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Via ECFS

REDACTED – FOR PUBLIC INSPECTION

February 19, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: **REDACTED – FOR PUBLIC INSPECTION** *Reply Comments of the National Cable & Telecommunications Association in WC Docket No. 05-25; RM-10593*

Dear Ms. Dortch:

Pursuant to the *Modified Protective Order*, *Second Protective Order*, and *Data Collection Protective Order* adopted by the Commission WC Docket No. 05-25, the National Cable & Telecommunications Association ("NCTA"), by and through its counsel, respectfully submits the enclosed **redacted** version of its Reply Comments in this proceeding.[1] NCTA is delivering one paper copy of the Highly Confidential comments to the Secretary's Office and two paper copies of the Highly Confidential Comments to Christopher S. Koves of the Wireline Competition Bureau's Pricing Policy Division. The redacted version of the Comments is being filed electronically via ECFS.

Please contact the undersigned if you have any questions or require additional information.

Respectfully submitted,

Michael H. Pryor

Michael H. Pryor

Enclosure

[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, *Modified Protective Order*, 25 FCC Rcd. 15168 (2010) ("*Modified Protective Order*"); 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, *Second Protective Order*, 25 FCC Rcd. 17725 (2010) ("*Second Protective Order*"); 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, *Order and Data Collection Protective Order*, 29 FCC Rcd. 11657 (204) ("*Data Collection Protective Order*").

REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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February 19, 2016

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REPLY COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association (NCTA) submits these reply comments to express concerns regarding proposals that would impose unnecessary rate regulation in geographic areas where cable operators and other competitive providers have built facilities to serve business customers. The current regulatory regime for special access services has enabled cable operators to enter the marketplace and expand the footprint of their offerings and the Commission should take great care to ensure that any changes it makes to that regime both preserve and enhance incentives for facilities-based competition and investment.

INTRODUCTION

Following perhaps the most extensive (and most expensive) data collection ever conducted by the Commission, the opening comments submitted by the incumbent LECs and competitive LECs predictably stake out positions that are, in all material respects, identical to the positions taken by those parties before the data collection. Incumbent LECs argue that the data proves that competition is widespread and further deregulation of their services is warranted,[1] while competitive LECs and certain special access purchasers argue that the same data proves that competition is practically non-existent and virtually all special access services, including new IP-based services, should be subject to strict rate regulation.[2]

From NCTA's perspective, the key for the Commission is to focus on identifying, at an appropriate level of granularity, geographic areas where there has been, or likely will be, facilities-based competitive entry. As should be clear from the extensive record in this

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[1] *See, e.g.*, AT&T Comments at 3-4; CenturyLink Comments at 4.

[2] *See, e.g.*, XO Comments at ix; Sprint Comments at 21-29.

proceeding, the cable industry plays a significant and growing – but far from dominant – role in the special access marketplace.[3] From a presence that was virtually non-existent when the Commission first started this proceeding back in 2005, cable operators now offer business customers a wide variety of high-capacity services including state-of-the-art Ethernet services over Hybrid Fiber Coax or 100% fiber optic networks.

Cable's expanding presence in the market for special access services unquestionably has been beneficial for business customers. Thousands of businesses across the country are experiencing more robust services and/or less expensive prices as a result of cable's entry and growth in this marketplace. Given the substantial consumer benefits that have resulted from this facilities-based competition, the most important task for the Commission in this proceeding is to ensure that it preserves incentives for continuing and expanding facilities-based competitive entry and investment.

I. THE COMMISSION SHOULD PRESERVE AND ENHANCE INCENTIVES FOR FACILITIES-BASED COMPETITION

As the Commission explained in both its 2005 *Notice of Proposed Rulemaking*[4] and its 2012 *Further Notice of Proposed Rulemaking*,[5] the fundamental purpose of this proceeding is to reassess the rate regulation regime governing TDM-based special access services for price cap

3 Verizon and USTelecom, for example, allege that cable providers are somehow dominant in the provision of special access services. *See, e.g.*, Verizon Comments at 3 (cable companies "are increasingly dominant in providing higher speed broadband services"); USTelecom Comments at 14-23. We are confident the Commission will see through this patently ridiculous argument. Although cable providers have made substantial investments to serve business customers and will continue to compete aggressively with ILECs and CLECs, it is not even remotely credible to maintain that any cable operator holds a dominant position in the business market. *See e.g.*, Windstream Comments at 7-8 (providing charts showing cable providers lag both ILECs and CLECs in non-residential customer expenditures).

4 *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*2005 Notice of Proposed Rulemaking*).

5 *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*2012 Further Notice of Proposed Rulemaking*).

incumbent LECs.[6] As we discuss below, the data collection should provide the Commission with sufficient information to undertake the necessary analysis and adjust regulation as necessary to best preserve and promote facilities-based competition.

The starting point for any reassessment of the regime for regulating incumbent LEC special access rates is Section 201(b), which requires that carriers offer service at rates that are just and reasonable.[7] The requirement that rates be reasonable does not equate to a requirement that rates be as low as possible. Nor does the fact that lower rates might be beneficial for purchasers of those incumbent LEC services compel the conclusion that the existing rates are unreasonable. Rather, in this proceeding, the focus should be on whether there is evidence of market power sufficient to demonstrate that pricing flexibility may have been granted prematurely to TDM-based special access services offered by incumbent LECs and that the rates now charged in those areas without competition are unreasonable.[8]

As a preliminary matter, ILEC rates for special access services have always been subject to the reasonable rate requirement of Section 201(b) and the formal complaint procedures of Section 208, even in cases where the Commission has granted pricing flexibility or forbearance from regulation. While CLECs have been complaining about ILEC special access rates for over

[6] *See, e.g., 2005 Notice of Proposed Rulemaking*, 20 FCC Rcd at 2004, ¶ 24 (seeking comment on tentative conclusion to continue regulating special access services under price caps), *id* at 70 ("As part of our examination of the proper price cap special access regulatory regime to adopt post-CALLS, therefore, we also examine whether the Commission's pricing flexibility rules have worked as intended and if not, whether they should be modified or repealed."); *2012 Further Notice of Proposed Rulemaking*, 27 FCC Rcd at 16323, ¶ 9 (noting that "as a result of a series of forbearance proceedings [regarding packet-switched services], the scope of services affected by the [2005] *Special Access NPRM* narrowed considerably."); *id.* at ¶ 80 (noting that once data is collected "we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for pricing flexibility."). *See also*, AT&T September 28, 2015 Ex Parte at 5.

[7] 47 U.S.C. § 201(b).

[8] *2012 Further Notice of Proposed Rulemaking*, 27 FCC Rcd at 16353, ¶ 88.

a decade, there have not been any formal complaint decisions by the Commission under Section 208 finding ILEC rates to be unreasonable under Section 201(b).

In addition, the Commission necessarily must conclude that rates charged by facilities-based competitors that offer special access service in direct competition with such ILECs are reasonable. The Commission recognized almost four decades ago, in the *Competitive Common Carrier* proceeding, that facilities-based competitors "always face a direct competitor that offers a readily substitutable service" and therefore "any attempt to price above [the incumbent carrier's] rates will be frustrated by an immediate loss of service."[9] As a result, "firms lacking market power simply cannot rationally price for services in ways which . . . would contravene Sections 201(b) and 202(a) of the Act."[10] Based on this longstanding precedent, where a competitor has entered the market with its own facilities, the Commission has no basis for concluding that the competitor's price is unreasonable.

Consequently, in areas with two or more facilities-based providers, the Commission has no basis to compel an incumbent LEC to offer service at a regulated rate that is lower than the competitive price. Such an approach would unfairly penalize facilities-based competitors because it essentially would force them to reduce rates which are, by definition, consistent with

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9 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations* , CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1, 23, ¶ 79 (1980) (*Competitive Common Carrier First Report and Order*).

10 *Id.*, 85 FCC 2d at ¶ 88. It may be argued that the Commission's regulation of CLEC switched access charges constitutes an exception to the general rule that new entrants need not be subject to rate regulation. However, the Commission's analysis in that context is distinguishable because it turned on a finding that long distance carriers are legally obligated to utilize a customer's chosen local exchange carrier to terminate long distance calls and therefore have no ability to choose a different access provider. *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9934, ¶ 28 (2001). In contrast, business customers purchasing special access services have no obligation to purchase service from a competitive provider and will do so only where that provider offers the best combination of prices and service quality.

the just and reasonable standard of Section 201(b).[11] Regulating the special access rates charged by incumbents in markets with facilities-based competition also could deter future investment as competitors could find it more advantageous to expand their footprint by buying special access services at artificially low regulated prices, rather than building new facilities. Such a policy sends precisely the wrong signal to marketplace participants. From the perspective of continued investment growth and network security, a marketplace with diverse facilities-based networks is preferable to one where multiple providers all rely on a single network. Any policy that discourages investment in facilities where it otherwise could occur should be a non-starter for the Commission.

The premise that competition between two or more facilities-based providers is sufficient to ensure that rates will be reasonable under Section 201(b) has been a cornerstone of the Commission's high-cost universal service regime for years. In the context of providing high-cost support in the territory of price cap LECs (the same companies at issue in this proceeding), the Commission does not provide support in areas where market forces have been sufficient to attract an unsubsidized provider of broadband and voice services.[12] Moreover, not only does the Commission not provide support in those areas, it also does not regulate the retail rates charged for voice or broadband services. The Commission should take a similar approach in this proceeding.

[11] *Competitive Common Carrier First Report and Order*, 85 FCC 2d at ¶ 88 ("[A] non-dominant competitive firm, for example, will be incapable of violating the just and reasonable standard of 201(b).").

[12] *Connect America Fund, et al*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17729, ¶ 170 (2011).

II. THE CLEC PROPOSALS FOR SUBSTANTIAL NEW RATE REGULATION SHOULD BE REJECTED

The CLECs wrongly argue that ILEC rates should be presumed unreasonable because ILECs purportedly have market power in the vast majority of commercial buildings in the United States. As more fully explained below, the analysis provided by the CLECs in support of this conclusion is unconvincing. When the Commission considers the availability of competitive fiber that has been deployed in census blocks where there is demand for special access services, it is clear that a different approach is warranted.

A. There Is No Basis for Adopting the CLEC Proposal to Require Four Facilities-Based Providers in a Building as a Prerequisite to Deregulation

NCTA strenuously disagrees with the argument made by some CLECs that three or four competitors in a building are necessary to produce competitive rates and that regulation is warranted when there are fewer providers.[13] Where an incumbent LEC's rates are constrained by the presence of a competing facilities-based provider in a particular area, there is no basis for concluding that wholesale providers are somehow entitled to even lower rates just because a third or fourth provider has not entered the market. It is inappropriate for the Commission to impose rate regulation that purports to represent the workings of a hypothetical competitive market in any area where the rates already reflect the existence of real world competitive entry that has produced substantial benefits for thousands of business customers. And it would be particularly inappropriate to adopt a regime where the trigger for that rate regulation – i.e.,

[13] *See, e.g.*, XO Comments at 53 (proposing pricing flexibility for DSn channel terminations predicated on buildings with four or more competitors); Windstream Comments at 100-101 (the Commission should consider deregulation only at individual buildings with "at least three non-ILEC competitors with their own last-mile fiber").

absence of entry by a third or fourth facilities-based competitor to the building – is completely in the hands of the very companies that would benefit from those regulated rates.

As noted above, the mere fact that prices could be lower does not compel the conclusion that the existing rates are unreasonable. This is not a proper measure of sustainable competition. Absent a showing that incumbent LEC rates reflect the exercise of market power, the Commission has no basis to consider rate regulation that could have the effect of discouraging facilities-based competitors from continuing to invest for the benefit of business customers.

The only analysis the CLECs provide to demonstrate that market power exists in any building **[Begin Highly Confidential]** **[End Highly Confidential]** is the regression analysis prepared by Dr. Baker on behalf of Level 3, Windstream, and XO,[14] but that analysis does not withstand even cursory scrutiny. For one, Dr. Baker's analysis purporting to indicate that no meaningful effect on ILEC prices occurs until **[Begin Highly Confidential]** **[End Highly Confidential]** conflicts with the CLECs own experts, Besen and Mitchell, who note that the economic literature instructs that "each additional competitor's incremental effect on price diminishes as the number of competitors increases."[15] In other words, the first competitor should have the most significant effect.

Accordingly, there is simply no plausible real-world explanation for Dr. Baker's finding that **[Begin Highly Confidential]**

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[14] Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services at 32-38.

[15] Declaration of Stanley Besen and Bridger Mitchell at 26.

[End Highly Confidential] No rational business would react in the manner suggested by Dr. Baker's analysis, which strongly suggests that there are one or more factors that are not accounted for in his conclusions.

Some CLECs have attempted to show that ILECs have market power based on their share of revenue for particular categories of services, but that analysis is unconvincing. Among other drawbacks, the revenue-based market shares proffered by the CLECs are, as their analysis reflects, heavily skewed by the ILECs' purported outsized share of DS1 revenue.[16] DS1 services are rapidly declining and being replaced by IP-based services offered by both cable providers and CLECs. As discussed in more detail below, the CLECs' own analysis demonstrates that revenue market shares at higher bandwidth levels are much more evenly distributed between ILECs and competitors, undermining any suggestion of market power.[17]

In the absence of clear evidence that incumbent LECs are pricing services in a manner that reflects the exercise of market power, the CLECs' entire argument boils down to the simple proposition that they would prefer to pay less than they do today. While there is no flaw in wishing for such a result, there also is no compelling legal justification for the Commission to grant those wishes.

B. The CLECs' Building-Centric Analysis Ignores Actual and Potential Competition

One of the central issues facing the Commission in this proceeding is the appropriate level of geographic granularity to use in analyzing the marketplace and, if warranted,

[16] *See* Declaration of William Zarakas and Susan Gately at Table 2.

[17] *Id.*

establishing regulations. For the reasons discussed below, the Commission should reject CLEC proposals to treat individual buildings as distinct geographic markets.

As in other contexts, there are many factors that must be considered in defining the appropriate geographic area to use for analysis and regulation of the special access marketplace. Under the original pricing flexibility rules, the Commission decided that the Metropolitan Statistical Area (MSA) was the appropriate geographic area.[18] Subsequent experience confirmed that a test based on central office collocation within an MSA was relatively easy to administer, but the use of such a large geographic area raised concerns that significant portions of the MSA might not be competitive even when the triggers were satisfied.[19]

Because of the granularity of the data collection, the Commission has a variety of options that would enable it to assess the marketplace at a more granular level than the MSA. CLECs argue that the only option that makes sense is to consider each individual building a separate market.[20] In particular, they argue that a customer cannot reasonably be expected to move to a new location based on the special access options available and therefore only the options available in the customer's current building are relevant in a competitive analysis.[21]

NCTA strongly disagrees with this argument because it completely disregards the likelihood that another provider will come to the building. The CLEC argument is premised on the implicit assumption that a competitor would seldom compete for business in a building it

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[18] *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14260, ¶¶ 72-74 (1999), *aff'd Worldcom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[19] *See, e.g., 2005 Notice of Proposed Rulemaking*, 20 FCC Rcd at 2023-2025, ¶¶88-93; *2012 Further Notice of Proposed Rulemaking*, 27 FCC Rcd at 16354, ¶ 90 ("How can we balance the potential administrative costs of a more granular review with the possible concerns associated with applying our pricing flexibility rules to large geographic areas?").

[20] *See, e.g.*, Baker Declaration at ¶ 35.

[21] *Id.*

does not serve, but such an assumption is simply not supported by the facts, including those proffered by the CLECs. Notwithstanding the obstacles that competitors face when they expand their footprint to new buildings, the record is clear that competitors continually expand the footprint of their networks and enter thousands of new buildings each year.[22] Even if the net growth each year in buildings served by competitors is only a fraction of the total commercial buildings, the willingness of competitors to expand their footprints is a factor any incumbent LEC must account for in responding to any new RFP in an area with competitive facilities in place.

There is no basis for the Commission to assume that the obstacles to competitive entry into new buildings are so significant that such entry cannot occur. Cable companies, like other competitive providers, appreciate that extending fiber to any particular building will result in costs and that the ILECs' existing, nearly ubiquitous access to commercial buildings may confer some advantage. The Commission, however, has addressed many of these obstacles. It has, for example, required ILECs to share conduit and barred carriers from entering into exclusive service contracts with landlords. Although these regulatory responses to certain ILEC advantages cannot erase every obstacle, they reflect a more direct and appropriate response than the large scale rate regulation sought by the CLECs.

Moreover, large sophisticated customers understand that switching providers will take time and money. They purchase service under long-term contracts that provide them the time necessary to conduct a procurement process when they are considering changing providers. For

[22] The Compass Lexecon Competitive Analysis of the FCC's Special Access Data ("White Paper") that was submitted by the ILECs identified significant competitive provider expansion between January and December 2013 based on several metrics, including circuit counts, customers and billing. White Paper at 23-24. Beyond the data collection, the incumbent LECs have submitted voluminous data regarding the expanding footprint of competitive providers in recent years. *See, e.g.*, Verizon Comments at 31-45; CenturyLink Comments at 11-24.

any given customer, competition plays out at the time they solicit a new contract. Accordingly, the key to assessing the level of competition is to determine whether competing offers at that point in time are sufficient to constrain the price offered by the incumbent LEC. As noted above, there is ample evidence in the record to confirm that companies can and do compete for business in buildings they do not serve.

The foregoing analysis suggests that census blocks are a far superior unit of aggregation than individual buildings for purposes of a competitive analysis and that the presence of cable and/or CLEC fiber within a census block is a better indicator of current competition and predictor of potential competition.[23] Census blocks provide a highly granular method of assessing the competitive status of the marketplace without some of the significant flaws inherent in a building-by-building analysis.[24] Moreover, given the *de minimis* number of locations that satisfy the CLECs' proposed test,[25] it seems obvious that their proposal is intentionally designed to preserve and expand rate regulation to the maximum extent possible.

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[23] Although the Commission has recognized that a location may be a relevant market, it has always aggregated locations facing similar competitive choices in undertaking competitive or market dominance analysis. *See, e.g., AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5678 ¶ 31 (2007).

[24] For example, given that **[Begin Highly Confidential]** **[End Highly Confidential]** and therefore were not usable for purposes of performing a location-based competitive analysis, *see* Zarakas and Gately Declaration at 9 n. 8, it is difficult to envision any regime in which the Commission could reliably determine the regulatory status of millions of commercial buildings without conducting a challenge process that would be far more burdensome than the one relied on in the context of the Connect America Fund.

[25] The CLECs' analysis indicates that only **[Begin Highly Confidential]** **[End Highly Confidential]** of buildings would meet a competitive test of four or more competitive providers, no doubt reflecting the fact that few buildings contain sufficient special access demand to support that level of entry. Baker Declaration at 59, Table 1.

C. The Data Demonstrate That There Are Two or More Facilities-Based Providers Almost Everywhere There Is Demand for Special Access Service

The CLECs' measurement of purported ILEC market power, which rests almost entirely on existing, actual competitive entry at the building level, is contrary to precedent and unreasonably discounts substantial cable and CLEC fiber deployment in areas that evidence special access demand. Both the Commission and the Department of Justice have recognized that the presence of competitive facilities in an area is competitively significant.[26] Virtually any area with special access demand will contain cable company facilities that serve, or are capable of serving, business customers. Moreover, the special access data collection demonstrates that multiple competitors – sometimes more than a dozen – typically have deployed fiber in census blocks with special access demand.

The declaration of CLEC experts Zarakas and Gately substantiates that multiple competitive providers have deployed fiber in a larger number of relevant census blocks.[27] Their declaration shows that three or more competitive providers have deployed fiber in nearly **[Begin**

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[26] In the context of Bell Company mergers, the Department of Justice adopted certain screens based on a combination of special access revenue opportunity at the location and the location's distance from existing competitive provider fiber routes. These screens were used to exclude buildings from competitive concern. *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, 22 FCC Rcd 5662, 5682-83, ¶ 42-46 (2007). Where competitive fiber was sufficiently nearby to buildings with sufficient special revenue demand, rendering new entry "likely" based on CLEC build out parameters, the DOJ found no competitive harm, even when the merger reduced the number of facilities-based providers to the building from two to one. *Id.* The Commission agreed with this analysis. *Id.* at ¶ 46. The courts too have instructed the Commission that, in assessing whether competitors are impaired without access to high capacity loops, it may not ignore "facilities deployment along similar routes." *United States Telecom Association v. FCC*, 359 F.3d 554 (2004) (*USTA II*). In response, the Commission adopted tests to determine high capacity loop impairment based on the business density of ILEC wire centers. *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*").

[27] Both CLEC and ILEC experts show that, although there are millions of census blocks in the U.S., only a fraction contain businesses with special access demand. It is this relatively small subset of census blocks that is relevant to this proceeding.

Highly Confidential] **[End Highly Confidential]** census blocks.[28] Although the CLECs did not correlate these census blocks with those census blocks with special access demand, a strong correlation can be reasonably inferred. For one, the number of census blocks identified by Zarakas and Gately as containing the fiber of three or more competitive providers is substantial in light of the total number of census blocks identified by both CLECs and ILECs as containing special access demand. The number of census blocks with fiber from three or more competitive providers actually exceeds the number of census blocks identified as having special access demand, whether the Commission uses the CLECs' estimate of **[Begin Highly Confidential]** **[End Highly Confidential]**[29] or the ILECs' estimate of **[Begin Highly Confidential]** **[End Highly Confidential]** The ILECs' analysis further reflects that at least one competitive provider has deployed fiber in **[Begin Highly Confidential]** **End Highly Confidential]** of the census blocks it identified containing special access demand.[31]

The deployment of so much competitive fiber in census blocks is highly relevant to the competitive analysis, much more so than the number of buildings to which they have already deployed – a static analysis that does not account for potential entry or the dynamic nature of the market place. Again, the CLECs' own experts prove the point. As stated by XO's expert,

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[28] Zarakas and Gately Declaration, Table 8. CLECs argue that the relatively small number of locations actually served by competitive providers is the more competitively significant metric, even in census blocks where three or more competitors have deployed fiber. The precedent discussed above, however, compels the conclusion that the presence of so much competitive fiber within census blocks, which represent very small geographic areas, mitigates against a finding of ILEC market power sufficient to sustain unreasonably high prices.

[29] Zarakas and Gately Declaration at 12-13, Table 1.

[30] White Paper at Table C.

[31] White Paper, Table F.

George Kuzmanovski, the deployment of fiber in metro areas dramatically increases the ability to deploy fiber to a building:

> Metro areas where XO has existing metro networks present a number of advantages for XO, which does not have the resources to be in every city. Where XO has a network, it knows the marketplace, has a sales force that can be deployed effectively, and understands whether it can build or should buy Type II services to reach customers. Moreover, the costs to reach new customers from existing facilities tend to be much less than the costs to pursue opportunities to serve customers in new metro areas, even if XO has long haul fiber facilities bypassing the city.[32]

That competitive fiber deployed in census blocks with special access demand can restrain pricing is further confirmed by the generally small size of those areas. As reflected in the ILECs' White Paper, the median size of census blocks with special access demand is extraordinarily small and their dimensions generally are well within the distance cited by CLECs that typically justifies a build out decision.[33] Based on this analysis, there is no reason to conclude that incumbent LEC pricing is not affected by the presence of competitive fiber facilities in a census block.

Moreover, future increases in demand for special access services, such as the increased demand attributable to the introduction of 5G wireless services, will provide even greater incentives for construction of competitive facilities. The additional backhaul needs that are expected to be generated by 5G services over the next few years provide a perfect opportunity for wireless carriers to attract bids from a variety of providers willing to extend new facilities to towers. While there have been suggestions that the Commission may conduct an analysis that

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[32] Declaration of George Kuzmanovski, ¶ 7.8.

[33] White Paper at 11 (describing size of census blocks in MSAs).

projects demand years ahead of the current period while erroneously assuming that the facilities to meet that demand are entirely static,[34] such an approach would be wholly inappropriate.

III. THE COMMISSION HAS NO BASIS FOR REGULATING THE RATES FOR ETHERNET SERVICES

For more than a decade, this rulemaking proceeding has been focused on reassessing the pricing flexibility triggers for TDM-based special access services offered by the incumbent LECs.[35] Nevertheless, the CLECs now argue that it is essential for the Commission to start regulating rates for the ILECs' IP-based Ethernet services.[36] While Ethernet services offer a competitive alternative to traditional TDM-based special access services, for the reasons explained below NCTA strongly disagrees with the argument that rate regulation is warranted.

As the CLECs' own data demonstrate, the market share of competitive providers **[Begin Highly Confidential]** **[End Highly Confidential]** and the most competitive sector of the marketplace is for services above 800 Mbps.[37] This finding is consistent with the information submitted by the ILECs showing the significant presence of cable operators and CLECs among the leading providers of Ethernet services.[38] In the face of such evidence, the necessary factual predicate for the Commission to establish a new regime of ILEC rate regulation for this category of services is entirely lacking, as

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[34] *See, e.g.*, Remarks of Jonathan Sallet, General Counsel, FCC, at Incompas 2016 Policy Summit (Feb. 10, 2016) ("For example, the structure and efficient performance of the market for dedicated business data services may be fundamental to the deployment of 5G mobile broadband, which will require many more cell sites and thus much greater demand for the business data services generally referred to as backhaul. Control of a necessary input can impact the competitiveness of the downstream market, in this case mobile broadband.").

[35] See note 6 supra.

[36] *See, e.g.*, Windstream Comments at 100; TDS Metrocom Comments, *passim*.

[37] Zarakas and Gately Declaration at Table 2.

[38] *See, e.g.*, CenturyLink Comments at 13-15.

is any basis to even consider regulating rates of Ethernet services offered by competitive providers.

Not only is there no factual basis for regulating the rates for Ethernet services, but there also is no legal basis for doing so at this time. The 2012 *Further Notice of Proposed Rulemaking* asks whether and how the Commission might change the pricing flexibility triggers in response to the data collection,[39] but not a single proposal or question related to the possible regulation of Ethernet services. There is no way that adoption of a rate regulation regime for Ethernet services could be considered a "logical outgrowth" of this insufficient notice.[40] Accordingly, the Commission has no basis for regulating Ethernet rates.

IV. THE COMMISSION SHOULD REJECT PROPOSALS FOR THE DISCLOSURE OF RETAIL ETHERNET PRICES

In support of their argument that significant new rate regulation is warranted, some CLECs have alleged that they are victims of a price squeeze in which certain incumbent LECs offer wholesale services at rates that exceed the rates those incumbent LECs offer to their retail customers.[41] CLECs propose a number of potential remedies to this situation, including a proposal from TDS Metrocom to require the public disclosure of all retail Ethernet contracts.[42]

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[39] *See 2012 Further Notice of Proposed Rulemaking*, ¶ 56 ("We propose and seek comment on a market analysis that we intend to undertake in the coming months to assist the Commission in evaluating whether the pricing flexibility rules result in just and reasonable special access rates and what regulatory changes may be needed."); ¶ 57 ("Once the data are collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility.").

[40] *See, e.g., Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) ("Whether the 'logical outgrowth' test is satisfied depends, in turn, on whether the affected party 'should have anticipated' the agency's final course in light of the initial notice.")(quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

[41] *See, e.g.*, Joint CLEC comments at 67, 70; Windstream Comments at 49-56.

[42] TDS Metrocom Comments at 30-31.

NCTA strongly opposes the TDS proposal. It is not reasonable to require all the retail Ethernet customers in America to disclose the prices they are paying for services simply to satisfy the curiosity of a handful of wholesale carriers. A price squeeze allegation requires a highly fact-specific inquiry by the Commission that should be handled in an adjudicatory proceeding. If any CLEC has reason to believe that it is the victim of a price squeeze, it can and should file a complaint pursuant to Section 208. Such a process would target the specific carriers whose prices are at issue and enable the parties and the Commission to consider all the relevant data without placing unnecessary burdens on customers and competitive providers that are not party to the dispute.

CONCLUSION

Facilities-based competition from cable operators and other competitors already has produced significant benefits for business customers and provides a foundation for such benefits to continue and grow as time goes on. Conversely, the approach advocated by the CLECs produces short-term benefits for those companies, while potentially penalizing other competitive providers that have invested billions of dollars in facilities, while also reducing the incentives for future investment by competitors and incumbents alike. For all the reasons discussed in these reply comments, NCTA encourages the Commission to reject the extreme proposals advanced by the CLECs and instead take a more balanced approach that preserves and encourages incentives for facilities-based competition.

Respectfully submitted,

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February 19, 2016