REDACTED - FOR PUBLIC INSPECTION

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

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

COMMENTS OF TDS METROCOM, LLC

TDS Metrocom, LLC ("TDS CLEC") submits the following brief comments in response to the Federal Communications Commission's ("Commission" or "FCC") Order Initiating Investigation and Designating Issues for Investigation.[1] TDS CLEC is principally concerned with the RBOCs' unreasonable pricing of Ethernet special access to wholesale customers, as discussed in its recently filed Comments and Second Declaration of Matthew J. Loch in the related Special Access Docket No. 05-25, RM-10593, of which the Confidential versions are attached hereto as Attachment A and incorporated by reference. TDS offers the following three points for consideration in this docket.

1. The RBOCs have all admitted as part of their Direct Cases that they enter into contracts with purchasers of TDM special access that require customers to commit to purchase specified volumes of TDM special access and allow customers to comply with the specified

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[1] *Order Initiating Investigation and Designating Issues for Investigation, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, 30 FCC Rcd 11417, 11431-32 ¶ 30 (Wireline Comp. Bur. rel. Oct. 16, 2015).

volume requirements by purchasing Ethernet. For example, Verizon admits that its "plans include technology-transition provisions, which allow a customer to convert an existing DS1 or DS3 circuit to Ethernet and count that Ethernet towards satisfying its commitment level."[2] Frontier's direct case **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[3] CenturyLink states that it has "established portability provisions that allow [Regional Commitment Program] and [Special Access Term Discount Plan] customers to migrate to Ethernet, while reducing their … commitments, respectively" to CenturyLink.[4] AT&T admits **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[5]

Thus, the RBOCs use their lock-up contracts for TDM special access to leverage the market power they have gained over the decades in TDM special access to impede competitors from constructing and offering Ethernet special access. Particularly in the second and third tier markets in which TDS CLEC operates, this eliminates alternative sources of supply for purchasers of Ethernet special access like TDS CLEC and leaves purchasers with no choice but to buy Ethernet special access from the RBOC, except in limited cases where they can build fiber laterals themselves."

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2 Verizon Direct Case at 96.

3 Frontier Direct Case at 7-9; 21**[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Like Verizon, Frontier provides a highly confidential table **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]**

4 CenturyLink Response at 21.

5 AT&T Brief at 21 n.58 *citing* Reid Decl. ¶¶ 25-32.

2. As TDS CLEC showed in the attached Comments, the RBOCs have been abusing their power in the market for Ethernet special access. They have been offering Ethernet to wholesale customers at above-retail prices, which makes no sense given that costs of selling to wholesale customers are less than costs of selling to retail customers, thereby impeding and excluding competition.[6] In addition, their wholesale prices are unjust and unreasonable, as shown by a comparison with NECA rates.[7]

3. In response to the question in ¶ 102 of the Designation Order on whether commercial contracts that directly or indirectly affect tariffed special access rates should be required to be filed, TDS CLEC strongly supports a filing requirement for contracts for Ethernet special access services. First, contracts between carriers in relation to traffic subject to the Communications Act are required to be filed under Section 211(a). That would include contracts between RBOCs and other carriers for Ethernet service. Second, under Section 211(b) the Commission has the authority to require filings by carriers of other contracts. Third, the Commission recognizes the value of price disclosures in detecting unjust or unreasonable discrimination.[8] Based on TDS CLEC's individual experience, it appears that at least some RBOCs are engaging in unjust or unreasonable discrimination, and a disclosure requirement under Section 211(a) of the Communications Act could both deter that unlawful practice and enable the Commission to impose appropriate relief if the practice persists.

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[6] Attachment A at pp. 25-27, 28-30.

[7] Attachment A at p. 27.

[8] *Technology Transitions Order,* 30 FCC Rcd 9461 at ¶158 (agreeing that "incumbent LECs should not preclude their wholesale customers that receive an IP replacement service… from disclosing the rates, terms, and conditions to a regulator in the context of an action before the Enforcement Bureau.").

Respectfully submitted,

/s/ Tamar E. Finn

Tamar E. Finn
Eric J. Branfman
Morgan, Lewis & Bockius LLP
2020 K Street, N.W.
Washington, DC 20006
(202) 373-6000
Tamar.finn@morganlewis.com
Eric.branfman@morganlewis.com

Dated: February 5, 2016

ATTACHMENT A

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

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

COMMENTS OF TDS METROCOM, LLC

Tamar E. Finn
Eric J. Branfman
Morgan, Lewis & Bockius LLP
2020 K Street, N.W.
Washington, DC 20006
Tamar.finn@morganlewis.com
Eric.branfman@morganlewis.com

Date: January 27, 2016

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	)	
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COMMENTS OF TDS METROCOM, LLC

TDS Metrocom, LLC ("TDS CLEC") submits the following comments in response to the Federal Communications Commission's ("Commission" or "FCC") Further Notice of Proposed Rulemaking[1] ("FNPRM") in the Special Access proceedings, which sought comments on proposed changes to rules for special access services provided by Incumbent Local Exchange Carriers ("ILECs") in price cap areas.

I. SUMMARY

The competition brought about by TDS CLEC's service offerings to small and medium-sized business customers ("SMB") in second and third tier markets has in the past generated

[1] *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*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) ("*Special Access FNPRM")*.

lower pricing to these customers by TDS CLEC tailoring service to the customer's needs and providing top quality service. In TDS CLEC's recent experience, however, that model can no longer be sustained with the RBOCs' current last mile wholesale Ethernet prices charged for the higher bandwidths, 10 Mbps and above, that customers are requesting. Any rulemaking that does not consider anti-competitive conduct by RBOCs with respect to Ethernet and other packet-based services would fail to consider many of the key competitive issues of 2016 and upcoming years.

As demonstrated in Mr. Butman's and Mr. Loch's declarations, at least in second and third tier markets, TDS CLEC is, in the majority of cases, in no position to provide the 10-100 Mbps and above Ethernet services that small and medium-sized business customers demand through the use of TDS CLEC's facilities. Given this fact, it therefore cannot impose the competitive pressure that is necessary for the Commission to forego regulation of RBOCs' Ethernet services. In considering whether RBOCs face the type of competition that can discipline their pricing of 10-100 Mbps and above wholesale Ethernet, it is important to consider that many business customers needing this type of service operate at multiple locations and desire a single source of supply. Even if a CLEC or cable competitor could serve a small percentage of the locations on an economical basis, the competitor's inability to build economically to all, or nearly all, of the locations dooms competition for these customers unless the Commission maintains reasonably priced wholesale access to RBOC last mile facilities.

As Mr. Loch explains in his declaration, the RBOCs' wholesale rates available to TDS CLEC are typically higher than the rates the RBOCs offer at retail to business customers, including TDS CLEC's SMB customers, for comparable services. This is the case for various bandwidths generally in demand by the SMB customers in TDS CLEC markets and, in some

cases, even more so for bandwidths in excess of 100 Mbps. Moreover, TDS CLEC has been charged higher wholesale rates by an RBOC for the same basic service offering in an RBOC's on-net building where there were no viable competitors in the same building than the RBOC charges for the same service in buildings where viable competitors are present. While this demonstrates that competition can act to constrain prices in certain instances, it violates Section 202(a)'s prohibition on discriminatory rates.

RBOCs are and have been abusing their market power in the market for wholesale Ethernet services in second and third tier markets, demanding rates that are plainly not "just and reasonable" because the wholesale rates significantly exceed retail rates with no legitimate business reason for doing so. This imposition of a price squeeze, abusing power in the wholesale market, has ripple effects in the retail market. Wholesale customers, including TDS CLEC, who must pay unjust, unreasonable, above-retail rates for wholesale inputs cannot apply any competitive pressure on the RBOCs' retail rates.

Because the same price squeeze that the Commission identified in the *Technology Transitions Order* exists whether or not the RBOC discontinues its TDM service, the Commission should ensure that CLECs have access to wholesale inputs at just and reasonable rates to provide service at bandwidth speeds and locations where self-deployment is not economical for CLECs, which in the experience of TDS CLEC is 10-100 Mbps or even higher, at least in second and third tier markets.

The Commission's definition of "special access" that is at issue in this rulemaking includes packet-based services. The FNRPM therefore put parties on notice that the Commission is evaluating whether current regulations (or lack thereof) ensure just and reasonable prices for

Ethernet special access services. If and where the data shows a lack of effective competition in specific Ethernet special access markets, the Commission can rely on its Section 201(b) rulemaking power to adopt new regulations that ensure just and reasonable rates. The Courts have upheld the Commission's use of its rulemaking power to set rate caps, most recently in adopting bill-and-keep for intercarrier compensation, and the Commission should use that authority again here. Assuming, arguendo, that all RBOC Ethernet services are subject to grants of forbearance, they must still comply with Section 201 and 202 requirements to offer service on just, reasonable, and non-discriminatory rates, terms, and conditions.

The FCC should establish rate caps to ensure just and reasonable wholesale Ethernet rates by benchmarking such wholesale rates to retail rates, less avoided costs, where sufficient competition (which requires more than a duopoly) does not occur to discipline prices. TDS CLEC submits that the Commission should develop a proxy for costs avoided when Ethernet is sold at wholesale. CLECs and the Commission could then use that avoided cost proxy, and publicly disclosed RBOC retail rates, to determine whether an RBOC may be offering unjust, unreasonable, or discriminatory wholesale rates.

Subjecting the rates, terms and conditions of commercial Ethernet agreements to confidentiality restrictions impedes TDS CLEC's ability to advocate in support of new rules and detect unreasonable and discriminatory rates. It also impedes the Commission's ability to rely on the most up-to-date information about pricing and competition in today's Ethernet markets. Some RBOCs already file commercial UNE-P replacement and transit agreements under Section 211(a), establishing precedent for the filing of commercial carrier-to-carrier agreements with the Commission, while others make such contracts public by posting on their website. Under

Section 211(b), the Commission may require the filing of "any other contracts of any carrier" and exempt minor contracts from such filing requirements. TDS CLEC submits that the Commission should adopt a contract filing or website posting requirement for RBOCs' retail Ethernet contracts that is designed to require pricing disclosures without being unduly burdensome.

Even if the Commission were to reduce the price cap rates for special access DS-1s and DS-3s, it likely could not reduce the rates enough to make them viable wholesale inputs to compete with a comparable retail 10-100 Mbps and above Ethernet product. Both the price and non-price advantages of Ethernet service make high capacity TDM bandwidth a second-best choice for the SMB customers that TDS CLEC serves. Even if competition from Ethernet must be considered in an evaluation of competition for TDM special access, the converse is not true for SMB retail services. TDS CLEC looks forward to working with the Commission to preserve throughout the technology transition the benefits that competition brings to SMBs.

II. INTRODUCTION – BUSINESS OPERATIONS OF TDS

TDS Telecommunications Corporation ("TDS") has a wholly-owned subsidiary that operates incumbent LECs in 25 states across the country ("TDS ILEC") as well as a wholly-owned subsidiary, TDS CLEC, that operates as a competitive LEC in four primary states. TDS CLEC serves second and third tier markets, specifically Lake County Illinois, Ann Arbor, Lansing, and Grand Rapids Michigan, Green Bay, Madison, and Milwaukee Wisconsin, and Minneapolis Minnesota. In these markets, TDS CLEC provides voice and data services--including hosted VoIP, Managed IP, SIP trunking, broadband Internet access, and a range of other networking capabilities. TDS CLEC serves predominantly small businesses, but many of

its customers have multiple locations, such as insurance companies, attorney offices, medical offices and chain businesses.

Over 80% of the business locations that TDS CLEC serves have fewer than 20 employees per location.[2] Recently, TDS purchased two cable companies with properties in Colorado, Texas, New Mexico, Nevada, Utah and Oregon, to add to its diversified and growing business model. Because of its decades of experience as an ILEC, nearly 20 years of experience as a CLEC, and its recent experience as a cable company, TDS is exceptionally well positioned to understand the advantages that an ILEC has with respect to last mile access, including TDM and Ethernet special access.

The competition brought by TDS CLEC has in the past generated lower pricing by tailoring service to the customer's needs, but that can no longer be sustained with the current last mile pricing and higher bandwidth service that customers are requesting. TDS CLEC (along with other CLECs) marketed services, such as DSL, before the RBOCs did and stimulated the RBOCs to upgrade their own networks to offer such service. Notably, the RBOCs had DSL technology available for many years but did not offer it until they were faced with competition from carriers such as TDS CLEC, who were offering the service to their customers. TDS CLEC has a long history of providing highly customized service to its customers with attention to top quality, a strong customer focus and responsive relationships. Despite this past advantage, TDS CLEC can no longer compete on equal footing with the RBOCs for SMB customers, whether using TDM facilities, with their high cost characteristics at faster speeds, or using fiber based Ethernet

[2] Declaration of Matthew J. Loch, ¶ 3 ("Loch Second Declaration"), attached hereto.

services unless the RBOCs provide Ethernet loops to TDS CLEC at just, reasonable and non-discriminatory wholesale rates.

III. ARGUMENT

A. FCC review of special access market must include Ethernet services/pricing.

This docket was opened in 2005 in response to a Petition filed in 2002 by AT&T, which was then a CLEC, regarding anti-competitive conduct by price cap ILECs in the sale of TDM special access. As the RBOCs have made clear in this and related dockets, the market is currently moving rapidly to Ethernet and other packet-based services. Any rulemaking that does not consider anti-competitive conduct by RBOCs with respect to Ethernet and other packet-based services would inevitably fail to consider many of the key competitive issues of 2016 and upcoming years. TDS CLEC submits that the Commission should evaluate competitive issues arising from RBOCs' anti-competitive conduct regarding Ethernet and other packet-based special access services and take action to ensure just, reasonable, and non-discriminatory wholesale Ethernet rates.

There is strong evidence that approximately half, or perhaps more, of today's special access is sold as Ethernet or other packet-based services. The Commission noted that 40% of special access was not TDM as of 2013.[3] Based on a brief review of RBOC filings in this and the related WC Docket 15-247, it is undeniable that in the ensuing years, packet-based special access services have been growing rapidly, while TDM special access services have been shrinking. Here are some examples from filings of RBOCs:

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[3] *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd 11417, 11423-24, ¶ 14 (2015) (*"Tariff Designation Order"*).

- "Ethernet has become the dominant technology, with the result that the DS1 services at issue here are experiencing rapidly declining sales."[4]
- ATLANTIC-ACM estimates that "Ethernet's share of private transport will grow from 38% of private transport in 2013 to 66% in 2019 as every sales conversation now starts with Ethernet."[5]
- "The marketplace is shifting away from the [TDM] services at issue here and toward higher-capacity fiber Ethernet services."[6]
- "There can be no meaningful dispute that -- as even the *Designation Order* [in WC Docket No. 15-247] acknowledges -- customers continue to migrate rapidly from ILEC legacy services to Ethernet and other broadband offerings."[7]
- "'10 Mbps Ethernet is the new T-1.' As a result, the demand for Ethernet and other enterprise broadband services has been rising very rapidly, and this growth, too, is projected to continue" over the five year period from 2014 to 2019.[8]

In these and other filings, the RBOCs vigorously argue that customers are rapidly switching from TDM special access to Ethernet because of the superiority of Ethernet, and thus any examination of competition for TDM special access must consider the availability of

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[4] AT&T Direct Case (Public Version) WC Docket No. 15-247, at p. 27 (filed Jan. 8, 2016) ("AT&T Direct Case").
[5] *Id.* at Ex. B., Att. 3, Declaration of Dennis Carlton, Mark Israel, Allan Shampine & Hal Sider, ¶ 43.
[6] CenturyLink White Paper on Discount Plan Terms and Conditions, WC Docket No. 15-247, at p. 4 (filed Jan. 8, 2016) ("CenturyLink White Paper").
[7] *Id.* at pp. 6-7.
[8] Verizon Direct Case (Public Version), WC Docket No. 15-247, at pp. 21-22 ("Verizon Direct Case").

Ethernet. For example, a White Paper submitted by CenturyLink, as part of its Direct Case in WC Docket 15-247, noted that:

> 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.[9]

Even if competition from Ethernet must be considered in an evaluation of competition for TDM special access, TDS CLEC contends that the converse is not true. As shown by the RBOCs, and as TDS CLEC shows below, for many purposes, TDM special access is not an acceptable or economically feasible substitute for Ethernet. Much of the special access market is moving to Ethernet, and the Commission must evaluate the state of competition in the market for Ethernet. While TDS CLEC believes that market conditions such as wholesale pricing exceeding retail pricing of Ethernet warrant the imposition of price benchmarks between wholesale Ethernet and retail, even without regulating Ethernet retail pricing, the Commission could improve competition in the market for Ethernet by increasing the disclosure of retail pricing that is now hidden from view.

B. The Commission has authority to take action to ensure RBOC Ethernet rates are just and reasonable.

1. Forborne packet-switched services are subject to Sections 201 and 202.

[9] CenturyLink White Paper at p. 7.

As the Commission recognizes, "[c]ompetition is a core value of the Act and the goal of many of the Commission's statutory responsibilities."[10] Assuming, arguendo, that the RBOCs' current Ethernet services qualify for forbearance[11] (a proposition with which TDS CLEC does not agree), all such services remain subject to Sections 201 and 202.[12] Because an RBOC offering Ethernet does so as a common carrier, it must provide service upon reasonable request, on terms and conditions that are just and reasonable. That duty extends to competitors and "[t]he guarantee of competitive wholesale access free of unreasonable discrimination has played a bedrock role in facilitating the market competition that exists today."[13]

Where facilities provided to two classes of customers are "essentially identical," a "disparate rate structure [is] discriminatory under Sec. 202(a) of the Communications Act.[14] For example, where two services use the same type of circuit, provide similar bandwidths, and perform essentially the same function, the Commission has found that they are "like services."[15] Similarly, where certain customers are given lower rates with no change in the facilities being

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[10] *In the Matter of Technology Transitions et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 1433, 1452, ¶ 58 (2014) ("*Technology Transitions Declaratory Order*").

[11] *Ex Parte* Letter from Karen Reidy, INCOMPAS to Marlene Dortch, FCC Secretary (filed Dec. 1, 2015).

[12] *See, e.g., 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*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18726, 18736-38, ¶¶ 35-36, 65-68 (2007) (*"AT&T Forbearance Order"*). AT&T agrees that forborne services remain subject to Sections 201, 202, and 208. *See* Ex Parte Letter from Keith Krom, Counsel for AT&T Services to Marlene Dortch, FCC Secretary at pp. 1-2 (filed Sept. 28, 2015) ("AT&T Sept. 28 Ex Parte").

[13] *Technology Transitions et al.*, Report and Order, Order on Reconsideration and Further Notice of
Proposed Rulemaking, 30 FCC Rcd 9372, 9466, ¶ 168 (2015) ("*Technology Transitions Order*").

[14] *Interconnection Facilities Provided to the International Record Carriers*, 63 FCC 2d 761, 765 (1977), *aff'd Western Union International, Inc., v. FCC*, 568 F.2d 1012 (2d Cir. 1977), *cert. denied* 436 U.S. 944 (1978).

[15] *Western Union International, Inc. v. FCC*, 568 F.2d at 1016.

furnished, the Commission has found that the two services are "like" communications services.[16] After a party proves two services are "like," the burden of proof shifts to the carrier offering the services to disprove discrimination.[17] One means to disprove discrimination is for the carrier to show a difference in its cost.[18] Absent proving "any material differences in [] network functions, network architecture, or service quality that would explain such disparities,"[19] Section 202(a) "embodies an absolute obligation to prevent such discrimination in the public interest regardless of the needs of particular users or other policy considerations."[20]

2. The FCC can use its Section 201 rulemaking authority to adopt wholesale rate caps.

The FCC has "on multiple occasions prescribed individual rates in notice and comment rulemaking proceedings."[21] The FCC may do so because it can implement Section 201(b)'s requirement of just and reasonable rates "either through section 205 rate prescription or through general rules that insist upon certain carrier practices."[22] Most recently, the FCC through

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[16] *American Trucking Associations, Inc. v. FCC*, 126 U.S. App. D.C. 236, 377 F.2d 121 (1966), *cert. denied*, 386 U.S. 943, 17 L. Ed. 2d 874, 87 S. Ct. 973 (1967).

[17] *Western Union International, Inc. v. FCC*, 568 F.2d at 1019 (*citing Trailways of New England, Inc. v. CAB*, 412 F.2d 926, 932 n.12 (1st Cir. 1969)).

[18] *Id*.

[19] *AT&T Corp. v. Business Telecom Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12332 ¶ 43 (2001).

[20] *Western Union International, Inc. v. FCC*, 568 F.2d at 1018.

[21] *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform—Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17870, ¶ 641 (2011) ("*USF Transformation Order*").

[22] See Federal Respondent's Uncited Response to the Joint Intercarrier Compensation Principal Brief of Petitioners at 39-40, *In re FCC 11-161*, No. 11-9900 (10th Cir. March 6, 2013) (internal quotations and citations omitted).

rulemaking adopted bill-and-keep, a rate cap, as the default compensation mechanism for traffic subject to section 251(b)(5).[23] Previously, the Commission prescribed through Section 201 rulemakings limits on subscriber line charges[24] and rate caps for CLEC access charges.[25] Even if a Section 205 proceeding is required, a Section 201 rulemaking satisfies Section 205's hearing requirement.[26] The FCC should use this rulemaking to establish rate caps to ensure just and reasonable wholesale Ethernet rates by benchmarking wholesale rates to retail rates, less avoided costs, where sufficient competition does not occur to discipline prices.

3. Rate caps for wholesale Ethernet services are a logical outcome of the notice in this proceeding.

TDS CLEC agrees with parties who argue that adopting rate caps for wholesale packet-based services, including Ethernet, is a logical outcome of the Notices in this proceeding.[27] AT&T concedes that the Commission could impose new regulation on forborne services through its "general rulemaking and other regulatory authority under Section 201(b) and the APA."[28] However, it argues the FNPRM "does not place the possible re-regulation of packet-based

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[23] *USF Transformation Order*, 26 FCC Rcd at 17919, ¶ 769.

[24] *See, e.g., Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 ,16012-18, ¶¶ 75-87 (1997), *aff'd Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (prescribing new limits on subscriber line charges for non-primary residential and multi-line business lines); *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, 12984, 12988-90, ¶¶ 58, 70-75 (2000), *aff'd in pertinent part, Texas Office of Pub. Util. Counsel*, 265 F.3d 313 (5th Cir. 2001) (prescribing revised ceilings on subscriber line charges).

[25] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Order and FNPRM, 16 FCC Rcd 9923, 9938 ¶ 40 (2001) (establishing through rulemaking a benchmark at or below which CLEC access rates are presumed just and reasonable).

[26] *Global Crossing Telecommunications, Inc. v Metrophones Telecommunications, Inc.* 550 US 45, 53 (2007).

[27] *See, e.g.*, Reply Comments of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC and tw telecom inc. at pp. 21-16 (filed May 31, 2013).

[28] AT&T Sept. 28 Ex Parte at p. 4.

Ethernet services at issue" because (1) the FNPRM seeks comment only on whether the Commission should modify its pricing flexibility rules that apply to DS-1 and DS-3 services and (2) the FNPRM acknowledges that the forbearance proceedings narrowed the scope of the 2005 Special Access NPRM.[29] TDS CLEC disagrees.

First, whether the forbearance orders narrowed the scope of the 2005 NPRM is immaterial because this Commission will take action based primarily on the 2012 FNPRM. Second, the 2012 FNPRM is not narrowly focused on pricing flexibility for DS-1 and DS-3 services. To the contrary, it includes "packet-based dedicated services such as Ethernet."[30] The FNPRM proposed a market analysis to "determine where and when special access prices are just and reasonable, and whether our current special access regulations help or hinder this desired outcome."[31] Because "special access" includes packet-based services, the FNRPM put parties on notice that the Commission is evaluating whether current regulations (or lack thereof) ensure just and reasonable prices for Ethernet special access services. The Commission confirmed the potential for new regulation of packet-based services when it recently stated that "whether incumbent LECs are subject to substantial competition in the provision of [] packet-based services" is the "subject of complex analysis" it is "conducting in the special access proceeding."[32] As the FNPRM foreshadowed, if and when the data shows a lack of competition in specific Ethernet special access markets, the Commission can rely on its Section 201(b) rulemaking power to adopt new regulations that ensure just and reasonable rates.

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[29] *Id.* at p. 5.
[30] *Special Access FNPRM,* 27 FCC Rcd 16318, 16326, ¶ 17.
[31] *Id.* at 16346, ¶ 67.
[32] *Technology Transitions Order*, 30 FCC Rcd 9372, 9443, ¶ 131.

C. RBOCs have abused and are abusing their market power in the market for Ethernet special access.

In ¶ 80 of its designation order in this docket, the FCC focuses on whether competition has been "sufficient to discipline the marketplace," announcing that it proposes to relax or eliminate regulation "where we find that the presence of actual or potential competition sufficient to ensure that rates, terms and conditions" are "just and reasonable." This amounts to a "market power" test. Where a dominant firm has market power, competition alone cannot force it to sell on terms that are "just and reasonable." TDS CLEC submits that based on its experience, competition has not been sufficient to "discipline the marketplace" for providing high-speed service in the range of 10-100 Mbps and higher to small and medium businesses in second and third tier markets, and that therefore rates, terms and conditions in these markets are not "just and reasonable."

1. The RBOCs possess market power in the market for providing 10-100 Mbps and higher speeds of Ethernet to business customers in second and third tier markets.

As the Commission explained in the *Qwest Phoenix Forbearance* proceeding, a market power analysis must examine wholesale and retail product markets separately, and distinct geographic markets separately.[33] The Commission has recognized that because customers are unlikely to relocate because of price changes, each customer location is a separate relevant

[33] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, 8646-47, 8657, ¶¶ 42, 46, 64 (2010) ("*Qwest Forbearance Order*"), *aff'd Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

geographic market, but "for reasons of administrative convenience, the Commission traditionally has aggregated customers facing similar competitive choices."[34]

As noted above, TDS CLEC operates in second and third tier markets. Each of these is a distinct geographic market, as business customers will not relocate from, say, Madison, Wisconsin to Chicago simply because Ethernet service is less expensive in Chicago than in Madison.[35] This is of critical significance because, as AT&T has argued, "competition is most intense" in "densely populated areas."[36] The Commission cannot allow itself to be misled into believing that if it finds that there is adequate competition in New York and Chicago, it need not be concerned with RBOC abuse of market power in Green Bay, Wisconsin or Lansing, Michigan. Depending on the analysis of 2013 data, the Commission may determine that examining the extent of competition in even smaller geographic areas, such as census blocks, is necessary to discipline rates and avoid regulation.[37]

The Commission also should find that Ethernet service is a product market separate from TDM special access service. As shown in the declarations of TDS personnel Mr. Butman and Mr. Loch, TDM UNEs or special access service is not an acceptable substitute for most buyers of Ethernet service, which is the type of broadband service most frequently demanded by businesses with between 10 and 1000 employees. As the Commission found, "the only viable TDM special access option for delivering more than 12 Mbps service to a customer location is a

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[34] *Id.*, ¶ 64.
[35] *Id.*
[36] AT&T Direct Case at p. 36.
[37] *USF Transformation Order*, 26 FCC Rcd 17663, 17701, 17730-31, ¶¶ 103, 175 (excluding from support census blocks served by an unsubsidized competitor operating as a facilities-based provider of residential terrestrial fixed voice and broadband service.

DS3 service,"[38] which is simply not price competitive with a 20 Mbps Ethernet circuit. The principal problem is that DS-3 UNEs are rarely available.[39] To deliver a UNE DS-3, an RBOC must have an existing TDM OCn facility terminating to the customer business location that has a DS-3 vacancy. If an OCn facility is not deployed, or if a deployed facility is exhausted, the RBOC will only provide a new DS-3 at the special access rate. Because both retail and wholesale pricing of DS-3s in the RBOC territories are much higher than retail pricing of 50 Mbps Ethernet, this option typically is not economically viable for TDS CLEC.[40]

In addition, Ethernet offers non-price advantages over bonded DS-1s and DS-3s that makes DS-1/DS-3s the second-best choice. The non-price advantages of Ethernet over fiber include the fact that it has nearly limitless bandwidth, which can be upgraded without any major capital expenditures. Thus, a customer can order 30 Mbps of bandwidth and upgrade to 50 Mbps as needed, with little additional cost. In contrast, using TDM technology, a customer needing 30 Mbps is forced to order a 45 Mbps DS-3 up front. The customer's decision to increase bandwidth to 50 Mbps would require a second DS-3.[41] Moreover, Ethernet enables cloud technology for applications and data storage and provides SMB businesses with an affordable upgrade option for adding bandwidth to take full advantage of the increased efficiencies and enhanced capabilities of cloud based services. Finally, Ethernet will provide SMB customers with the

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[38] *Technology Transitions Order*, 30 FCC Rcd 9372, 9465, ¶ 165.
[39] See Letter from Matthew Jones, Counsel for TDS Telecommunications Corporation to Marlene Dortch, FCC Secretary, attaching Declaration of Matthew Loch, ¶ 7 (filed June 22, 2015) ("Loch Declaration").
[40] Loch Second Declaration, ¶ 26.
[41] Loch Second Declaration, ¶ 27.

capability for video conferencing and applications such as "Go to Meeting," and WebEx for communications to remote locations, customers and vendors.[42]

Cable modem service is also not an acceptable alternative for businesses needing Ethernet service. First, SMB customers that purchase Ethernet service place significant value on the reliability and security associated with dedicated capacity and a high quality of service, including network availability guaranteed close to 100% of the time. Because cable modem service is a best effort service, it cannot provide such guarantees,[43] and does not prioritize voice over data during periods of heavy use.[44] While this does not necessarily disqualify cable modem service from the perspective of smaller customers, most of TDS CLECs' SMB customers that want 10 Mbps or more prefer dedicated connections with symmetrical speeds to operate and support cloud-based applications.[45]

Second, cable modem service is also inferior to Ethernet in that DOCSIS is provided over facilities that are common to (shared by) several customers on the same route and aggregated with other traffic, as contrasted with the dedicated facilities and pathways that symmetrical Ethernet service deploys. Thus, heavy use by one of several customers sharing DOCSIS facilities will slow down the other customers' service.[46]

Even in the limited locations in TDS CLEC's markets where cable competitors have deployed Ethernet, a duopoly is not sufficient to constrain prices. As the Commission

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[42] Loch Second Declaration, ¶ 28.
[43] *See* Letter from Matthew Jones, Counsel for TDS Telecommunications Corporation, to Marlene Dortch, FCC Secretary, attaching Declaration of James Butman, ¶ 5 (filed March 26, 2015) ("Butman Declaration").
[44] Loch Second Declaration, ¶ 5.
[45] Loch Second Declaration, ¶ 4.
[46] *Id*., ¶ 5.

acknowledges, it is inappropriate to assume that a "duopoly always constitutes effective competition and is necessarily sufficient to ensure just, reasonable, and nondiscriminatory rates and practices, and to protect consumers."[47]

TDS CLEC's on-net fiber build or alternative last mile facility ownership attempts have proven that CLEC construction is not economically viable to serve SMB customers in the second and third tier markets where TDS CLEC operates. In these areas, customers are spread out and are typically located in buildings with a single tenant or a small number of tenants and it is generally not economical for a CLEC to build fiber to them for this volume of service. TDS CLEC knows by comparing data compiled by its own ILEC that ILEC networks are, in the majority of cases, much closer to potential customers than CLEC networks. For example, TDS ILEC's network in rural Lancaster, Wisconsin is on average **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** miles from business customer locations, while TDS ILEC's network in suburban Verona, Wisconsin is on average **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** miles from business customer locations.[48]

In contrast, TDS CLEC's fiber network, even though it is focused in most cases on medium RBOC markets, is significantly farther from business customers, requiring a longer build-out to reach a customer. For example, around medium sized cities such as Grand Rapids, Ann Arbor, and Lansing, Michigan and Green Bay, Wisconsin, TDS CLEC's network is on average **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** miles from business customer locations.[49] Even in larger, more densely populated cities such as Milwaukee and

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[47] *Qwest Forbearance Order*, 25 FCC Rcd at 8635-36, ¶29 (2010).
[48] Butman Declaration, ¶ 8.
[49] *Id.*

Madison, Wisconsin, TDS is on average **[BEGIN CONFIDENTIAL]**[redacted] **[END CONFIDENTIAL]** miles from business customer locations.[50] The differential in distance to a business customer between ILEC and CLEC greatly increases the CLEC's cost of deploying fiber, because deployment cost is highly distance-sensitive.[51]

These distance differentials between ILEC and CLEC are even greater when TDS CLEC is compared with AT&T, whose territory is much more urban with greater business density than that of TDS ILECs. For new fiber builds, AT&T also has significant cost advantages, above and beyond the fact that its network is already closer to most customers than a CLEC's network. AT&T has a much larger embedded customer base because of the long running benefits of its incumbent status, including large anchor customers along the route, so it can spread fixed costs over larger and more customers. Network design and economies of scale enable ILECs to use dedicated fiber pairs to reach the customer and avoid the cost of adding electronics such as Dense Wave Division Multiplexing (DWDM) in the network so that TDS CLEC can preserve feeder fiber facilities.[52]

RBOCs already have rights of way, conduits and aerial attachments that can be re-purposed, providing advantages in cost and speed of deployment. They also have significant cost advantages in building access, particularly in carrier hotels, because of their size and past occupancy. In the experience of the TDS ILECs, an ILEC frequently does not have to pay for space and power in a building.[53] The Declaration of AT&T attorney Andrew Edelstein asserts that it is industry custom and practice for ILECs not to pay for their use of space and power in a

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[50] *Id.*
[51] *Id.*, ¶ 10.
[52] *Id.*, ¶ 12.
[53] *Id.*

carrier hotel to provide services in the building.[54] In contrast, when TDS CLEC seeks to access a building, it typically must pay for space and power. Another CLEC, Windstream, has estimated that cost at $678 per month per building.[55]

As an example of the cost disadvantages TDS CLEC faces, TDS ILEC and TDS CLEC recently deployed fiber to business customers in two different locations. The ILEC fiber build was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**, while the CLEC fiber build was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.[56] This differs from the usual in that the CLEC fiber build was shorter than the ILEC's. Despite this, and although there is no material cost variation resulting from the differences in location, the ILEC's cost was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** while the CLEC's was **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** resulting from the fact that the CLEC necessarily incurred several categories of costs that the ILEC need not incur.[57] For this, reason, TDS CLEC does not even bid on projects where the fiber build distance is greater than a relatively short distance, as close as **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** in some cases.[58] Even where TDS CLEC bids on projects where it must extend fiber less than **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** its

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[54] *Garland Connect, LLC v Pacific Bell*, California Superior Court Case No. BC513029, Defendant AT&T California's Designation of Expert Witness; Declaration of Andrew Z. Edelstein Declaration, ¶¶ 4, 8 (filed Jan. 14, 2015); available at http://apps.fcc.gov/ecfs/comment/view?id=60001014101.

[55] *See* Letter from John Nakahata, Counsel for Windstream, to Marlene Dortch, FCC Secretary, attaching ANALYSIS OF FIBER DEPLOYMENT ECONOMICS FOR EFFICIENT PROVISION OF COMPETITIVE SERVICE TO BUSINESS LOCATIONS, pp. 7, 9 (filed June 8, 2015).

[56] Butman Declaration, ¶ 14.

[57] Butman Declaration, ¶¶ 10-13.

[58] *Id.*, ¶ 16.

success rate of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of bids won is much lower than TDS ILEC's success rate of **[BEGIN CONFIDENTIAL]** [redacted][59] **[END CONFIDENTIAL].**

Because of higher costs of deploying its own fiber, TDS CLEC serves only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its business customers over its own fiber. In contrast, TDS ILEC serves **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of its business customers over its own fiber.[60] Despite these cost disadvantages, TDS CLEC has invested more than $550,000,000 in infrastructure in second and third tier markets in four states. It cannot invest additional capital in the face of the cost handicaps it faces.[61]

TDS CLEC has unsuccessfully explored several approaches to deploying its own facilities despite the ILEC's cost advantages. After performing thorough analysis, TDS CLEC concluded that deployment of TDS CLEC fiber to AT&T remote terminal locations in Madison, Wisconsin (sub loop unbundling) would not be economically viable because of insufficient density of customer locations and the capital that would be required to deploy feeder facilities, electronics, and power capability to satisfy AT&T's network interconnection requirements.[62]

Another approach tested by TDS CLEC was to identify target areas in its markets where it might be economically feasible to build a fiber network. TDS CLEC identified the Fox Valley region of Wisconsin as the most viable target for this approach. Deployment of the trial in this location entailed an investment of over **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** served only **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

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[59] Butman Declaration, ¶ 16.
[60] *Id.*, ¶ 17.
[61] *Id.*, ¶ 24.
[62] *Id.*, ¶ 19.

customers at speeds ranging from 10 Mbps to 1 Gbps, and generated a net present value over a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** investment term that was well below the standards for a viable investment case.[63] In the nearly 18 months after its Fox Valley trial, TDS CLEC was unable to identify a second workable target for a fiber deployment trial. TDS CLEC concluded that the modest profit margin yielded by the Fox Valley trial was as good as it gets, and abandoned the initiative.[64]

TDS CLEC has also explored utilizing its own wireless end user connections to business customers. In 2007, TDS CLEC acquired spectrum licenses in the 2.5 GHz range from a company in Madison, Wisconsin and deployed infrastructure to provide fixed wireless last mile connections to business customer locations in that area. TDS CLEC encountered a series of operational challenges, including an inability to obtain tower space at reasonable rates and difficulty obtaining permission from building owners to place equipment on multi-tenant buildings. In addition, fixed wireless technology proved insufficient to meet consumers' needs for bandwidth and reliability. This technology could not simultaneously support both voice and data services, and customers generally did not view the quality of the service as comparable to dedicated wireline connections.[65]

TDS CLEC also conducted a trial of unlicensed fixed wireless connections in the Fox Valley region of Wisconsin over a period of years, primarily between 2005 and 2015. TDS CLEC has concluded that the unlicensed technology it has trialed would only support Internet access speeds up to 4 Mbps and would not reliably support voice service. Moreover, this

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[63] Loch Declaration, ¶ 4, Loch Second Declaration, ¶ 7.
[64] *Id.*
[65] Butman Declaration, ¶ 21.

technology is also subject to the operational challenges discussed above with respect to licensed wireless service (*i.e.*, obtaining tower space and permission of building owners). Thus, TDS CLEC has decided not to pursue this trial any further and closed it down last year.[66]

TDS CLEC conducted an extensive study of the economic viability of deploying Ethernet over Copper in its suburban, exurban, and rural market areas. After thorough analysis, TDS CLEC concluded that high capital costs and lack of certainty whether and when AT&T would remove/retire copper made this approach economically infeasible.[67]

Finally, in considering whether RBOCs face the type of competition that can discipline their pricing of 10-100 Mbps and above Ethernet, it is important to consider that many business customers needing this type of service operate at multiple locations and desire a single source of supply at all, or virtually all, of their locations.[68] Even if a CLEC or cable competitor can serve some of the locations on an economical basis, the competitor's inability to build economically to all, or nearly all, of the locations dooms competition for these customers unless the Commission maintains reasonably priced wholesale access to last mile facilities. For the most part, these customers are simply not interested in ordering service from a carrier that cannot serve a substantial majority of their locations within a single state at a competitive price.[69]

2. RBOCs are abusing their market power for provision of Ethernet in second and third tier markets.

RBOCs are and have been abusing their market power in the market for wholesale Ethernet services in second and third tier markets, demanding rates that are plainly not "just and

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[66] *Id.*, ¶ 22.
[67] *Id.*, ¶ 28.
[68] Loch Second Declaration, ¶ 3.
[69] *Id.*

reasonable" because the wholesale rates exceed retail rates, with no legitimate business reason for doing so. This imposition of a price squeeze, abusing power in the wholesale market, has ripple effects in the retail market. Wholesale customers who must pay unjust and unreasonable, above-retail rates for wholesale inputs cannot apply any competitive pressure on the RBOCs' retail rates.

In its recent *Technology Transitions Order*, the Commission recognized that the transition from regulated TDM service to unregulated IP service created the possibility that incumbents might seek to stifle competition by charging significantly more for wholesale service than for retail service, thus impeding CLEC competition, particularly in "suburban, remote, rural and other areas not served by cable or other modes of service where the only competition that exists at the retail level is between an incumbent LEC and a competitive LEC that needs wholesale access from the incumbent LEC in order to compete at the retail level."[70] The Commission further noted that, to the extent that the cost of packet-based wholesale services are unreasonably high, a CLEC may not be able to absorb the "cost of the wholesale inputs without losing customers or losing revenue and potentially exiting the market, to the detriment of its customers and the public . . .."[71]

In the *Technology Transitions Order*, the Commission took steps to ensure that ILECs did not discontinue TDM special access service without offering comparable rates, terms and conditions for replacement packet-based service, at least until an effective order was issued in this proceeding. Even where the ILEC leaves the TDM service in place, customers' higher bandwidth demands and the price and non-price efficiencies of Ethernet technology, as

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[70] *Technology Transitions Order*, 30 FCC Rcd 9372, 9466, ¶¶ 167-168.
[71] *Id.*, 30 FCC Rcd at 9447 ¶ 136.

compared with TDM, have made bonded DS-1 and DS-3s a second-best choice for the SMB customers TDS CLEC serves.[72] Because the same price squeeze that the Commission identified in the *Technology Transitions Order* exists whether or not the RBOC discontinues its TDM service, the Commission should take action in this docket to ensure CLECs have access to wholesale inputs to provide service at bandwidth speeds at which self-deployment is not economical. As demonstrated above and in Mr. Butman's and Mr. Loch's declarations, at least in second and third tier markets, CLECs are in no position to provide 10-100 Mbps Ethernet and above through the use of their own facilities in the majority of cases and thus to impose the competitive pressure that is necessary to forego any regulation. The problem is undoubtedly worse in areas that are more rural than the second and third tier markets in which TDS CLEC competes.

a. RBOCs are offering TDS CLEC wholesale Ethernet at above-retail prices.

TDS CLEC operates in the territory of two RBOCs. As Mr. Loch explains, the RBOCs' wholesale rates available to TDS CLEC are typically higher than the rates the RBOCs offer at retail to TDS CLEC's customers. This is the case for various bandwidths generally in demand by the SMB customers in TDS CLEC markets and, in some cases, even more so for bandwidths in excess of 100 Mbps.[73] Although charging a higher rate for a service that requires connection to an off-net building is understandable, TDS CLEC has been charged higher rates by an RBOC for the same basic service offering in an on-net building where there were no viable competitors

[72] Loch Second Declaration, ¶ 27.
[73] *Id.*, ¶¶ 19-20.

in the same building.[74] While this demonstrates that competition can act to constrain prices in certain instances, it violates Section 202(a)'s "absolute obligation to prevent such discrimination."[75] It also shows that competition in one building in a geographic area does not necessary discipline prices in another building in the same area for the same basic service. This can be contrasted with AT&T's DS1 pricing, for example, where "AT&T does not charge different rates for different locations within an MSA" and argues "the intense competition for buildings with large amounts of business provides a competitive constraint for all DS1s throughout an MSA."[76] The fact that an RBOC is varying wholesale Ethernet rates by building is further evidence that competition does not ensure just and reasonable rates, at least for those customers in buildings where the RBOC charges higher rates.

The higher wholesale prices demanded by the RBOCs that TDS CLEC competes with are unjust and unreasonable, in violation of § 201(b), and unreasonably discriminatory, in violation of § 202(a). The RBOCs do not experience higher costs when they sell at wholesale. To the contrary, RBOCs offering Ethernet on a wholesale basis logically should experience lower costs when selling at wholesale, avoiding certain costs such as retail billing and collection, customer service, and marketing/sales.[77] This is consistent with Section 252(c)(3), the Commission's rules,[78] and the findings of the state commissions implementing the Commission's rules, that carriers experience significantly lower costs when they sell at wholesale, rather than at retail. The fact that RBOCs are demanding above-retail rates from wholesale customers on its face (1)

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[74] *Id.*, ¶ 13.
[75] *Western Union International, Inc., v. FCC*, 568 F.2d at 1018.
[76] AT&T Direct Case at n.103.
[77] Loch Second Declaration, ¶ 24.
[78] 47 C.F.R. § 51.601 *et seq.*

creates a price squeeze preventing wholesale competition; (2) reflects that the RBOC has market power, because it would otherwise be ceding the wholesale market to its competitors; and (3) makes no business sense, apart from a desire to exclude competition. Moreover, there are no pro-competitive benefits resulting from this approach.[79]

b. A comparison with NECA retail rates shows that RBOCs are offering Ethernet at wholesale at unjust and unreasonable rates.

As another means of judging the reasonableness of RBOCs' wholesale Ethernet rates, TDS CLEC also compared NECA Rate Band 10 (fairly rural) retail Ethernet rates and the RBOC average retail Ethernet rates (typically in significantly more urban areas). For bandwidth between 10 and 100 Mbps, the retail rates that the RBOCs offered to its customers exceeded NECA retail rates by between 18% and 175%, depending on bandwidth. Although TDS CLEC compared RBOC rates to NECA Band 10, Bands 1-9 of NECA rates would result in an even larger percentage difference between RBOC average rates and NECA rates.[80] Given that costs should be much lower in the RBOCs' more densely populated territory, this comparison provides further confirmation that RBOCs' wholesale Ethernet rates to CLECs, which typically are above the RBOCs' retail rates, are excessive, unjust and unreasonable.

c. The effect of RBOCs offering Ethernet at wholesale at above-retail pricing and unjust and unreasonable rates is to impede competition.

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[79] *See* United States Department of Justice, "Competition and Monopoly: Single Firm Conduct under Section 2 of the Sherman Act", Chapter 3 available at http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-3 ("If conduct does not make economic sense at the time it is undertaken except for its exclusionary effect on competition, it likely will be difficult to defend").

[80] Loch Second Declaration, ¶ 23.

As a result of RBOC pricing of wholesale Ethernet at prices above retail for the same service, TDS CLEC has only been able to find a small number of its larger business customers out of over **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for which it could earn any profit at all using RBOC Ethernet, and even for these few customers, the economics are not all that attractive for TDS CLEC. A five-year financial analysis shows that the circuits sold thus far will require TDS CLEC to invest over **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to earn a **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** internal rate of return (compared with a common industry objective of 25% (or higher)) with a negative net present value.[81] Moreover, the larger sized customers that TDS CLEC serves in this manner are not representative of traditional SMBs. The customers generally have more sophisticated data requirements and larger budgets that they can leverage to satisfy these requirements.[82] Ethernet purchased from the RBOCs at unregulated rates does not offer a cost-effective solution to meet the needs of the vast majority of SMBs that do not meet this profile. Less than 20% of TDS CLEC customers have more than 20 employees per location,[83] and that sample is approximately representative of the universe of business customers nationwide. The bottom line is that by offering Ethernet to wholesale customers at above-retail prices, the RBOCs eliminate competition from LECs that do not own, and CLECs that cannot economically build, their own last-mile facilities. As discussed above, for customers needing Ethernet in second and third tier markets, construction of last mile facilities by CLECs is not economically feasible. And, even where it is, because multi-location customers prefer a single supplier, without

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[81] Loch Declaration, ¶ 5.
[82] *Id.*, ¶ 6.
[83] Loch Second Declaration, ¶ 3.

reasonably priced wholesale access, even competitors that can build to some locations cannot compete with an RBOC that can serve all locations. Therefore, the RBOC preserves its monopoly power through this tactic.

D. RBOC wholesale Ethernet rates should be capped at retail less avoided costs.

1. Wholesale rates that exceed retail rates for the same or similar service are not just and reasonable.

The *Technology Transitions Order* found that "depending on the competitive state of various markets, there may be an incentive for the incumbent to charge higher rates at the wholesale level in order to prevent or disadvantage competition at the retail level."[84] As explained above, TDS CLEC's experience in its second and third tier markets for SMB customers is that RBOC wholesale Ethernet rates exceed retail rates for the comparable service, putting TDS CLEC at a severe competitive disadvantage. As the Commission recently observed, where the answer to the question "[w]ill an incumbent's wholesale charges for the IP replacement product exceed its retail rates for the corresponding offering?" is positive, it "weigh[s] toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered."[85]

2. Wholesale rates should be based on the costs avoided by the RBOC.

The conclusion that "reasonably comparable rates, terms, and conditions are not being offered"[86] is further supported where "there is not a sound reason for any [price] differences in offerings."[87] As Mr. Loch explains, the RBOC should avoid costs when offering Ethernet at

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[84] *Technology Transitions Order*, 30 FCC Rcd at 9466, ¶ 167.
[85] *Id.*
[86] *Id.*
[87] *Id*.

wholesale, not incur additional costs that might justify a higher rate.[88] Yet instead of reducing the wholesale rate to recognize costs actually avoided, in TDS CLEC markets, the RBOC average wholesale rate is typically higher than Ethernet retail rates.

TDS CLEC submits that the Commission should develop a proxy for costs avoided when Ethernet is sold at wholesale. The state commissions have all calculated avoided costs pursuant to Section 252(d)(3). For example, TDS CLEC's interconnection agreements with RBOCs reflect avoided cost discounts for resold services of 17.66% in Minnesota, 16.62% in Michigan, and a range of 17-25% in Wisconsin.[89] Such a percentage discount proxy could then be used for wholesale Ethernet. CLECs and the Commission could then use that avoided cost proxy, and disclosed RBOC retail rates (discussed below), to determine whether an RBOC may be offering unjust and unreasonable rates.

3. The FCC should adopt retail pricing disclosure requirements to enable detection of unjust and unreasonable rate discrimination.

The Commission recognizes the value of price disclosures in detecting unjust or unreasonable discrimination.[90] The current RBOC practice of subjecting the rates, terms and conditions of commercial Ethernet agreements to confidentiality restrictions[91] impedes TDS CLEC's ability to advocate in support of new rules and detect unreasonable and discriminatory

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[88] Loch Second Declaration, ¶ 24.

[89] TDS CLEC reviewed its interconnection agreement and amendments with AT&T in Illinois, but could find no provision regarding percentage discounts for resale rates.

[90] *Technology Transitions Order,* 30 FCC Rcd 9466 at ¶168 (agreeing that "incumbent LECs should not preclude their wholesale customers that receive an IP replacement service… from disclosing the rates, terms, and conditions to a regulator in the context of an action before the Enforcement Bureau.").

[91] Loch Second Declaration, ¶¶ 15-16.

rates. It also impedes the Commission's ability to rely on the most up-to-date information about pricing and competition in today's Ethernet markets.

TDS CLEC does not suggest that the Commission require RBOCs to post and maintain a schedule of all Ethernet rates, whether wholesale or retail, for each and every customer.[92] Some RBOCs already file commercial UNE-P replacement and transit agreements under Section 211(a), which establishes precedent for the filing of commercial carrier-to-carrier agreements with the Commission, while others make such contracts public by posting on their website. Under Section 211(b), the Commission may require the filing of "any other contracts of any carrier" and exempt from such filing requirements minor contracts. TDS CLEC submits that the Commission should adopt a contract filing or website posting requirement for retail Ethernet contracts that is designed to require pricing disclosures without being unduly burdensome.

IV. CONCLUSION

For the reasons explained herein, the Commission should take the actions recommended by TDS CLEC to ensure that RBOCs offer wholesale Ethernet at just, reasonable, and non-discriminatory rates, terms and conditions. Specifically, the Commission should establish a benchmark that wholesale rates should not exceed retail less avoided costs and retail rates should be published to enable competitors and the Commission to detect and prevent unlawful discrimination. As the Commission recognizes, "[t]he guarantee of competitive wholesale access free of unreasonable discrimination has played a bedrock role in facilitating the market

[92] *Technology Transitions Order*, 30 FCC Rcd at 9470, ¶ 179 (rejecting suggestions that ILECs post rates, terms and conditions of replacement service offerings on their websites).

competition that exists today."[93] Although TDS CLEC's customers have benefitted from that guarantee in the past, the market shift to Ethernet without the same wholesale Ethernet guarantee threatens TDS CLEC's ability to continue to offer SMBs a competitive option. The technology transition is not an excuse to abandon the guarantee of nondiscriminatory wholesale access, which has resulted in the "benefits of additional choice to an enormous number of small- and medium-sized businesses, schools, government entities, healthcare facilities, libraries, and other enterprise customers."[94] TDS CLEC looks forward to working with the Commission to preserve, throughout the technology transition, the benefits that competition brings to consumers, including "lower prices, higher output, and increased innovation and quality."[95]

Respectfully submitted,

/s/ Tamar E. Finn

Tamar E. Finn
Eric J. Branfman
Morgan, Lewis & Bockius LLP
2020 K Street, N.W.
Washington, DC 20006
(202) 373-6000
Tamar.finn@morganlewis.com
Eric.branfman@morganlewis.com

Dated: January 27, 2016

[93] *Technology Transitions Order*, 30 FCC Rcd at 9466, ¶ 168.
[94] *Id.*, 30 FCC Rcd at 9427, ¶ 101.
[95] *Id.*

REDACTED - FOR PUBLIC INSPECTION

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

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

SECOND DECLARATION OF MATTHEW J. LOCH

1. I am the Vice President of Sales for TDS Telecommunications Corporation ("TDS"), a wholly owned subsidiary of Telephone and Data Systems, Inc. In my role, I have responsibilities for all wireline commercial sales functions.

2. This declaration is in support of the Comments of TDS Metrocom, LLC ("TDS CLEC") in response to the Federal Communications Commission's *Special Access FNPRM* which seeks comments on proposed changes to rules for special access services provided by Incumbent Local Exchange Carriers ("ILECs") in price cap areas. I previously filed a declaration in this docket on June 22, 2015.

3. Over 80% of the businesses that TDS CLEC serves are small and medium-sized businesses ("SMBs") or other customer locations that have fewer than 20 employees. Many of these SMB locations are part of a multi-location customer network, such as insurance companies, attorney offices, medical offices and chain businesses. Most multi-location

customers desire a single provider at all, or virtually all, of their locations. While TDS CLEC has deployed "on-net" Ethernet facilities to a few locations of multipoint customers, TDS CLEC usually needs to lease alternative last mile facilities to complete the customer-required network.

4. Today, SMB customer bandwidth demands start at 10 Mbps, but are quickly migrating to 20 Mbps or higher. While some very small businesses are satisfied with cable best efforts broadband, even TDS CLEC's smaller business customers prefer dedicated connections with symmetrical speeds to operate and support cloud-based applications.

5. Cable modem service using DOCSIS is provided over facilities that are common to (shared by) several customers on the same route and aggregated with other traffic. Thus, heavy use by one of several customers sharing facilities will slow down the other customers' service. Because cable modem service is a best efforts service, and does not prioritize voice over data during periods of heavy use, it cannot guarantee the quality of dedicated symmetrical bandwidth that most TDS CLEC SMB customers demand.

6. The vast majority of the SMB customers that TDS CLEC serves are not located in buildings served by multiple fiber providers. For example, Madison, Wisconsin, is one of TDS CLEC's primary markets. Yet even in Madison, TDS CLEC has built fiber into less than **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** of the business locations.

7. As Mr. Butman explained, TDS CLEC faces fundamental fiber build cost disadvantages vis-a-vis its ILEC affiliate that contribute to TDS CLEC's low success rate in economically deploying fiber loops to serve its customers.[1] For example, even though TDS CLEC provided on-net services ranging from 10 Mbps to 1 Gbps to customers in its Fox

[1] *See* Letter from Matthew Jones, Counsel for TDS Telecommunications Corporation, to Marlene Dortch, FCC Secretary, attaching Declaration of James Butman, ¶¶ 7-14 (filed March 26, 2015) ("Butman Declaration").

Valley, Wisconsin fiber deployment trial, that trial fell well below the standards of a viable business case.[2]

8. Mr. Butman also explained that TDS CLEC has explored multiple alternative methods of obtaining last mile access, including self-deployment, unbundled network elements ("UNEs"), special access, licensed and unlicensed wireless technologies, cable Ethernet, Ethernet over Copper and now RBOC commercial fiber based Ethernet.

9. I previously explained that TDS CLEC has been able to provide services using RBOC Ethernet as the last-mile connection in limited situations for larger customers and even then at a lower than reasonable rate of return. This declaration provides additional information to explain why RBOC wholesale Ethernet at current commercial rates is not an economically viable means of offering competitive voice and broadband services to SMB customers.

10. In my role at TDS CLEC, I am familiar with the wholesale Ethernet rates RBOCs offer TDS CLEC and to some extent the retail Ethernet rates the RBOCs quote our customers. Following are my observations with regard to what we have seen from the RBOCs as we attempt to compete to provide needed Ethernet services in the markets we serve.

11. Some RBOCs charge TDS CLEC a monthly recurring charge for a Network-to-Network Interface ("NNI") Port to aggregate and connect Ethernet circuits that reach TDS CLEC customer locations. The NNIs are established with either 1 Gbps or 10 Gbps capacity. The RBOCs have varying approaches as to the cost of those NNIs and those charges can be quite high relative to what TDS projects for NNI Port costs in its own ILEC business.

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[2] *See* Letter from Matthew Jones, Counsel for TDS Telecommunications Corporation, to Marlene Dortch, FCC Secretary, attaching Declaration of Matthew Loch, ¶ 4 (filed June 22, 2015) ("Loch Declaration").

12. The RBOC wholesale Ethernet rates charged to TDS CLEC generally vary depending on whether the building is on-net (already served by fiber) or off-net (requiring construction), with off-net buildings priced significantly higher.

13. Understandably, the RBOC charges TDS CLEC a lower rate for on-net buildings where fiber is available and no additional construction costs are required. However, TDS CLEC has been charged higher rates by an RBOC for the same basic service offering in an on-net building where there were no viable competitors in the same building.

14. For off-net buildings, the RBOCs require TDS CLEC to pay for the cost to place conduit from the right-of-way to the minimum point of entry in the subject building. TDS CLEC must either contract with a third party for the construction and placement of the conduit (estimated at up to $10,000) or in one case the RBOC has agreed to provide the conduit for a lower, flat non-recurring charge.

15. The wholesale Ethernet rates being offered to TDS CLEC by the RBOCs in the period 2014-2016 are subject to confidentiality provisions in the contract that prevent TDS CLEC from revealing them in this docket, even under Highly Confidential treatment, unless required by law, governmental authority or legal process.

16. The RBOCs typically include confidentiality provisions in their retail SMB customer contracts as well, which makes it difficult for TDS CLEC to determine what the RBOCs are offering for retail Ethernet rates.

17. Nonetheless, I have seen standard Ethernet SMB model contracts offered by the RBOCs that at times have become available over the Internet.

18. TDS CLEC has also polled a portion of its existing and prospective customers who may have received RBOC Ethernet quotes to gain some perspective of what retail rates are

being offered by RBOCs in the marketplace. This retail pricing that I reviewed offered no volume-based discounts.

19. Based on my familiarity with the RBOC wholesale rates currently offered to TDS CLEC and the RBOC retail rates that I reviewed, I conclude that the wholesale rates available to TDS CLEC are typically higher. This is the case for various bandwidths generally in demand by the SMB customers in TDS CLEC markets and in some cases even more so for bandwidths in excess of 100 Mbps.

20. I calculated the average RBOC retail Ethernet rate by using customer-supplied prices. For bundled voice and data services, I reduced the package price by $200, which I believe is a reasonable proxy for the local and long distance services that are included in the RBOC Ethernet package. A simple comparison showed that the standard retail Ethernet rates offered by the RBOC typically were lower than the wholesale rates currently available to TDS CLEC.

21. Further, I calculated the standard TDS CLEC retail Ethernet rates by starting with our wholesale rate from the RBOCs for the same bandwidth and a comparable contract term. I added the TDS equipment costs (e.g. customer premises equipment) and the standard mark-up TDS uses to offer its Ethernet retail product.

22. Based on the best available information, TDS CLEC calculated the percentage differences shown below between the RBOCs' retail and TDS CLEC's retail Ethernet prices. These percentage differences show that the RBOCs' retail rates are well below what TDS CLEC must charge its retail customers for basically the equivalent service based on the underlying wholesale input costs TDS CLEC must pay the RBOCs.

Bandwidth	TDS CLEC Necessary Average Retail Ethernet Rate based on wholesale purchase from RBOC expressed as a percentage of RBOC Average Retail Ethernet Rate
10 Mb	235%
20 Mb	162%
50 Mb	149%
100Mb	117%

23. I also compared NECA Rate Band 10 (fairly rural) retail Ethernet rates and the much higher RBOC (significantly more urban) average retail Ethernet rates. Although Bands 1-9 of NECA rates would result in an even larger percentage difference between RBOC average rates and NECA rates, I used Band 10 because that is the Band TDS ILECs use for the least rural of their exchanges under the NECA tariff #5 dated January 1, 2016.

Bandwidth	RBOC Average Retail Ethernet Rate Expressed as a percentage of NECA Retail Ethernet Rates for Band 10 dated 1/1/16
10 Mb	118%
20 Mb	179%
50 Mb	212%
100 Mb	275%

24. I am not aware of any cost differences between a retail and wholesale Ethernet service that would justify a higher rate for the service when offered to a wholesale customer. To the contrary, the RBOCs offering Ethernet on a wholesale basis logically should avoid certain costs. These avoided costs include costs associated with retail billing and collection, as well as customer service and marketing/sales costs.

25. Without access to reasonably priced wholesale Ethernet, TDS CLEC is increasingly not able to meet the bandwidth demands of its SMB customers at competitive retail prices. As Mr. Butman explained, bonding DS-1s purchased as UNEs or special access does not allow TDS CLEC to offer higher bandwidth services to SMBs at affordable prices.[3]

26. As I have explained, TDS CLEC is very seldom able to obtain DS-3s as UNEs, which could in theory provide up to 45 Mbps of bandwidth if they were available.[4] To deliver a UNE DS-3, an RBOC must have an existing TDM OCn facility that has a DS-3 vacancy. If an OCn facility is not deployed, or if a deployed facility is exhausted, the RBOC will only provide a DS-3 at the special access rate. Because both retail and wholesale pricing of DS-3s in the RBOC territories in which TDS CLEC competes are much higher than retail pricing of 50 Mbps Ethernet, this option typically is not economically viable.

27. Even if bonded DS-1s or a DS-3 special access input were economically viable, Ethernet over fiber offers customers non-price advantages that make bonded DS-1s and DS-3s the second-best choice. Ethernet over fiber has nearly limitless bandwidth, which can be upgraded without any major capital expenditures. Thus, a customer can order 30 Mbps of bandwidth and upgrade to 50 Mbps as needed, with little additional cost. In contrast, using TDM technology, a customer needing 30 Mbps is forced to order a 45 Mbps DS-3 up front and the customer's decision to increase bandwidth to 50 Mbps would require a second DS-3. Once a carrier has deployed Ethernet capability, it incurs little cost to increase bandwidth from 10 Mbps up to 1 Gbps. This can be contrasted with TDM, which requires substantial costs, including electronics, to upgrade to higher bandwidths.

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[3] Butman Declaration, ¶ 28.
[4] Loch Declaration, ¶ 7.

28. Moreover, Ethernet enables cloud technology for applications and data storage and provides SMB businesses with an affordable upgrade option for adding bandwidth to take full advantage of the increased efficiencies and enhanced capabilities of cloud based services. Finally, Ethernet will provide SMB customers with the capability for video conferencing and applications such as "Go to Meeting," and WebEx for communications to remote locations, customers and vendors.

29. TDS believes that the RBOCs must be required to take the following steps to ensure healthy competition and better broadband options for the vast majority of business customers in the USA:

- Charge wholesale customers rates that are no higher than standard retail offers.
- Provide wholesale customers with a discount off retail rates for the actual marketing, billing, collection and other costs avoided by the wholesale provider.
- Provide wholesale customers with terms and conditions at minimum comparable to those offered to retail customers.
- Publish on a regular basis a list of retail Ethernet rates (net of any and all discounts) in each market, including any difference in rates when the customer location had to be connected to the RBOC network in order to provide service.

30. In summary, TDS CLEC needs access to scalable, fiber-based, reasonably priced Ethernet services to continue to meet the increasing bandwidth needs of SMBs and other customers.

REDACTED - FOR PUBLIC INSPECTION

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my information and belief.

Matthew J. Loch

Dated: January 26, 2016