

**REDACTED – FOR PUBLIC INSPECTION**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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
	)	

**REPLY COMMENTS OF FRONTIER COMMUNICATIONS CORPORATION**

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### EXECUTIVE SUMMARY

The question this proceeding asks – whether the Commission should continue to favor CLEC and cable competitors while restricting ILECs in providing dedicated access services – is readily answered by the data the Wireline Competition Bureau has collected. The data unambiguously demonstrate that there is robust competition to provide those services in the vast majority of census blocks, and in virtually every census block in MSAs with pricing flexibility. Given this evidence of intense competition, the existing uneven price cap regime is unnecessary and unjustified. It is also harmful, because it handicaps ILECs like Frontier in responding to offerings by its often-larger competitors, distorting competition and depriving customers of the broadest range of choices. Given the factual record, the right (and legally sustainable) course is for the Commission to lift existing price-cap requirements.

The data collection emphatically shows extremely widespread competitive deployment of dedicated transmission services. Not only have competitive providers built facilities to provide those services in virtually all census blocks; many blocks show multiple competitors. The data in fact understate the level of competition and the number of competitors because it dates from 2013, and the record contains ample evidence that competition has intensified since then.

Cable is quickly expanding in the business broadband market, and cable operators are also among the largest providers of Ethernet services to business. Some CLECs incorrectly contend that cable-based offerings should be excluded from a competitive assessment because they do not (according to these commenters) substitute for ILEC and CLEC services. That argument cannot be squared with the record, which shows that cable is capturing a progressively larger share of dedicated transmission services and expanding its role in this sector at breakneck speeds. Claims that best-efforts services should be excluded are also contradicted by the actual behavior of companies which routinely purchase these services to meet their broadband needs. The advent of DOCSIS 3.1 underscores the potent competition that cable is driving, and further undercuts CLEC claims.

The data also demonstrate growing intermodal competition to ILECs' dedicated transmission services from Ethernet over copper and from fixed wireless services that are being widely deployed in communities nationwide. While CLECs would have the Commission ignore those newer services, they offer no grounds for doing so, and indeed there are none. Rather, these services are being used in the marketplace as substitutes for ILEC offerings – by some of the very same entities that here deny their utility altogether.

Rather than acknowledge these multiple procompetitive trends, CLECs attempt to sidestep them by relying on a backward-looking, static approach to evaluating competition. But that approach conflicts with the forward-looking, dynamic approach that the Commission regularly applies and said it will apply here. First, CLECs focus on the number of competitors in a given market at a given point in time, and argue that as many as four are needed for competition. But the Commission does not rely on such simplistic headcounts, nor do other federal agencies engaged in competitive analysis or the courts. Second, CLECs rely on

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inherently backward-looking market share figures. Those figures are invalid given the fragmentary data they were based on which ignored several types of services. In any event, the Commission correctly concluded it would not rely on market share as an accurate gauge of competition. What matters is whether a provider faces competitive pressure, not its share of the market.

Third, CLECs seek to divide dedicated transmission services into numerous discrete product markets in an apparent effort to guarantee findings that thousands of distinct, granular “markets” are uncompetitive because they are completely unrelated to one another. Again, however, the data do not support doing so. To the contrary, evidence shows a single product market in which customers can and do select among a wide variety of prices, services and other features. Last, CLECs claim that a single building or location comprises the geographic market, but there is no economic rationale for this claim. The data show that providers do not need to be physically in a building or at a location in order to impose competitive discipline on providers that do serve it. Such an absurdly granular geographic market standard would also be infeasible to administer, because price regulation could vary literally building by adjacent building and month by month, undercutting the Commission’s goal of maintaining an administratively simple regime.

The relief the CLECs request is, finally, at odds with the Commission’s longstanding policy of regulatory parity, which recognizes that placing all competitors under the same rules minimizes market distortion and promotes the most robust competition. Proponents of expansive regulation seek to maintain (or, worse, exacerbate) a regime that hobbles Frontier and other ILECs while leaving all other competitors – including many that are far larger than Frontier – regulation-free. The CLECs’ proposals to expand regulation of ILECs (but only ILECs) would in the end benefit CLECs, but not competition and not the purchasers who would benefit from unbridled competition. Where, as here, no single competitor or class of competitors has a unique advantage over others, a disparate regulatory scheme is unsustainable and will distort competition. The right course is to lift the price cap regime, or at least to re-establish a path toward pricing flexibility in new markets. To the extent any limited regulation is needed, it should apply to *all* competitors.

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Frontier Communications Corporation (“Frontier”) hereby replies to the opening comments filed in the above-referenced dockets.<sup>1</sup>

**INTRODUCTION**

The core question presented by this proceeding is this: Should the Commission protect the interests of the public or those of specific parties – namely, purchasers of dedicated transmission services and competitors to the ILECs in the provision of such services – by tilting the playing field to thwart competitive forces and favor their particular business models? For more than a decade, the parties seeking expansive regulation here have insisted that ILECs enjoy market power throughout the nation, necessitating strict price-cap regulation not only for their

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<sup>1</sup> *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 Red 16318 (2012) (“2012 Special Access Notice”)* (subsequent history omitted).

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legacy DSn-capacity offerings but for next-generation Ethernet as well. The data collected by the Wireline Competition Bureau disproves these claims. The record now shows tremendous levels of competitive deployment throughout all metropolitan statistical areas, with nearly ubiquitous competitive deployment in Metropolitan Statistical Areas (“MSAs”) subject to Phase I or Phase II pricing flexibility, and – as described below – none of the commenters’ various attempts to dismiss the evidence holds up to scrutiny.

The only rational response to the record evidence, therefore, is to promote rather than curtail competition in the high-capacity transmission markets. This means lifting, not expanding, price cap regulations that tie ILECs’ figurative hands behind their backs as they face strenuous competition from CLECs, cable companies, fixed wireless providers, and others. Indeed, one of the greatest challenges Frontier faces is the inability to swiftly respond to such competition due to the Commission’s legacy price-cap regulations. Outdated tariffing requirements prevent Frontier from offering the tailored contracts that its customers demand, and divert investment that would otherwise be directed to expanding residential and business broadband offerings. And when rivals offer would-be customers spur-of-the-moment price reductions to close a deal, Frontier too often is precluded from responding in kind by tariffing mandates that forbid it to reduce those customers’ rates. This framework makes no sense in the current marketplace, in which large cable providers and CLECs are quickly becoming dominant. Without greater pricing flexibility – or, at a minimum, reapplication of the suspended flexibility regime and its associated triggers – ILECs like Frontier will not be able to fairly compete with cable or fiber-based CLECs going forward. This result is legally untenable and contrary to any notion of sound policy. Thus, for the reasons discussed herein, the Commission should reject the special pleading of providers seeking an unwarranted and artificial competitive advantage. Instead, it

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should adopt clear rules that promote investment, deployment, and fair competition among all providers of the dedicated business broadband services at issue here.

### DISCUSSION

#### **I. THE DATA COLLECTION REVEALS NEARLY UBIQUITOUS COMPETITIVE DEPLOYMENT AND REQUIRES FURTHER RELIEF FROM PRICE-CAP REGULATION.**

##### **A. Nearly Every MSA Census Block is Served by a Competitive Provider Who Does or Can Offer a Competitive Alternative to ILEC Special Access Services.**

The Commission's special access data collection demonstrates clearly that the business broadband market is competitive. This fact is evident from the outdated and unnecessarily narrow 2013 data set collected by the Wireline Competition Bureau, and it is even more apparent when one accounts for more recent deployments by CLECs, cable companies, fixed wireless providers, and others. Commenters seeking a return to the days of pervasive command-and-control pricing regulation attempt to reconcile these desires with the highly competitive marketplace at issue by simply assuming away actual or potential competitors. In particular, they ask the Commission to exclude from the relevant product market services provided by cable companies using DOCSIS 3.0 and 3.1. But, as others have explained in this docket, such connections are appropriately included in any competitive analysis. The record demonstrates that competitive providers using fiber, cable, or wireless plant have deployed network facilities in the vast majority of census blocks with any demand for special access services. Indeed, competitive buildout is virtually ubiquitous in areas where ILECs have already been granted

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pricing flexibility, and only slightly less pervasive in areas where pricing flexibility has not been granted.<sup>2</sup>

Specifically, the record demonstrates that, as of 2013, competitive providers had deployed facilities that compete with ILEC special access services in **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]  
[REDACTED]  
[REDACTED] **[END HIGHLY CONFIDENTIAL]**. Even if the Commission excluded DOCSIS 3.0 connections or other comparable connections from the analysis (which, as described below, it should not do), facilities from competitors are still present in **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]  
[REDACTED]  
[REDACTED] **[END HIGHLY CONFIDENTIAL]**. Special access competition is pervasive.

**B. Cable Offerings Must Be Included in Any Competitive Analysis.**

Chairman Wheeler has explained that cable has “become the nation’s dominant broadband provider.”<sup>3</sup> While the Chairman may have been focused on the residential broadband

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<sup>2</sup> Mark Israel, Daniel Rubinfeld, and Glenn Woroch, *Competitive Analysis of the FCC’s Special Access Data Collection*, at 16, WC Docket No. 05-25 (filed Jan. 27, 2015) (“Compass Lexecon Report”). Notwithstanding claims by some parties that an area cannot be considered competitive unless multiple ILEC alternatives are available, as explained in the Compass Lexecon economic analysis, any sunk investment by a competitor in direct competition with the ILEC, or with the potential to compete against the ILEC by extending network “laterals” to serve new demand, will impose a competitive constraint on the special access pricing of ILECs.

<sup>3</sup> Tom Wheeler, Chairman, Fed. Comm’n, Remarks at NCTA – INTX 2015 (May 6, 2015).

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market, the record in this docket is replete with evidence that cable providers are, at a minimum, leveraging that dominance to continue expanding competition in the special access market. In just the past two years, “cable operators have increased the penetration of business locations they serve by more than 50 percent while ILEC penetration dipped nearly 14 percent.”<sup>4</sup> Experts recognize that “[c]able is the fastest growing segment in the wholesale and retail business Ethernet markets.”<sup>5</sup> Indeed, for Ethernet business services, “[t]he Cable MSO segment remained the fastest growing overall in 2014, garnering growth that considerably outpaced the Incumbent Carrier and Competitive Provider segments.”<sup>6</sup> The largest U.S. cable operators – Time Warner Cable, Comcast, and Cox – are now the fifth, sixth, and eighth largest providers of Ethernet services in the United States, respectively,<sup>7</sup> and Comcast was recently named the fastest-growing Ethernet provider for the second consecutive year.<sup>8</sup> Additionally, all of the major cable companies use their networks to provide wireless backhaul services.<sup>9</sup> “Whether it’s Cox, which

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<sup>4</sup> Sean Buckley, *Cable Operators Taking Greater Share of Large Businesses, Says Analyst Firm*, FierceTelecom (Sep. 21, 2015), <http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21>

<sup>5</sup> Sean Buckley, *Cable Hones its Wholesale Skills in Special Access, Wireless Backhaul*, FierceTelecom (Apr. 7, 2015), <http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul>.

<sup>6</sup> *2014 U.S. Cable MSO Ethernet LEADERBOARD*, Vertical Systems Group (Mar. 16, 2015), <http://www.verticalsystems.com/vsglb/2014-u-s-cable-mso-ethernet-leaderboard/>.

<sup>7</sup> *Id.*

<sup>8</sup> *The Fastest Growing Ethernet Provider, Two Years Running*, Comcast Business (Feb. 25, 2015), <http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running>.

<sup>9</sup> Infonetics Research, *Macrocell Mobile Backhaul Equipment and Services 19 (2014)* (“Several US MSOs are leveraging their metro fiber (HFC) plants by deploying fiber to nearby cell sites

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has been working with wireless operators directly and with tower companies, or Charter with its sizeable niche in the wireless backhaul market, the cable companies are keen to take their slice of the wireless business. With small cells due to take off, these companies are seeing even more opportunities in wireless.”<sup>10</sup>

Notwithstanding cable providers’ meteoric ascent as a leading player in the dedicated services market, some commenters suggest that cable-based offerings should be excluded from any competitive analysis because they are not – in these commenters’ view – a substitute for ILEC and CLEC provided dedicated services.<sup>11</sup> One can understand these commenters’ impulse to write off cable competitors – it is, to be sure, hard to defend calls for expansive regulation in the face of nearly pervasive competition – but there is strong and mounting evidence indicating that cable is and intends to be a vigorous competitor in the dedicated transmission market. For example, Comcast recently announced a new business unit created specifically to market and sell

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where the business case makes sense.”). *See also* Comments of Verizon, WC Docket No. 05-25, at 54-56 (filed Jan. 28, 2016) (“Verizon Comments”).

<sup>10</sup> Monica Allevan, *Cable Companies Cater to Wireless Operator Backhaul Needs*, FierceTelecom (Apr. 9, 2015), <http://www.fiercewireless.com/tech/story/cable-companies-cater-wireless-operator-backhaul-needs/2015-04-09>.

<sup>11</sup> They offer numerous reasons, including (i) cable “best efforts” service lacks the quality of service (“QOS”) assurances that medium and large enterprise customers demand; (ii) cable companies may not have facilities at or near buildings since they primarily serve residential customers; (iii) providers of cable offerings do not have a nationwide reach and are therefore not able to effectively serve large institutions with multiple locations; (iv) cable provider facilities in buildings and wholesale services are often coaxial cable, not fiber, which limits the type and performance of the Ethernet service they provide. *See, e.g.*, Comments of XO Communications, WC Docket No. 05-25, at iv, 16, 26, 39 (filed Jan. 27, 2016) (“XO Comments”); Comments of Windstream Services, WC Docket No. 05-25, at 22-23, 35 (filed Jan. 28, 2016) (“Windstream Comments”); Comments of Birch *et al.*, WC Docket No. 05-25, at 5, 15-18, 27-28 (filed Jan. 27, 2016) (“Joint CLEC Comments”); Comments of Sprint Corp., WC Docket No. 05-25, at 12-14 (filed Jan. 27, 2016) (“Sprint Comments”).

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enterprise services on a nationwide basis to Fortune 1000 companies.<sup>12</sup> Contrary to suggestions that cable can only serve small business customers,<sup>13</sup> Comcast has emphasized that it is targeting “large enterprises that have 300 locations or more” and that it offers managed services “to more than 20 large enterprise companies and ha[s] already signed multiple eight figure deals.”<sup>14</sup> Moreover, despite claims by CLECs that cable companies are hampered by limited geographic reach, Comcast, for example, has reached network agreements with other leading cable operators, enabling it to serve national clients with local offices and locations beyond Comcast’s core footprint. Analysts note that “[w]ith its national network reach and end-to-end service delivery capabilities, Comcast is well positioned to serve the outsourced network management needs of large business that require increasing network capacity to serve expanding multi-site requirements.”<sup>15</sup>

Comcast’s success in the dedicated capacity market is not at all hypothetical. Rather, Comcast Business has already signed “large customers from multiple industries,” ranging from

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<sup>12</sup> *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises*, Comcast Business (Sept. 16, 2015), <http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises>. See also Letter from Jonathan Banks and Diane Griffin Holland, US Telecom, to Marlene H. Dortch, Sec’y, FCC, WC Docket No. 05-25, RM-10593 (Sept. 18, 2015).

<sup>13</sup> See, e.g., XO Comments, Declaration of James Anderson at 15-16 (suggesting that XO only competes with cable “at th[e] smaller end of the customer market”).

<sup>14</sup> Transcript at 14, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Thomson Reuters (Oct. 27, 2015) (quoting Neil Smit, Senior EVP Comcast Corp., President & CEO of Comcast Cable Communications); see also *Comcast Creates Enterprise Services Unit to Target Big Businesses*, CNBC (Sep. 16, 2015, 9:17 AM), <http://www.cnbc.com/2015/09/16/comcast-creates-enterprise-services-unit-to-target-big-businesses.html> (noting that in just the first nine months of 2015, Comcast signed up 25 to 30 enterprise customers with \$45 million in contracts).

<sup>15</sup> Comcast Business, *supra* note 12 (quoting Melanie Posey, Research Vice President at IDC).

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financial services firms to banks to hospitality chains to retailers.<sup>16</sup> These arrangements are possible because Comcast Business offers “the largest facilities-based last mile alternative to the phone company,” with over 141 national route miles of fiber, covering 39 states and 20 of the nation’s top 25 markets, and the first and largest fully 40G backbone.<sup>17</sup> As a result, Comcast Business is one of the company’s fastest-growing divisions, “seeing its bet on the larger business market paying off as the segment has exceeded a \$5 billion revenue run rate, while maintaining 20 percent growth.”<sup>18</sup>

Of course, Comcast is not alone in the expansion into the retail and wholesale enterprise broadband space. Time Warner Cable (“TWC”), for example, advertises business and wholesale customers the opportunity to “expand [their] out-of-market reach with Dedicated Internet Access (DIA) on our high-capacity fiber network with access to over 45,000 multi-tenant on-net buildings.”<sup>19</sup> Late last year, TWC Business Class announced a new “Carrier Serviceability Portal” that enables providers to search “nearly 1 million on-net and near-net TWC [Business Class]-wired buildings.” The search results reflect the expansive reach of “a 150,000-fiber-route-mile network infrastructure that serves 31 major metro areas nationwide with more than 43,000 multi-tenant, fiber-lit buildings, nearly 1 million DOCSIS-

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<sup>16</sup> *Id.*

<sup>17</sup> *The Comcast Network Overview*, Comcast Business (2014), <http://i.crn.com/custom/The-Comcast-Network-Overview.pdf>.

<sup>18</sup> Sean Buckley, *Comcast Business Surpasses \$5B Revenue Run Rate, Sees Growing Traction in Enterprise Segment*, FierceTelecom (Feb. 4, 2016), <http://bit.ly/20cfaOU>.

<sup>19</sup> *Wholesale IP Transit with Direct Access to TWC Broadband Users*, Time Warner Cable Business Class, <https://business.timewarnercable.com/solutions/carrier-services/wholesale-ip-transit.html> (last visited Feb. 18, 2016).

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equipped buildings and connectivity into 64 data centers across the nation.”<sup>20</sup> TWC’s business division serves about 718,000 business customers,<sup>21</sup> and is growing fast, having added 32,000 commercial buildings to its network in the first half of 2015 alone.<sup>22</sup>

TWC’s enterprise broadband reach is one of the main rationales Charter has given to support its merger with TWC. It has indicated that the company’s post-merger footprint would “offer[] us greater ability to develop products and to serve medium and large . . . commercial customers” and give it “incentives to expand our . . . base footprint of optical networks to serve the medium and large business services marketplace.”<sup>23</sup> Charter indicates that “business services has been one of the fastest growing areas within Charter,” with year-over-year revenue growth averaging just under 20 percent<sup>24</sup> and that it will invest \$2.5 billion to better serve commercial areas within its footprint if the merger is approved.<sup>25</sup> This will build on the “12,000+ fiber lit

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<sup>20</sup> *Time Warner Cable Business Class Carrier Serviceability Portal Simplifies Discovering Connected Locations*, Time Warner Cable Business Class (Sept. 28, 2015), <https://business.timewarnercable.com/resource-center/news/carrier-serviceability-portal-simplifies-discovering-connected-locations.html>.

<sup>21</sup> Time Warner Cable Inc., *Quarterly Report*, at 3 (filed July 30, 2015), <https://www.sec.gov/Archives/edgar/data/1377013/000119312515269291/d146752d10q.htm>

<sup>22</sup> Kamran Asaf, *Cable Commercial Segment Sustains Momentum in Q2*, SNL Kagan (Oct. 2, 2015).

<sup>23</sup> Transcript at 3, *CHTR – Charter Announces Transactions with Time Warner Cable and Bright House Networks M&A Call*, Thomson Reuters (May 26, 2015).

<sup>24</sup> Public Interest Statement of Charter Commc’ns, Inc., Time Warner Cable, Inc., and Advance/Newhouse P’ship, MB Docket No. 15-149, at 18 (filed June 25, 2015).

<sup>25</sup> *Charter Communications (CHTR) Earnings Report: Q2 2015 Conference Call Transcript*, TheStreet (Aug. 4, 2015), <http://s.t.st/media/xtranscript/2015/Q3/13243727.pdf>.

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buildings[,] 3,800 lit cell towers,” and “44,000+ near net buildings” it currently claims.<sup>26</sup> Cox Communications (“Cox”) is also seeking to expand its last-mile service to medium and large businesses within its cable footprint, and to provide backhaul for cell towers and small cells.<sup>27</sup> Currently, Cox has over 5,000 fiber-fed wireless towers, more than 30,000 miles of metro fiber infrastructure, over 140,000 miles of hybrid fiber coax (“HFC”) infrastructure, more than 225,000 HFC serviceable businesses, and over 110,000 fiber serviceable buildings.<sup>28</sup> While fiber is the main special access solution, Cox is also “looking at other options to deploy and leverage more of our plant to get more buildings on net as quickly as possible.”<sup>29</sup>

In light of the above, cable companies are unquestionably suppliers of a substantial portion of dedicated services that compete against ILEC special access today. Notably, the majority of the statistics cited above are all based on reports issued *after* the period covered by the Wireline Competition Bureau’s 2013 data collection. Thus, the Commission must acknowledge that the 2013 data far under-reports the level of competition today, particularly given the numerous cable announcements in the second half of 2015.<sup>30</sup>

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<sup>26</sup> *Spectrum Business: Carrier Solutions*, Charter Commc’ns, <https://business.spectrum.com/content/carrier> (last visited Feb. 18, 2016).

<sup>27</sup> Carol Wilson, *Cox Biz Looks Beyond SMBs*, Light Reading (Dec. 4, 2014), <http://www.lightreading.com/cable-video/cable-business-services/cox-biz-looks-beyond-smbs/d/d-id/712419>.

<sup>28</sup> Carrier Services, *Cox Business*, <https://www.cox.com/business/industry-expertise/carrier-backhaul.html> (last visited Feb. 18, 2016).

<sup>29</sup> Buckley, *supra* note 5.

<sup>30</sup> Verizon’s comments include a helpful chart providing statistics in different categories for multiple providers comparing the difference between 3Q 2013 and 3Q 2015. For the cable companies listed, as well as non-cable competitors, there were substantial increases over the two

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**C. The Commission Should Reject CLEC Efforts to Exclude Best-Efforts Cable Service from Consideration.**

Many CLEC commenters have suggested that best efforts cable service is insufficient to meet the needs of mid-size and large enterprise customers and that even dedicated services over non-fiber networks are insufficient. These claims are contradicted by the actual behavior of market competitors, who routinely purchase cable-based service, proving that such service poses a competitive threat to ILEC offerings. Any framework the Commission adopts must account for this threat.

As an initial matter, many dedicated transmission services are provisioned through fiber optic facilities or via Ethernet over hybrid fiber-coaxial offerings, not via best-efforts cable modem service. Cable providers have emphasized the viability of Ethernet-over-HFC as a substitute in their own marketing. TWC boasts of its “[n]early 1 million HFC serviceable buildings,”<sup>31</sup> and Charter of its “wide-reaching” HFC-reliant network, which provides a “low-cost alternative to Optical Ethernet.”<sup>32</sup> As research firm Vertical Systems Group had indicated, enterprise customers “want to buy something over Fiber or HFC.”<sup>33</sup> There is no basis whatsoever from excluding these cable Ethernet offerings from the instant assessment.

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year period in virtually every category, including fiber route miles, on-net buildings, business customers, and business revenues. *See* Verizon Comments at 14.

<sup>31</sup> Time Warner Cable Business Class, *supra* note 19.

<sup>32</sup> *Spectrum Business: Ethernet*, Charter Commc’ns, <https://business.spectrum.com/content/business-ethernet#coax> (last visited Feb. 18, 2016).

<sup>33</sup> Erin Dunne, *Can Cable Ride Ethernet to Enterprises?*, Light Reading (Dec. 17, 2015), <http://www.lightreading.com/cable/cable-business-services/can-cable-ride-ethernet-to-enterprises/v/d-id/719906> (starting at the 1:36 mark).

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Nor is there reason to exclude best-efforts cable service from the analysis. It is true that some enterprise customers demand dedicated circuits, but many do not. For those who do not, best-efforts cable offerings provide a robust and less-expensive alternative to traditional Ethernet service. Indeed, a DOCSIS 3.0 connection can offer speeds up to 100 Mbps, far surpassing the capability of traditional TDM special access circuits. As Verizon notes, “although best-efforts broadband differs in some respects from traditional special access, these differences are not critical for many customers, and also are diminishing.”<sup>34</sup> For example, Comcast’s business-class high-capacity symmetric network @Home service, delivered over its hybrid fiber-coax network, is backed by SLAs and is available for a variety of Ethernet services at symmetric bandwidth speeds up to 10 Mbps.<sup>35</sup> Given the substantial number of locations served by cable providers over best efforts connections, and the increasing availability of service guarantees for even these best-efforts connections, it would be inappropriate to categorically remove them from the analysis.

Cable’s status as a true ILEC competitor is strengthened by the advent of DOCSIS 3.1, a standard whose capabilities far surpass those of its predecessor. “Best efforts” or not, DOCSIS 3.1 permits speeds up to 10 Gbps along with numerous other improvements over DOCSIS 3.0. Comcast has stated that it will begin deploying the service in several parts of the country in 2016, noting that “the beauty of DOCSIS 3.1 is that it is backwards compatible, so no digging up

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<sup>34</sup> Verizon Comments at 39.

<sup>35</sup> Cindy Whelan, *Comcast Takes Telework to the Next Level with Ethernet @Home*, Current Analysis (Dec. 16, 2014), <http://www.currentanalysis.com/Compete/Login.aspx?ReturnUrl=%2fCOMPETE%2fFrontEnd%2fReport.aspx%3frid%3d93764%26rss&rid=93764&rss> (subscription required).

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streets or backyards. . . . DOCSIS 3.1 will work over our existing network as currently configured.”<sup>36</sup> In addition to offering speeds up to 10 Gbps downstream and 1 Gbps upstream, DOCSIS 3.1 also provides a greater quality of experience for users by significantly reducing network delay and dramatically improving responsiveness for high-bandwidth applications. It also enables a significant increase in network capacity with the ability to transmit up to 50 percent more data over the same spectrum, on existing HFC networks.<sup>37</sup> The physical layer specification of the standard indicates that DOCSIS 3.1 includes new features “for the purpose of increasing capacity, increasing peak speeds, improving scalability, enhancing network maintenance practices and deploying new service offerings.”<sup>38</sup> Similarly, the security layer specification also identifies new features “for the purpose of increasing channel capacity, enhancing network security, expanding addressability of network elements, and deploying new service offerings.”<sup>39</sup> Even XO acknowledges that “cable companies may in the long run have the potential to be robust competitors in the Dedicated Services market.”<sup>40</sup> In short, the capabilities of next-generation cable networks – which require no new physical network investment – add yet

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<sup>36</sup> See, e.g., Tony Werner, *World’s First Live DOCSIS 3.1 Gigabit Class Modem Goes Online in Philadelphia*, Comcast Voices (Dec. 22, 2015), <http://corporate.comcast.com/comcast-voices/worlds-first-live-docsis-3-1-gigabit-class-modem-goes-online-in-philadelphia#.VnlhdfcTuHJ.twitter>.

<sup>37</sup> *DOCSIS 3.1 – A New Generation of Cable Technology*, CableLabs, <http://www.cablelabs.com/innovations/featured-technology> (last visited Feb. 18, 2016).

<sup>38</sup> See *Data-Over-Cable Service Interface Specifications, DOCSIS 3.1: Physical Layer Specification*, CableLabs (Dec. 10, 2015), <http://www.cablelabs.com/wp-content/uploads/specdocs/CM-SP-PHYv3.1-I08-151210.pdf>.

<sup>39</sup> See *id.*

<sup>40</sup> XO Comments at 39.

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another data point demonstrating that regulations of only ILEC special access services should be lifted and that there is no justification for increased regulation only of ILECs.

**D. Ethernet Over Copper and Fixed Wireless Services Are Also Providing Competitive Alternatives.**

Other intermodal alternatives, including Ethernet over Copper (“EoC”) and fixed wireless, offer additional competition to the special access market.

The Commission itself has acknowledged that EoC, provisioned by CLECs using unbundled ILEC loops, is capable of providing speeds greater than 100 Mbps to enterprise users<sup>41</sup> and “enhances the ability of enterprise customers to choose the most cost-effective option” for themselves.<sup>42</sup> As XO has stated, “even where fiber to a building has been installed . . . EoC provided by a competitor can be a cost-effective way to offer customers a choice for high bandwidth service.”<sup>43</sup> According to market research company Frost & Sullivan, 2014 “witnessed an increased urgency from communication services providers,” including “a renewed focus on Ethernet over Copper services.”<sup>44</sup> For example, Birch, Integra and Level 3 remarked that they and other CLECs now “deliver Ethernet-over-copper services to hundreds of

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<sup>41</sup> See XO Comments at 8.

<sup>42</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 ¶ 134 (2015).

<sup>43</sup> Comments of XO Communications, GN Docket No. 13-5, at 8-9 (Feb. 5, 2015).

<sup>44</sup> Frost & Sullivan, *Business Carrier Ethernet Services Market Update, 2015*, at 7 (Sept. 2015).

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thousands of business customer locations that are not within reach of their fiber networks”;<sup>45</sup> XO provided EoC services to more than 950,000 buildings in 2015.<sup>46</sup>

The rapid growth of high-capacity fixed wireless services is also well documented in the record.<sup>47</sup> Commission data reveal that competitors are using fixed wireless to provide services at more than [BEGIN HIGHLY CONFIDENTIAL] █████ [END HIGHLY CONFIDENTIAL] locations in more than [BEGIN HIGHLY CONFIDENTIAL] █████ [END HIGHLY CONFIDENTIAL] zip codes nationwide.<sup>48</sup> A few CLECs, however, dismiss the competitive impact of wireless, asserting that it cannot provide an alternative to business customers.<sup>49</sup> That is incorrect. With 4G LTE deployments nationwide, wireless services are increasingly able to provide speeds that are a suitable alternative for customers that have relied before on wireline special access. In fact, the record shows that CLECs themselves are deploying wireless backhaul capability that can provide special access to customers.<sup>50</sup>

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<sup>45</sup> Comments of Birch, Integra, and Level 3, GN Docket No. 13-5, at 30 (Feb. 5, 2015).

<sup>46</sup> Comments of XO Communications, GN Docket No. 13-5, at 5 (filed Feb. 5, 2015).

<sup>47</sup> *See, e.g.*, Verizon Comments at 46-49 (quoting Windstream statement that it now offers “carrier-grade Ethernet and Internet over Ethernet connectivity delivered by digital microwave technology” in multiple large cities, and citing other wireless deployments.).

<sup>48</sup> *Id.* at 50-51.

<sup>49</sup> Joint CLEC Comments at 4.

<sup>50</sup> Verizon Comments at 59-60. *See also* Comments of CenturyLink, Inc., WC Docket No. 05-25, at 14 (filed Jan. 28, 2016) (“CenturyLink Comments”) (“Sprint’s successful migration of its wireless backhaul to competitive Ethernet providers serves as merely one illustration of the extent to which legacy services are being phased out.”).

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### II. CLECS USE THE WRONG STANDARDS FOR ASSESSING COMPETITION.

Rather than acknowledge the numerous procompetitive developments discussed above, CLEC commenters seek to sidestep them by asking the Commission to adopt a backward-looking, static approach to evaluating the dedicated service market. Their proposed approach relies on snapshot metrics (such as how many providers were actually competing at a point in time) that do not accord with longstanding frameworks for competitive analysis. Their approach to competition is designed to produce a predetermined result: more regulation and, worse, regulation that would restrict only some competitors including Frontier. Thus, rather than using the forward-looking metrics the Commission said it would apply,<sup>51</sup> the CLECs advocate different and much stricter tests.<sup>52</sup> They rely on historical data and discount the many pro-competitive trends, an approach that is inconsistent with the Commission’s policies.<sup>53</sup> There are at least four major flaws in the CLECs’ approach: they (1) ask the Commission to look narrowly at only the

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<sup>51</sup> “We agree with those commenters who state that the Commission’s analysis must take account of both actual and potential competition, as well as sources of intramodal and intermodal competition.” *Special Access Notice*, 27 FCC Rcd 16318 ¶ 69 n. 152.

<sup>52</sup> Some CLECs point to the Justice Department’s merger guidelines as support for focusing on actual competition. See U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines*, (2006), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> (“DOJ/FTC Horizontal Merger Guidelines”). The guidelines were developed to evaluate the competitive effects of a proposed merger of two firms and thus are designed for different purposes than the set of administratively simple tests the Commission is considering for triggering pricing flexibility. But in any event the DOJ guidelines are forward-looking: They account for potential and future entry in assessing the competitive impact of a transaction on a market. *Id.* at § 5.1 at 15-16.

<sup>53</sup> The Commission has stated that competition should be analyzed “in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as the market continues to evolve.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 50 (2005).

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number of *actual* competitors in a market, (2) rely on stale and meaningless market-share data, (3) break the special access product market into a complex set of allegedly separate markets, and (4) wrongly define the geographic market as a single location or building. Together, these analytical flaws completely undermine the CLECs' claims for more regulation. The Commission's longstanding framework to measure competition is far more dynamic, because it correctly seeks to identify the factors that show potential as well as existing competition, and looks prospectively toward how those factors may promote more competition. When the many record facts demonstrating growing and robust competition are measured against the *proper* standards, they not only counsel against re-regulation, but warrant reducing existing regulation.

### **A. Competitive Analysis Does Not Turn on a Simplistic Tally of Competitors at a Given Point in Time.**

Several CLECs ask the Commission to conduct a numerical "head count" of dedicated transmission providers, asserting that two (or even three) is not enough, but that four actual competitors should exist before the agency backs away from *ex ante* price regulation.<sup>54</sup> But neither DOJ's guidelines nor FCC precedent sets such a numerical bar. Competition is of course far more nuanced and dynamic than can be measured through the mere number of competitors in a marketplace. Basing regulation on the sheer number of competitors is also inherently backward-looking, because that approach relies on a snapshot of competition at one point in time and ignores the threat that new competitors may enter, which *itself* disciplines incumbent providers. This problem is especially evident in the CLECs' focus on 2013 data, which is now

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<sup>54</sup> See, e.g., Sprint Comments at iii-iv; XO Comments at iv (advocating that pricing flexibility for DS<sub>n</sub> terminations be granted only when two thirds of the square footage in buildings comprising a central business district have "four or more competitors with facilities in buildings over which TDM services are offered.").

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of course well over two years old. The record contains voluminous data showing that, even as of 2013, new competitors were continuously emerging – and it shows that since that time this trend has accelerated. As other ILEC commenters point out, when they are high-capacity transmission purchasers out of their incumbent footprints, they enjoy increasing competitive options (from ILECs, CLECs, and cable providers) to procure those services.<sup>55</sup>

Ultimately, what matters is not the number of actual competitors at any given point in time, but whether a competitor *could* self-provision facilities or rely on an existing provider. This is why the DOJ and FTC state that such analysis must account for potential and future entry into the relevant market,<sup>56</sup> why the courts have held that competition assessments must consider “whether the potential for competitive market entry is sufficient to constrain an incumbent carrier’s ability to maintain prices above competitive levels,”<sup>57</sup> and why the Commission itself has “consistently considered *both* actual and potential competition” in evaluating markets.<sup>58</sup> There is no reason for it to eschew this approach here in favor for a backward-looking snapshot-in-time framework lacking any legal or analytical basis.

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<sup>55</sup> See, e.g., CenturyLink Comments at 12 (attesting to “the wide variety of options of which CenturyLink can and does avail itself as an out-of-region access purchasers, illustrating the dramatic shift in the wholesale marketplace that has occurred since the last data collection.”).

<sup>56</sup> See DOJ/FTC Horizontal Merger Guidelines, § 5.1 at 15-16.

<sup>57</sup> Qwest Corp. v. FCC, 689 F.3d 1214, 1221 (10th Cir. 2012).

<sup>58</sup> Verizon Tel. Cos. v. FCC, 570 F.3d 294, 303 (D.C. Cir. 2009).

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**B. Incomplete and Stale Market-Share Data Do Not Measure Competition.**

CLECs make the same error in harping on what they claim to be market-share data to assert that ILECs' market shares show lack of competition.<sup>59</sup> Given the fragmentary data that the Commission collected, it is impossible to calculate market shares using the Herfindahl-Hirschman Index ("HHI") with any accuracy. As noted above, the CLECs' analysis ignores entire categories of providers (those using cable, fixed wireless, or Ethernet over Copper plant), consigning their HHI "analysis" to irrelevance. Moreover, the data are now well more than two years old, making their use even more problematic. CLECs' HHI claims should be ignored for these reasons alone.

Even putting aside these flaws, reliance on market share alone has never been appropriate in competitive analysis, as the Commission recognized in this proceeding. The *Notice* advised parties that "[w]e do not propose to conduct a simple market share or market concentration analysis."<sup>60</sup> And for good reason: It is well established within antitrust literature that market shares do not paint a comprehensive portrait of competition within an industry. As the leading antitrust treatise concludes, even a high market share will not necessarily denote market power.<sup>61</sup> Two former FCC Chief Economists similarly have noted that "current product-market shares may indicate very little about the future of the industry or about whether any given firm will

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<sup>59</sup> Sprint Comments at iv, 25.

<sup>60</sup> 2012 *Special Access Notice*, 27 FCC Rcd 16318 ¶ 67.

<sup>61</sup> P. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 506d (2007) ("Substantial market power can persist only when there are significant and continuing barriers to expansion and entry.").

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possess significant market power.”<sup>62</sup> This is especially true for a market such as the one at issue here, as explained by Compass Lexecon’s submission in this docket:

[W]hile a legacy incumbent may have larger market share by virtue of historically being among few options, that does not mean that the incumbent is not subject to strong competition once facilities-based entry occurs. The incumbent’s offerings are constrained by the competitive offerings now available in the marketplace. Instead, one would expect to see the incumbents’ share of the market decreasing as competitors’ shares increase, which, as explained below, is precisely what we see in the marketplace for special access services. . . . [I]n the present context, investment in network facilities is a better measure of current and future competition than are historical market shares.<sup>63</sup>

In short, HHI data on their own supply no basis for imposing more regulation.<sup>64</sup>

### **C. There Is a Single Special Access Product Market.**

By claiming that there are numerous narrowly defined product markets, one for virtually every separate dedicated transmission service, CLECs can assert that there is often only one or at most two competitors offering each service.<sup>65</sup> However, dedicated transmission offerings

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<sup>62</sup> Michael L. Katz & Howard A. Shelanski, “*Schumpeterian*” *Competition and Antitrust Policy in High-Tech Markets*, 14 *Competition* 47, \*10 (2005).

<sup>63</sup> Compass Lexecon Report at 9.

<sup>64</sup> Even if HHI scores were relevant here, the CLEC analysis would be of no relevance, because they cherry-pick the markets at issue, focusing on the ILECs’ market shares for the lowest data speeds. It is clear why they do this – ILECs face even more aggressive competition for higher-capacity services than they do for lower-capacity services. But policy-making based on these lower speeds would make no sense whatsoever, given the undeniable and inexorable shift toward far higher speeds as data demand skyrockets.

<sup>65</sup> *See, e.g.*, XO Comments at ii (requesting that the Commission “analyze separately the following Dedicated Services product markets: TDM or CBDS services (channel terminations), TDM or CBDS services (transport), Ethernet or PBDS services (channel terminations), Ethernet or PBDS services (transport) and best efforts services.”). XO even asks for still another separate product market, “wholesale Dedicated Services,” when the Commission “finds that retail

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encompass a variety of services that mix and match different speeds, capacity, prices, and other contract terms and conditions. Purchasers' own needs are constantly changing in order to meet their own customers' changing demands. Often a purchaser can meet its needs with a variety of alternative offerings, making tradeoffs among prices, speeds and other features. In short, a purchaser often chooses among the different offerings in a carrier's service portfolio, and these offerings typically are substitutes for one another. The correct approach is thus to treat dedicated transmission as a single product market – one that includes all intra- and intermodal competitors.<sup>66</sup>

The CLECs' approach, under which the Commission would have to define (and then regulate) all of these multiple products, would also be unadministrable. The market is not static; new offerings arise continuously. As a practical matter, the Commission simply lacks the resources to monitor each such "market" on an ongoing basis, let alone determine what rules should apply to it (and for how long). Even were it to attempt to define multiple dedicated transmission "products," those products would likely evolve almost before the ink used to print

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markets for Dedicated Services are not competitive." XO does not explain whether only one or all five of the alleged retail "markets" have to be non-competitive in order to trigger a sixth wholesale product market, adding further uncertainty to a scheme that is already unnecessarily complex. As XO itself admits, it "finds the lines between product offerings often blur and defining product markets is a complex undertaking where not every situation fits neatly." *Id.* at 27.

<sup>66</sup> *See, e.g.*, Verizon Comments at 20 ("[T]he record demonstrates that the Commission's analysis should include all forms of high-capacity services that customers are using to meet their needs, which includes not just legacy TDM-based special access services but also Ethernet services and best-efforts broadband services offered by cable."); CenturyLink Comments at 32 ("[A]t a minimum, the Commission must include in its analysis all high-capacity transmission services being marketed and purchased as alternatives to price-cap carriers' special access offerings.").

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its order had dried. There is no workable policy regime that would permit real-time determinations as to the point at which each of these products has been transformed into a new product market in each of the geographic markets under consideration (no matter how broadly defined). Thus, both on the merits and to ensure that the adopted approach can be administered, the Commission should make clear that the business broadband marketplace at issue here constitutes a single product market.

**D. A Single Location or Building Is an Invalidly Narrow Geographic Market.**

The CLECs’ result-driven approach posits that the geographic area in which competition should be assessed is literally a single location or building.<sup>67</sup> CLECs appear to believe that if only they can persuade the Commission to define the “market” with unreasonable granularity and count the number of competitors serving each location or building, the result will show some or even many buildings with few actual providers – particularly if they can also induce the Commission to exclude relevant competitors from the analysis altogether.<sup>68</sup>

The Commission should quickly reject this exceedingly narrow definition of the geographic market for special access services. *First*, there is no economic rationale for it. The record shows that dedicated transmission providers do not need to be physically in a building to provide competitive discipline.<sup>69</sup> They can, for example, connect that building to their own fiber rings or other carriers’ rings by deploying short lateral facilities. Commenters explain the value

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<sup>67</sup> Sprint Comments at 18; Joint CLEC Comments at 19; XO Comments at ii.

<sup>68</sup> *See supra* Parts I(A)-(D).

<sup>69</sup> “Competitors deploy networks that are within reach of all or most of the concentrated demand within a given metropolitan area. The competitor will then market its service broadly throughout the geographic area.” Verizon Comments at 21. *See also* Compass Lexecon Report at 10.

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of laterals in enabling carriers to offer competitive special access services throughout an area, wherever purchaser demand exists.<sup>70</sup> The data show that competitors have deployed their own facilities in nearly all MSA census blocks with special access demand.<sup>71</sup> Those census blocks are small – according to Compass Lexecon, the median area of all MSA census blocks for which competitive providers reported a special access location is **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** square miles.<sup>72</sup> Thus, competitors often can easily deploy laterals from existing facilities to new locations within the census block, and need not already have facilities deployed to a location in order to exercise competitive discipline. CLECs’ own public statements attest to this point: They routinely trumpet their ability to extend their networks to acquire new customers in buildings they do not currently serve.<sup>73</sup>

*Second*, both the Commission and the Justice Department have rejected application of a location- or building-specific market test. Instead, they have held that once a competitor has facilities in an area, it provides a competitive alternative (and thus discipline) to incumbent

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<sup>70</sup> See, e.g., CenturyLink Comments at 27-28 (laterals “are relatively inexpensive and therefore economic to deploy”); AT&T Comments at 7 (“Special access competition does not occur merely or even primarily among carriers that already have an existing connection to a building, because additional carriers with the ability to deploy a connection (based on, for example, a larger fiber ring or transport facilities that are near the building) also vigorously compete for the business of the building’s special access customers.”).

<sup>71</sup> See, e.g., AT&T Comments at 3.

<sup>72</sup> Compass Lexecon Report at 11.

<sup>73</sup> See Verizon Comments at 42-43 (quoting statements from numerous CLECs as being ready, able and willing to serve customers in areas nearby their networks).

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providers for other locations throughout that area.<sup>74</sup> No record data undercuts the reasoning for this approach, and the Commission should not depart from it.

*Third*, CLECs advocating a building-by-building standard fail to grapple with the immense implementation problems that it would create. A location-specific regime is infeasible and would make no sense given that the needs of different companies buying special access services in individual buildings continually change, particularly as occupants turn over. How would the Commission possibly apply any standard it adopts to literally millions of locations nationwide? How could it impose price restraints building-by-building? Would it subject an ILEC to regulation in one building, but not in another building across the street (because there is another provider serving a tenant in that building)? And what would happen once a competitor does, in fact, extend a new lateral to a building (as competitors regularly do)? CLECs offer no practical solution to the many problems their geographic market definition would create.

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Once the right standards are applied to the record data, they evidence a vibrant, growing, competitive special access market with substantial actual and potential competition. In short, the Commission should focus not on the static, narrow, and distorted picture CLECS draw, but on the data and other information (including CLECs' and other competitors' own statements to

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<sup>74</sup> See, e.g., *AT&T and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5682-83 (2007) (adopting DOJ's "screens" to determine whether a building could be served by competitors, which take into account nearby facilities).

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investors). This evidence shows conclusively that ILECs lack market power, and thus that the Commission should ratchet back its regulatory scheme to accord with market realities.

### III. NEITHER LAW NOR SOUND POLICY COUNTENANCE THE REGULATORY DISPARITIES COMPETITORS SEEK HERE.

When opening this proceeding in 2005, the Commission acknowledged the importance of an “approach [that] will allow the market to determine rates where competitive market forces exist,”<sup>75</sup> and sought to “advance the pro-competitive, de-regulatory national policies embodied in the Telecommunications Act of 1996”<sup>76</sup> as described in the 1999 *Pricing Flexibility Order*. Consequently, the Commission has wisely lightened regulatory burdens as competition in the dedicated transmission market has blossomed.

The “relief” now requested by ostensible proponents of competition runs contrary to this principle. CLECs’ calls for regressive regulation of the market<sup>77</sup> – up to and including re-adoption of regimes abandoned as unnecessary by the Commission over the course of many years – reflect attempts to leverage regulatory policy for parochial, not public, benefit. There can be no doubt that consumers benefit most from a fully competitive market. CLECs risk

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<sup>75</sup> *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 ¶ 24 (2005).

<sup>76</sup> *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 ¶ 1 (1999).

<sup>77</sup> *See, e.g.*, Local CLEC Comments at 64 (asking the Commission to adopt a re-regulate and adopt a presumption that incumbent LECs, in 2016, warrant regulation in “all dedicated service markets”).

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undermining competition by seeking disparate treatment for identical services – by seeking to use regulation, rather than deployment, to build market share and cut costs. The Commission can and should reject these requests for regulatory arbitrage.

### **A. Competition and Competitive Neutrality Maximize Consumer Benefit.**

The advantages of competition over regulation in constraining the prices and behavior of market participants are beyond dispute.<sup>78</sup> In the Commission’s words, “[c]ompetition can protect consumers better than the best-designed and most vigilant regulation.”<sup>79</sup> And, as Chairman Wheeler has explained, “the best way to serve consumers and economic growth is through the push and pull of competition.”<sup>80</sup> Hence his assertion that “where competition exists, the Commission will protect it,”<sup>81</sup> because the “best answer for limited competition is more competition, plain and simple,”<sup>82</sup> *not* regulation.

For that competition to take place, like parties must be regulated in like fashion. This principle, sometimes known as “competitive neutrality” and/or “regulatory parity,” has been at

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<sup>78</sup> See, e.g., Alberto Alesina *et al.*, *Regulation and Investment*, 3.4 J. of the European Econ. Ass’n 791 (2005); Graeme Guthrie, *Regulating Infrastructure: The Impact on Risk and Investment*, 44.4 J. on Econ. Lit. 925 (2006); Mark Armstrong and David Sappington, *Regulation, Competition, and Liberalization*, J. of Econ. Lit. 325 (2006).

<sup>79</sup> See *Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15351 ¶ 204 (1997). See also *Comsat Corp., Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier et al.*, 13 FCC Rcd 14083 ¶ 134 (1998).

<sup>80</sup> Tom Wheeler, Chairman, Fed. Commc’ns Comm’n Remarks at the COMPTTEL Fall Convention and Expo (Oct. 6, 2014).

<sup>81</sup> *Id.*

<sup>82</sup> Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, Remarks at 1776 Headquarters: The Facts and Future of Broadband Competition (Sept. 4, 2014).

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the heart of the Commission’s policy framework.<sup>83</sup> For example, in light of nondominant treatment of CLEC enterprise broadband services, the Commission eliminated dominant carrier regulation for ILEC offerings, saying this would “serve the public interest by eliminating the market distortions that asymmetrical regulation . . . causes”<sup>84</sup> by “promoting regulatory parity among providers.”<sup>85</sup> Other federal communications policies, in fields as diverse as numbering administration,<sup>86</sup> pole attachment rates,<sup>87</sup> and universal service,<sup>88</sup> are also based on the agency’s

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<sup>83</sup> The Commission has said that competitive neutrality means “neither unfairly advantag[ing] nor disadvantag[ing] one provider over another” in the application of Commission rules. *Federal-State Joint Bd. on Universal Service*, Report and Order, 12 FCC Rcd 8776 ¶ 47 (1997).

<sup>84</sup> *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 ¶ 49 (2008); *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 ¶ 46 (2007) (“*AT&T Forbearance Order*”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Memorandum Opinion and Order, 22 FCC Rcd 19478 ¶ 45 (2007) (“*Embarq Forbearance Order*”).

<sup>85</sup> *AT&T Forbearance Order*, 22 FCC Rcd at 18732 ¶ 49; *Embarq Forbearance Order*, 22 FCC Rcd at 19504 ¶ 48.

<sup>86</sup> See 47 U.S.C. § 251(e)(2) (providing that the “cost of establishing telecommunications numbering administration arrangements and number portability . . . be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission”).

<sup>87</sup> See *Implementation of Section 224 of the Act; A National Broadband Plan for our Future, Report and Order and Order on Reconsideration*, 26 FCC Rcd 5240 ¶ 217 (2011) (“Where incumbent LECs are attaching to other utilities’ poles on terms and conditions that are comparable to those that apply to a telecommunications carrier or a cable operator – which generally will be paying a rate equal or similar to the cable rate under our rules – competitive neutrality counsels in favor of affording incumbent LECs the same rate as the comparable provider (whether the telecommunications carrier or the cable operator).”).

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commitment to competitive neutrality. Nor is the Commission the only federal entity to recognize the need to advance the public interest through competitively neutral rules.<sup>89</sup>

Courts have recognized that regulatory parity is necessary as a matter of justice. Agencies cannot “treat like cases differently”;<sup>90</sup> rather, they must “apply the same criteria” and “provide a consistent approach” to “all [parties] petitioning for exemptions” from general requirements.<sup>91</sup> No deference is owed to an agency that “reached diametrically opposite conclusions on the basis of virtually [identical] situations”; the broad discretion afforded regulators does not give agencies authority to “arbitrarily treat similar situations dissimilarly.”<sup>92</sup>

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<sup>88</sup> See *Connect America Fund*, 29 FCC Rcd 15644 ¶ 66 (2014) (citing the “principle that universal service policies be equitable and nondiscriminatory and the principle of competitive neutrality”).

<sup>89</sup> Reply Comments of the U.S. Department of Justice, CC Docket No. 90-132, at 26 n.42 (filed Sept. 28, 1990) (“Applying different degrees of regulation to firms in the same market necessarily introduces distortions into the market; competition will be harmed if some firms face unwarranted regulatory burdens not imposed on their rivals.”).

<sup>90</sup> *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985) (quoting *United States v. Diapulse Corp. of Am.*, 748 F.2d 56, 62 (2d Cir. 1984)).

<sup>91</sup> *Id.* at 691, 695; see also *Marco Sales Co. v. FTC*, 453 F.2d 1, 7 (2d Cir. 1971) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654, 660 (5th Cir. 1964) (Brown, J., concurring), *rev’d on other grounds*, 382 U.S. 46 (1965)) (an agency is not permitted to “grant to one person the right to do that which it denies to another similarly situated. There may not be a rule for Monday, another for Tuesday . . .”).

<sup>92</sup> *Local 777, Democratic Union Org. Comm. v. NLRB*, 603 F.2d 862, 869, 872 (D.C. Cir. 1978). See also *id.* at 870 (NLRB reached “essentially a different decision on essentially the same facts”).

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**B. The Commission Should Preserve Competitive Neutrality And Refuse to Regulate Like Participants Differently.**

As detailed above, certain CLECs<sup>93</sup> in this proceeding have asked the Commission to dismiss regulatory parity and artificially favor their own offerings over those of the ILECs. These requests run counter to the Commission’s competitively neutral approach, and are grounded in fundamentally flawed economic premises. Regardless of historical positioning, all companies seeking to compete in the special access market face similar challenges, especially as the market demands that service be deployed to formerly unserved buildings, cell sites, and other locations.

Whether ILEC, CLEC, cable provider, fixed wireless company, or none of the above, in 2016 no company enjoys unique advantages in the provision of dedicated transmission offerings. No one company is deployed everywhere. No one company can avoid leasing capacity on third-party fiber rings. No one company is free from the expense associated with building laterals to facilitate new deployment. Breaking ground on new deployment requires anteing up capital for sunk costs no matter how a company is classified or what marketplace position it happened to hold in 1996. And once those sunk costs have been incurred, the immobile nature of the investment incents providers to remain in the market, no matter who they are.<sup>94</sup>

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<sup>93</sup> See, e.g., Joint CLEC Comments at 64 (asking the Commission to adopt a re-regulate and adopt a presumption that incumbent LECs, in 2016, warrant regulation in “all dedicated service markets”); Comments of Sprint at 80 (“[T]he Commission must correct the unreasonable impact of the now-discredited triggers and return areas that are currently subject to Phase II pricing flexibility to the price cap regulatory regime.”).

<sup>94</sup> Richard Gilbert, *Mobility Barriers and the Value of Incumbency*, in 1 Handbook of Industrial Organization 520 (Richard Schmalensee & Robert Willig eds., 1989). See also Compass Lexecon Report at 6-7.

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Commenters' myopic focus on ILECs leads them to ignore the basic fact that other providers are becoming ever-more-relevant players in the dedicated transmission markets. Fewer than half the top eight Ethernet providers are ILECs. Rather, two of the top eight are Level 3 (the second-largest provider of Ethernet services) and XO, both of whom here lobby the Commission to skew the rules of the game further in their favor.<sup>95</sup> More broadly, the notion that CLECs such as Level 3 and Comcast deserve special treatment against an ILEC such as Frontier is preposterous, particularly when one compares the companies' respective market capitalizations, communications service revenues, and national market shares for business carrier Ethernet services:

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<sup>95</sup> Vertical Systems Group, *supra* note 6.

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	Level 3	Comcast	Frontier
<b>Market Capitalization</b> <sup>96</sup>	\$17.077 Billion	\$140.389 Billion	\$4.964 Billion
<b>Communications Service Revenue (FY 2015)</b> <sup>97</sup>	\$8.229 Billion	\$37.605 Billion	\$3.759 Billion
<b>Business Carrier Ethernet Services, Market Share by Revenue (2014)</b> <sup>98</sup>	14.8% of the total national market	3.1% of the total national market	Unranked by Frost and Sullivan (less than 3% of the total national market)

Commenters seeking regressive ILEC-specific regulations also hypocritically avoid addressing what is for them a problematic market reality: The very significant number of locations served exclusively by a non-ILEC provider. The record indicates that some **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** percent of locations fit this description.<sup>99</sup> If, *arguendo*, the tortured economic theories used by CLECs to justify ILEC-specific regulation possessed any intellectual force, logic would dictate that the same regulations apply to CLECs, cable providers, or other, where *they* are the only provider present.

<sup>96</sup> *Level 3 Communications, Inc. – Financial Highlights*, SNL Kagan, <https://www.snl.com/InteractiveX/reports.aspx?ID=4077948&KeyReport=580> (last visited Feb. 16, 2016); *Comcast Corporation – Financial Highlights*, SNL Kagan, <https://www.snl.com/InteractiveX/reports.aspx?ID=4057180&KeyReport=580> (last visited Feb. 16, 2016); *Frontier Communications Corporation – Financial Highlights*, SNL Kagan, <https://www.snl.com/InteractiveX/reports.aspx?ID=4057107&KeyReport=580> (last visited Feb. 16, 2016).

<sup>97</sup> *Id.*

<sup>98</sup> Frost & Sullivan, *Business Carrier Ethernet Services Market Update, 2015: United States*, at 34 (Sept. 2015).

<sup>99</sup> Sprint Comments, Declaration of Stanley M. Besen and Bridger H. Mitchell, at 14.

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Not surprisingly, proponents of ILEC-specific regulation are silent on this natural extrapolation of their theories.

In short, then, to “minimize marketplace distortions arising from regulatory advantage,”<sup>100</sup> the Commission should reject calls by parties seeking to leverage special access regulations to their own advantage, and instead continue forward with the well-grounded pro-competition policies that have motivated it to date.

**IV. CONCLUSION**

For the reasons discussed above, the Commission should reject the self-serving analyses submitted by those seeking expansive regulation in this docket, and should adopt a regime that expands, rather than rescinds, the deregulation of ILEC special access pricing.

Respectfully submitted,

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<sup>100</sup> *Telephone Number Requirements for IP-Enabled Services Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531 ¶ 1 (2007).