliver are managed services, cloud computing, and unique applications that are developed and deployed via next-generation, IP-based managed networks. These services are critical to many small entities as well as numerous mid-sized and large enterprise customers. For example, a county representative of a health department with two public health clinics using a competitive provider commented that, faced with the rise of electronic medical records (EMR), medical imaging sharing and telehealth technology, the department relies “upon fast and efficient broadband networks to deliver the best health care” to its communities.<sup>9</sup> Numerous other entities have commented on how competition

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<sup>8</sup> *Technology Transitions, Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, FCC 15-97, Report And Order, Order On Reconsideration, and Further Notice of Proposed Rulemaking, ¶ 101 (rel. Aug. 7, 2015) (“Technology Transitions Order”).

<sup>9</sup> Letter of Linda Snyder, Supervisor of Admin. Svcs. at Green County Health Department to Chairman Wheeler, WC Docket No. 05-25, *et al*, dated June 16, 2015.

provided “more desirable packages and a higher level of service [thereby allowing them] to invest additional money back into vital programs.”<sup>10</sup>

The significant positive impact of competition by competitive providers that use special access services as wholesale inputs on innovation and end-users’ ability to invest is echoed by the *hundreds of customer letters* that have been submitted into the record. The industries represented by the letters are diverse, including health care providers, learning institutions, school districts, public safety organizations, cities, hotel chains, restaurant and fast food chains, and retail clothing stores. They are demanding the tailored products and better customer service, at affordable rates, provided by competitive providers that often rely on special access services as a wholesale input to their retail services. As the Office of Advocacy of the U.S. Small Business Administration states: “Competitive carriers offer services and products to small businesses that incumbent providers do not offer, and may lack the incentive to offer without any competitive pressure to do so.”<sup>11</sup>

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<sup>10</sup> Letter from Gary Neat, Sys. Dir. of Info. Sys., Ephraim McDowell Med. Ctr., to Chairman Wheeler, WC Docket No. 05-25 *et al.*, at 1, dated Jun. 22, 2015; *see also*, Letter from Mary Jane Johnson, Owner, Tomorrow’s World Early Learning Ctr., to Chairman Wheeler, WC Docket No. 05-25 *et al.*, at 2, dated Jun. 15, 2015 (“The availability of low cost, affordable broadband options make it easier for school administrators and day care owners to invest in teachers and caregivers.”); *see also*, Letter from Tony Downs, IT Dir., Cumberland Family Med. Ctr., to Chairman Wheeler, WC Docket No. 05-25 *et al.*, at 1, dated Jun. 22, 2015 (noting that the competitive carrier they use to provide the broadband and voice services on which they rely provides it with individualized services and high-quality customer support and enables them to cut overhead costs.).

<sup>11</sup> Letter from Jamie Belcore Saloom, SBA Office of Advocacy, to Chairman Wheeler, WC Docket 05-25 *et al.*, dated June 23, 2015.

B. Special access reform will promote wireless competition and deployment

Wireless providers rely significantly on wireline facilities for the links between their cell sites and their mobile switching centers (“MSCs”), including the last-mile connections between their cells sites and local exchange carrier serving wire centers that they must reach in order to aggregate traffic for transport to its MSCs.<sup>12</sup> Carriers route wireless traffic over dedicated circuits to protect customer privacy and ensure security.<sup>13</sup> This “backhaul” is a substantial part of their expense in providing wireless services. Sprint has estimated the cost of backhaul to be about a third of its operating costs of a cell site.<sup>14</sup> Excessive backhaul cost put unaffiliated wireless providers, such as Sprint, at a substantial competitive disadvantage over the incumbent wireless affiliates.

Moreover, wireless consumers are demanding access to more and more content wherever they are and on whatever device they may have. The amount of video viewed on mobile devices is skyrocketing and is only expected to increase.<sup>15</sup> In addition, more and more things are becoming attached to the Internet, from cars to Coke machines, Fitbit to heart monitors. This means that mobile networks will need to dramatically increase their current capacity to accommodate this demand. It is this challenge that faces the deployment of the next generation of mobile networks, or 5G.

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<sup>12</sup> See Comments of Sprint Nextel Corporation, WC Docket No. 05-25, Declaration of Paul Schieber, p. 3, filed Feb. 11, 2013

<sup>13</sup> See *id.* at p. 6

<sup>14</sup> Comments of Sprint NextTel, WC Docket No. 05-25, p. 33, filed Aug. 8, 2007.

<sup>15</sup> See Cisco VNI Forecast (Mobile Highlights), available at: [http://www.cisco.com/web/solutions/sp/vni/vni\\_forecast\\_highlights/index.html](http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html).

There are only two ways to increase capacity on a wireless network, add more spectrum or increase the number of cell sites. 5G will integrate access to the limited spectrum available to mobile carriers and combine it with a vastly denser network of cell sites. It is anticipated that 5G will require thousands of new cell sites. To operate, however, each of these cell sites must be connected to the network, and that means more dedicated access. In other words, 5G will depend upon a significant increase in mobile carrier purchases of dedicated special access circuits to provide mobile broadband services.<sup>16</sup> Accordingly, this proceeding will directly impact the speed and capacity of the next generation of mobile broadband services.

C. Wholesale policies enable and stimulate competitive investment, which in turn spurs incumbent investment.

Competition causes both competitive carriers and incumbents to increase investment, employ more workers and foster innovation in new technologies. Therefore, the Commission needs to reform special access to stimulate innovation and broadband deployment by competitive providers, which in turn stimulates deployment and innovation by incumbents. Even AT&T Chairman and CEO, Randell Stephenson recognizes the benefits of pro-competitive policies in stimulating investment, stating that “business investment increases with thoughtful, responsible

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<sup>16</sup> See Testimony of Chairman Wheeler, Oversight of the Federal Communications Commission, House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce, November 17, 2015, p. 69, *available at*: <http://docs.house.gov/meetings/IF/IF16/20151117/104195/HHRG-114-IF16-Transcript-20151117.pdf> (“[S]pecial access services [] are necessary for competition. We ought to start calling these “competitive services.” Because you can’t have cell densification, which makes wireless networks work better, without backhaul, which requires this special access. You can’t have the Internet of Things in 5G built out. It is going to do nothing but expand the need for this, let alone the kind of competitive services you were talking about that increases service opportunity by competitive providers and lowers costs.”); *see also*, “Network Densification: The Dominant Theme for Wireless Evolution into 5G, IEEE Communications Magazine, February 2014.

*regulation*. And when companies invest—whether in expansion or improved services for consumers and businesses—they create jobs. It is a simple, powerful formula.”<sup>17</sup>

It is evident that retail competition has spurred enormous innovation and prompted wide-scale transition and investment by the telecom giants. The evolution from narrowband services, to broadband services, to high-speed broadband services, was generated by competition. The investment, innovation, and competitive choice provided by competitors has, in turn, spurred investment in broadband deployment by incumbents, while increasing adoption of broadband by customers. For example, confronted by deployment of DSL by competitors in the mid-1990s, incumbents upgraded to DSL.<sup>18</sup> Following the introduction of Ethernet services provisioned over fiber and copper by competitive carriers to businesses of all sizes, incumbent carriers responded with their own Ethernet offerings.<sup>19</sup> Indeed, the largest incumbent LECs have even acknowledged that they have been forced “to develop services that [their] customer[s] want to

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<sup>17</sup> See BusinessWire, “AT&T to Invest Approximately US\$3 Billion in Mexico to Extend Mobile Internet to 100 Million Consumers & Businesses by Year-End 2018” June 25, 2015, *available at*: <http://www.businesswire.com/news/home/20150625006155/en/ATT-Invest-Approximately-US3-Billion-Mexico-Extend#.VgXd1MuFO75>.

<sup>18</sup> See, Statement of James W. Cicconi, General Counsel and Executive Vice President, AT&T Corporation, Hearing Before the Committee on Energy and Commerce, House of Representatives, Apr. 12, 2001 (emphasis added), *available at*: <https://www.gpo.gov/fdsys/pkg/CHRG-107hhr72829/html/CHRG-107hhr72829.htm> (“The Bells are spending billions to deploy DSL for one reason. Competition. DSL is not a new technology. It sat on the Bell shelf for years. They had no incentive to roll it out until competitors showed up as a result of the 1996 Act. In fact, they didn't even face any market opening restrictions before the 1996 Act, and so there was actually no impediment to their deployment of this technology.”).

<sup>19</sup> See, Written Statement of Mark Iannuzzi, President, TelNet Worldwide, Inc. on Behalf of COMPTEL, United States House of Representatives, Committee on Energy and Commerce, Subcommittee on Communications and Technology, Hearing on “The Evolution of Wired Communications Networks” October 23, 2013.

buy,”<sup>20</sup> including the provision of packet-based services,<sup>21</sup> and to upgrade their facilities<sup>22</sup> to keep up with the competition.

For competitors to establish the customer base needed to innovate and invest, however, they need an economically viable means of obtaining wholesale inputs (*i.e.*, reasonably priced special access services). There are a large number of business locations where there simply is no economically viable case for competitors to build out last-mile facilities.<sup>23</sup> Moreover, a key feature of the medium-sized business and enterprise broadband markets is the interdependency of demand, *i.e.*, the fact that many customers have multiple locations and seek a single provider to serve them all. Indeed, for many customers, the ability to serve all locations is a threshold consideration in their evaluation of alternative vendors.<sup>24</sup> In some cases, competitors may have demand and potential revenues to make economical constructing their own facilities all the way to a customer site. But the large number of multi-location customers for dedicated services

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<sup>20</sup> Verizon Comments *In the Matter of Technology Transitions*, GN Docket No. 13-5 and WC Docket No. 05-25 *et al*, p. 28, filed Feb. 5, 2015.

<sup>21</sup> Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3, filed Jan. 14, 2013 (“CLECs are leading providers of Ethernet services, and ILECs have ‘respond[ed] with further investments in their own Ethernet offerings.’”) (emphasis added) (internal citation omitted).

<sup>22</sup> CenturyLink Comments *In the Matter of Technology Transitions*, GN Docket No. 13-5 and WC Docket No. 05-25 *et al*, p. 1, filed Feb. 5, 2015.

<sup>23</sup> See *Technology Transitions Order*, n. 35, citing Windstream Comments at 15 (“CLECs also must continue to use last-mile inputs from ILECs, because there often is no viable economic case for competitors to build their own last-mile facilities to address the relatively low level of demand for bandwidth from small, medium-sized, and multi-location customers.”)

<sup>24</sup> See Comments of COMPTTEL, *In the Matter of CenturyLink’s Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier Regulations and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, p. 8, filed Feb. 14, 2014.

creates a substantial barrier to entry when competitors can serve some, but not all, locations on their own last-mile facilities: To compete, carriers must have an extensive network footprint to be able offer services widely. In fact, many competitors have made significant investment in their own networks. Nonetheless, given the bleak reality that last-mile facilities are uneconomic to duplicate in many instances, the footprint-barrier can only be overcome through wholesale access policies that enable providers (including incumbents attempting to compete outside their incumbent territories) to extend the geographic reach of their networks to off-net locations to create the multi-location service packages that this customer segment demands.<sup>25</sup>

In addition to exorbitant rates, unreasonable terms and conditions imposed by incumbents can impact competitors' ability to invest. For example, one competitor has explained how shortfall penalties attached to special access purchases have had a "chilling effect" on its fiber deployment plans, causing it not to buildout to locations that otherwise met its criteria.<sup>26</sup> The impact has a domino effect: had the competitor "been able to justify the build to the target buildings, the construction would have created future opportunity . . . to bring fiber to additional buildings that would have passed by the new construction at less marginal costs."<sup>27</sup> Moreover, incumbent LECs' lock-up provisions in special access contracts have the effect of reducing the addressable market for existing or potential alternative wholesale providers than would otherwise

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<sup>25</sup> Moreover, relief from the incumbents' exorbitant rates would free up resources for competitors to invest in network plant. *See* Letter of Thomas Jones, Counsel for Level 3 Communications, LLC to Marlene Dortch, WC Docket No. 05-25, Sept. 23, 2015.

<sup>26</sup> Letter of Thomas Cohen, Counsel for XO Communications, Inc. to Marlene Dortch, WC Docket No. 05-25, p. 8, dated Sept. 23, 2015.

<sup>27</sup> *Id.* at 9.

be the case.<sup>28</sup> As a result, such providers have a reduced incentive to deploy last-mile fiber facilities to commercial buildings.

## **II. The Commission’s Comprehensive Reform Needs to Include All Forms of Dedicated Services, Including Packet-Based Services.**

The Commission has a duty to ensure rates for dedicated access service—regardless of the technology of the service—are just, reasonable, and non-discriminatory.<sup>29</sup> When confronted with possible—let alone evident—market failure, the Commission is obligated to take action to prevent the exercise of market power. While the economic reports provided by INCOMPAS member companies will provide comprehensive market analysis as to the need for reform of the Commission rules on special access, it is indisputable that where there are only one or two facilities-based provider(s) in a market—regardless of the type of dedicated transmission service provided over the facility—policies to ensure wholesale access at nondiscriminatory, just and reasonable rates, terms and conditions are necessary for a competitive retail market to exist. Comprehensive reform must include all forms of special access services (*e.g.*, packet-based as well as TDM-based services).

The fundamental barrier to competitive access to certain business customer’s buildings—network infrastructure costs that far exceed revenues—is present regardless of whether the electronics used on the network facilities are transmitting traffic in IP or TDM. While incumbents may roll out fiber wires or new electronics, the incumbents’ deployment plans for these “new” builds largely leverage existing infrastructure (*e.g.*, conduit, rights-of-way access, building entries), much of which was deployed under monopoly conditions. Incumbents also

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<sup>28</sup> See *Designation Order* at ¶¶ 7, 12, 32, 42, 55 and 73.

<sup>29</sup> 47 U.S.C §§201 and 202.

benefit from their far larger customer base of both retail and wholesale customers, which means—even if their deployment project costs are exactly the same as a competitor’s (and they are not)—the incumbent still would have a far lower cost *per customer location* hurdle to clear than any competitor seeking to enter the market.<sup>30</sup>

The Commission’s assessment of the market should focus on the extent to which incumbent LEC has market power over the physical connection to the end-user, regardless of whether the incumbent LEC uses that connection to provide TDM or packet-based services. If the Commission's evaluation and remedy to the existence of market power in the special access services market is limited by technology (as the Commission has in the past), it will be flawed in the long term. For when the incumbent switches from TDM-based services in areas where it is uneconomical for a competitor to build (or the incumbent otherwise maintains market power), the incumbent will still have market power.

The Commission recognizes this in the *Technology Transitions Order* and, accordingly, conditioned the discontinuance of incumbent LEC TDM-based special access services on the offering of reasonably comparable wholesale inputs during the pendency of this special access proceeding. In doing so, the Commission firmly established that the comprehensive evaluation of the special access market is not limited to TDM DS1 and DS3 special access services.<sup>31</sup>

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<sup>30</sup> See Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5 & 12-353, RM-10593, WC Docket Nos. 05-25 & 15-1 (filed June 8, 2015) (“Windstream June 8 Ex Parte”); *id.*, Attach A at 13-15 (“CostQuest White Paper #1”).

<sup>31</sup> The Commission had provided sufficient notice even prior to the *Technology Transitions Order*. See Letter of Thomas Jones, to Marlene Dortch, WC Docket No. 05-25, dated Aug. 28, 2015 (“Nor is there any question that incumbent LECs have been on notice that the Commission could (1) reverse forbearance and (2) adopt rate regulation of their packet-based special access services. . . . [T]he agency has provided more than sufficient notice under APA to take both these actions.”) See also, AT&T Public Policy Blog, “The War on Infrastructure Investment, posted by Bob Quinn on Nov. 3, 2015 (“. . . the massive special access review the Commission opened

Indeed, if the special access proceeding were limited to an analysis and reform of the rates, terms and conditions for TDM-special access services, as incumbents have claimed, the proceeding would have no impact on, or relevance to, the situation the Commission sought to resolve in the *Technology Transitions Order*—namely, the rates, terms and conditions for wholesale access when TDM services are discontinued—and the interim nature of the condition on discontinuance would be nonsensical. As the Commission stated in that Order, it “preserve[d] a clear path to transition to IP and the benefits of competition, and provide[d] the Commission with the flexibility to adopt long-term rules best suited for the future as a result of its review of the special access data.”<sup>32</sup>

The Commission recognized in its *Broadband Forbearance Orders* that it may ultimately need to reverse course from the treatment of packet-based services decided in those orders<sup>33</sup> and the D.C. Circuit explicitly affirmed this, noting that the forbearances granted the incumbents, including Verizon, “is not chiseled in marble...the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy

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back in 2012 to examine the level of competition in the special access services marketplace (including asking for enormously broad amounts of data on pricing) – even for services like Ethernet . . .”).

<sup>32</sup> *Tech Transition Order* at ¶ 6.

<sup>33</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, 22 FCC Rcd. 18705, FCC 07-180, Memorandum Opinion and Order, n. 120 (2007) (“AT&T Forbearance Order”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S. C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, WC Docket No. 06-147, FCC 07-184, 22 FCC Rcd. 19478, Memorandum Opinion and Order, n. 113 (2007) (“*Embarq & Frontier Forbearance Order*”); *Qwest Petition for Forbearance Under 47 U.S. C. § 160(c) from Title II and Computer inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, FCC 08-168, 23 FCC Rcd. 12260, Memorandum Opinion and Order, n. 127 (2008) (“*Qwest Forbearance Order*”). The Commission also recognized its address the Verizon deemed granted forbearance. *AT&T Forbearance Order* at ¶ 50.

approaches to regulation in this area.”<sup>34</sup> In addition, the forbearances that were granted by the Commission do not apply to all incumbent LEC packet-based special access services. The relief granted by the Commission only applies to the petitioners’ services in existence at the time of the petition, as offered, and only to the extent the services were specified for relief requested by the petitions.<sup>35</sup> As INCOMPAS discussed in a recent *ex parte*, services such as AT&T’s ASE service is not covered by the Commission’s grant of forbearance to AT&T.<sup>36</sup> Furthermore, even with regard to services covered by the grants, the forbearances granted by the Commission do not preclude the adoption of new regulations pursuant to the Commission’s statutory authority.

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<sup>34</sup> *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (2009).

<sup>35</sup> *AT&T Forbearance Order* ¶¶12, 30 and 63; *See also, Embarq & Frontier Forbearance Order* at ¶ 1; *Qwest Forbearance Order* at ¶ 1 (“[W]e grant substantial forbearance relief to [Embarq/Frontier and Qwest] with regard to their *existing* packet-switched broadband telecommunications services and their existing optical transmission services.”) (*emphasis added*); *see also, Embarq & Frontier Forbearance Order* at ¶ 12 and *Qwest Forbearance Order* at ¶ 33 (“In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services, *as offered by the petitioners today*, is not necessary to ensure that the petitioners’ rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory.”) (*emphasis added*); *see also, Embarq & Frontier Forbearance Order* at ¶ 39 and *Qwest Forbearance Order* at ¶ 43 (“We do not know the precise nature of such future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here. Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1).”).

<sup>36</sup> Letter of Karen Reidy to Marlene Dortch, WC Docket No. 05-25, pp. 3-5, filed Dec. 1, 2015. Neither is special construction services to deploy network facilities. *See* Letter from John T. Nakahata to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, PS Docket No. 14-174, WC Docket No. 05-25, and RM-10593 (filed May 27, 2015).

In its *Broadband Forbearance Orders*, the Commission did not grant relief from Sections 201 and 202 of the Act and, accordingly, “may prescribe such rules and regulation as may be necessary in the public interest to carry out the provisions of this Act,” which includes ensuring just, reasonable and nondiscriminatory rates terms and conditions for dedicated services.<sup>37</sup>

As evidence of unjust and unreasonable rates and market failure for a core enterprise broadband service (Ethernet), INCOMPAS (then COMPTTEL) commissioned an analysis that compared Ethernet prices of AT&T and CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in the NECA Access Service FCC Tariff #5 (NECA Tariff #5).<sup>38</sup> Both AT&T and CenturyLink are far larger and operate in more dense areas than the carriers concurring in NECA Tariff #5 and, accordingly, should enjoy significantly greater economies of scale and scope. Consequently, the cost experienced by AT&T and CenturyLink should be *less* than the NECA Tariff #5 carriers. Yet, prices charged by AT&T and CenturyLink were often greater by an order of magnitude.<sup>39</sup>

The Commission has considered cost an important determinant of just and reasonable rates.<sup>40</sup> AT&T and CenturyLink’s Ethernet access and transport services cannot plausibly bear

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<sup>37</sup> 47 U.S.C. §§ 201 and 202. Section 251(c)(4) also requires incumbent LECs to “offer for resale at wholesale rates any telecommunications service that the carrier provides at retail.” 47 U.S.C. § 251(c)(4). The Commission has not issued an Order clarify the extent of relief that was deemed granted to Verizon. Nonetheless, the Commission should take necessary action to level the playing field.

<sup>38</sup> Comments of COMPTTEL, WC Docket No. 05-25, pp. 10-11 and Attachment, filed Apr. 16, 2013. As noted in Attachment A at 3, Verizon does not publically file its Ethernet prices and, as such, no comparison was possible.

<sup>39</sup> *Id.*

<sup>40</sup> *See, e.g., Investigation of Special Access Tariffs of Local Exchange Carriers*, 4 FCC Rcd 12, Memorandum Opinion and Order, at ¶ 32 (1988) (emphasis supplied) (“The Communications Act requires that rates be just and reasonable and not create unreasonable discrimination or

any reasonable relationship to cost. If the rural ILECs can offer, at the rates embodied in NECA Tariff #5, a wholesale broadband transmission platform that can easily (and effectively) enable a finished retail service comparable to the AT&T and CenturyLink services at a *fraction* of the price of AT&T and CenturyLink, then the only logical conclusion is that the AT&T and CenturyLink prices are unreasonably and unjustly inflated.

Additionally, when evaluating the state of the market for special access services, the Commission must take into account the limitations on and uncertainties surrounding access to unbundled elements and the impact those limitations and uncertainties have on the sustainability of that form of competition. For example, many competitors use a bare copper loop obtained from the incumbent as an unbundled element to provide Ethernet services in competition with the incumbent. The Commission's rules provide no comparable fiber-based alternative to the bare copper loop when copper is retired.<sup>41</sup> Thus, as the incumbents transition their networks to fiber, this form of competition will be lost and, consequently, will provide no check on their market power.

## CONCLUSION

The Commission should adopt appropriate remedies to prevent the exercise of market power in the special access market. By doing so, the Commission will unleash a virtuous cycle of investment and innovation for wired and wireless networks alike. Competition will flourish, spurring more investment by both competitors and incumbents. Businesses of all sizes and mobile broadband consumers will benefit, and customers will be more satisfied with their ability

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undue preference. Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b), 202(a). *Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates, because cost-based rates both deliver price signals which contribute to efficient use of the networks and generally distribute network costs to the customer who causes those costs.*"

<sup>41</sup> Unbundled DS1 and DS3s should still be made available over fiber.

to choose their broadband provider. Accordingly, it is in the public interest for the Commission to proceed expeditiously in modifying its policy framework and ensuring special access services are offered at just and reasonable rates and terms and conditions.

Respectfully submitted,

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