WILKINSON) BARKER) KNAUER) LLP

1800 M STREET, NW
SUITE 800N
WASHINGTON, DC 20036
TEL 202.783.4141
FAX 202.783.5851
WWW.WBKLAW.COM
RUSSELL P. HANSER
202.383.3408
RHANSER@WBKLAW.COM

REDACTED – FOR PUBLIC INSPECTION

February 26, 2016

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

Re: *CenturyLink Rebuttal, WC Docket No. 15-247*

Dear Ms. Dortch:

CenturyLink, by its attorneys, hereby files the ***PUBLIC REDACTED*** version of its Rebuttal in the above-referenced docket. CenturyLink is separately filing the ***HIGHLY CONFIDENTIAL*** version of this pleading by hand delivery.

Please contact the undersigned if you have any questions.

Sincerely,

WILKINSON BARKER KNAUER, LLP

Russell P. Hanser

Attachment

REDACTED – FOR PUBLIC INSPECTION

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

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

CENTURYLINK REBUTTAL

Craig J. Brown
CENTURYLINK, INC.
1099 New York Avenue, NW, Suite 250
Washington, D.C. 20001
(303) 992-2503

Russell P. Hanser
Brian W. Murray
Frank W. Krogh
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, D.C. 20036
(202) 783-4141

February 26, 2016

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EXECUTIVE SUMMARY

The Oppositions filed in response to the Direct Cases in this docket provide no basis on which to invalidate any of the terms and conditions under investigation. To start, they fail to demonstrate any market power in the provision of high-capacity dedicated services. Even if they did demonstrate such power, CLECs have not shown that the specific provisions under consideration violate Sections 201 or 202 of the Communications Act. To the contrary, the extensive precedent discussed by CenturyLink and others demonstrates conclusively that the practices at issue are procompetitive and lawful.

For reasons discussed at length in the special access rulemaking, the Bureau should reject CLECs' counterfactual claims regarding the state of the high-capacity transmission marketplace. Defeatist rhetoric is no match for facts – in particular, the extensive evidence of near-ubiquitous competitive deployment and customer choice that has been compiled in the special access rulemaking. Even if the evidence demonstrated market power (and it surely does not), that would not be the end of the inquiry. Rather, the Bureau will have to answer the narrow legal questions it initially identified in its order initiating this investigation by applying the law to the facts presented regarding the operation of the specific terms and conditions at issue. The CLECs thus must show that the particular tariffs under investigation violate specific statutory provisions. They have not done so, nor can they.

To the extent the CLECs address specific contractual provisions, the vast majority of their arguments do not apply to the CenturyLink plans at issue – specifically, the Regional Commitment Program ("RCP") and Special Access Term Discount Plan ("TDP"). Some CLECs address the four ILECs involved in this investigation collectively, as if their pricing plans were uniform, but that is not true. In particular, CenturyLink has explained clearly that the percentage commitments in its plans do not require customers to purchase from it any particular percentage of their overall purchasing requirements. Thus, CenturyLink's plans do not "lock up" customers as these CLECs claim – a point evidenced by the steady exodus of customers from the RCP and TDP over time. An even more egregious misstatement is the Joint CLECs' incorrect allegation that CenturyLink's RCP requires particular levels of historic spends. That is unequivocally wrong: CenturyLink has specifically stated that the discounts set forth in the RCP and TDP do not tie customers to their prior purchase volumes (or any proportion thereof), as all other CLECs involved in this proceeding appear to recognize. Thus, the Joint CLECs' Section 202(a) discrimination argument, which relies on commitments tied to past purchases, is inapplicable as to CenturyLink.

When they do address CenturyLink's actual practices, CLECs' assertions fall flat as a matter of law, fact, and common sense. The CLECs' complaints about the marketplace and other types of contracts or contract provisions that they would have preferred are beside the point. Any contract can be reimagined in ways that further benefit one contracting party, but that does not answer the question of whether the pricing plans at issue are lawful.

CLECs also have failed to rebut (or in most cases even address) the extensive precedent holding that terms such as those used by CenturyLink are lawful. In its White Paper, CenturyLink demonstrated that, under well-settled competition-law precedent, the RCP and TDP are not exclusive dealing arrangements (because they do not require a customer to commit all, or even a certain portion, of its total demand to CenturyLink), and present no competitive threat. Furthermore, even if these pricing plans *were* exclusive dealing arrangements, they would still be lawful because CenturyLink is not a *monopoly* provider of high-capacity transmission. In addition, the business justifications for the RCP's and TDP's discounts, including CLECs' use of some of the same discount pricing practices, are the most important consideration in assessing the legality of this type of contract under the antitrust laws and would salvage these plans even if they were otherwise suspect (which they are not). As CenturyLink has explained, the terms and conditions under review here serve business purposes long endorsed by the courts: they provide certainty, ensure demand and supply, and protect against price fluctuations, protecting seller and buyer alike.

Not surprisingly, most CLECs avoid any discussion of this overwhelming precedent. When they do address a small handful of the cases, they misstate the relevant holdings. The Joint CLECs rely heavily on other authorities, including an irrelevant FTC consent decree, in an effort to surmount CenturyLink's caselaw. In doing so, they fail to appreciate that agency's longstanding practice of including in settlements terms that go beyond generally applicable legal mandates, and inadvertently underscore how different the RCP and TDP are from the type of exclusionary contract that raises antitrust issues.

Moreover, CLEC criticisms of ILEC migration provisions are inapposite and/or easily rejected with respect to CenturyLink's plans. RCP customers can reduce their original commitment when migrating to higher-capacity services and may shift services among locations, so long as they meet their revenue commitments – which, again, they select in the first instance. The TDP also allows customers to shift the circuits in use without penalty, and to reduce their commitments during the contract term by migrating to other services. These plans do not present the difficulties cited by some critics, and in fact already meet the going-forward requirements proposed by Windstream.

The Bureau also should reject the CLECs' suggestion that it is unlawful for a contract to include provisions that govern the length of the contract's term and/or that are designed to enforce the contracting parties' mutual commitments. The fact that a lawfully created contract holds both sides to the terms of the bargain struck is not at all remarkable, much less unlawful. In fact, courts that have evaluated terms similar to those in CenturyLink's RCP and TDP have made it clear that such volume commitments, shortfall fees, and early termination penalties are lawful and enforceable. In so doing, the courts have recognized that agreements containing volume commitments reflect a *quid pro quo* that allows purchasers of a service to enjoy lower rates and justifies capital expenditures by the seller of a service. Furthermore, the courts are understandably reluctant to substitute their own, *ex post* conclusions regarding the proportionality of shortfall and early termination fees for the *ex ante* estimates of contracting parties. The logic of these decisions applies equally to CenturyLink's plans at issue. Nor are the contracts here the result of economic duress or otherwise of a type that would be unenforceable under principles of contract law.

Finally, as CenturyLink's White Paper explained, several of the terms and conditions at issue here are employed by the very CLECs that have long complained about ILEC practices. The fact that competitors in a market engage in a practice itself demonstrates that the practice is not an unlawful exercise of market power.

For the reasons discussed herein, the Bureau should close the instant investigation and find the provisions under consideration lawful.

REDACTED – FOR PUBLIC INSPECTION

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

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

CENTURYLINK REBUTTAL

CenturyLink hereby rebuts arguments responding to its Direct Case filed in response to the Wireline Competition Bureau's ("Bureau's") *Designation Order* in the above-referenced proceeding.[1]

INTRODUCTION

The White Paper submitted with CenturyLink's Direct Case made two core points. First, the market for dedicated high-capacity transmission is extremely competitive and continuously becoming more so.[2] Second, the terms and conditions found in the CenturyLink discount plans under investigation – the Regional Commitment Program ("RCP") and Special Access Term Discount Plan ("TDP") – are just, reasonable, and lawful.[3] Nothing in the six Oppositions filed in this docket undercuts either of these points.

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

[2] *See* CenturyLink White Paper on Discount Plan Terms and Conditions, WC Docket No. 15-247, at 4-17 (filed Jan. 8, 2016) ("CenturyLink White Paper").

[3] *See id.* at 17-49.

To be sure, critics of these and other ILEC pricing plans spill much ink complaining about the marketplace generally. But, as CenturyLink has explained more fully in the Special Access rulemaking docket, their analyses of the data submitted to the Bureau are rife with methodological errors. More tellingly, these parties have been forced by the evidence to occupy increasingly indefensible analytical ground, arguing (among other things) that the Commission must ignore the offerings of cable providers, of many CLECs themselves, and of others selling indisputable substitutes for ILEC offerings; that competitors cannot feasibly extend their networks even by tens of feet to serve new customers; and that the proliferation of scalable Ethernet offerings provisioned by parties other than the ILECs is simply irrelevant to the state of the market for DSn services. CenturyLink trusts that the Commission will repudiate these efforts to assume away all competition.

The Oppositions filed in this docket ultimately do turn to attacks on ILEC discount plans, but the resulting record is largely bereft of arguments linking those plans to specific violations of Section 201 or 202. In many respects, CLECs seem to contend merely that the contracts into which they freely entered with incumbents could have (and, therefore, *should* have) been designed to benefit them even more, whether by providing discounts not subject to any conditions, by allowing the CLECs to breach their duties mid-contract without any corresponding penalties, or otherwise. In this regard, the CLECs' main complaint is not that the contracts are unlawful, but rather that they are *contracts* – *i.e.*, that they hold parties to their mutually agreed-upon reciprocal obligations, just like contracts in all other industries. Such complaints simply are not cognizable under the Communications Act.

When they do focus on specific terms, the Oppositions often focus on terms that CenturyLink does not employ – a point that many (though, sadly, not all) CLECs appear to recognize. And even when they do focus on terms found in the RCP and/or TDP, the Oppositions fail to rebut – and in most cases, fail even to acknowledge – the wealth of precedent set out in CenturyLink's White Paper, which demonstrated that such provisions are lawful and have in fact been adjudicated *pro*competitive, not the reverse.

In short, critics of the ILEC plans have failed to demonstrate that any terms set out in the RCP or TDP violate the Communications Act. The marketplace is competitive, which itself necessitates a finding of lawfulness. But even if it were not, the overwhelming weight of precedent shows that the CenturyLink agreements at issue here, and the terms and conditions therein, are of a sort regularly upheld and enforced by the courts and the Commission. The Bureau should resist rent-seeking requests for it to break new legal ground here. There simply is no basis for holding that well-worn principles of competition and contract law are somehow inapplicable in the dedicated transmission sector. Accordingly, CenturyLink respectfully requests that the Bureau declare its terms and conditions lawful and close this investigation.

DISCUSSION

I. THE BUREAU SHOULD REJECT CLECS' COUNTERFACTUAL CLAIMS REGARDING THE STATE OF THE MARKETPLACE

As the *Designation Order* makes clear, this investigation presents a set of narrow legal questions, all of which involve an assessment of whether particular types of contract terms are lawful under Sections 201 and 202 of the Act.[4] Of course, the Bureau will answer those questions against the backdrop of the dynamic and constant changes that are occurring in the high-capacity transmission segment of the communications marketplace. While the CLECs

[4] *Designation Order*, 30 FCC Rcd at 11429-30 ¶ 24 (designating the issues under investigation).

expend considerable effort conjuring images of a gloomy competitive environment in which their only options are the pricing plans at issue here,[5] their defeatist rhetoric is no match for facts – in particular, the extensive evidence of near-ubiquitous competitive deployment and customer choice that has been compiled in the special access rulemaking. CenturyLink will not repeat that discussion here, but refers the Bureau to that material.[6] Among other things, CenturyLink and others have explained at length why the Commission must account for cable-based offerings, Ethernet services offered by CLECs using unbundled network elements ("UNEs"), and various other offerings that provide meaningful competition in the high-capacity marketplace.[7] The marketplace continues to grow and change – the day before this Rebuttal was filed, Vertical Systems Group ("VSG") published its U.S. Carrier Ethernet Leaderboard results for year-end

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[5] *See generally, e.g.*, Comments of TDS Metrocom, LLC, WC Docket No. 15-247, at 3 & Attach. A (attaching its comments from the rulemaking) (filed Feb. 5, 2016); Sprint Corp. Opposition to ILEC Direct Cases, WC Docket No. 15-247, at 5-22 (filed Feb. 5, 2016) ("Sprint Opp."); Comments of XO Communications, LLC on ILECs' Direct Cases, WC Docket No. 15-247, at 2-28 (filed Feb. 5, 2016) ("XO Opp."); Opposition of Windstream Services, LLC, WC Docket No. 15-247, at 3-12 (filed Feb. 5, 2016) ("Windstream Opp."). Except where noted, the term "CLEC" as used herein refers to parties that filed Oppositions to the Direct Cases submitted in this docket by the four ILECs, including traditional CLECs and some purchasers of those services, such as Sprint.

[6] Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) ("CenturyLink 2016 Comments"); Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) ("CenturyLink 2016 Reply Comments"). These filings are part of the instant record. *See Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, 30 FCC Rcd 13680, 13683-84 ¶ 10 (2015) ("[W]e believe that making the data and information from the rulemaking proceeding available more broadly to parties in the tariff investigation would best serve the public interest. . . . Therefore, the Bureau . . . [i]ncorporates the balance of the present record of the rulemaking, WC Docket No. 05-25, RM-10593, and information that becomes part of the record in this docket in the future, including all other confidential and highly confidential data, into the record of the tariff investigation . . . .").

[7] *See generally, e.g.*, CenturyLink 2016 Comments at 30-37; CenturyLink 2016 Reply Comments at 5-20, 26-31.

2015. It found among other things that Windstream had broken into the top tier of Ethernet providers, and that Cox had surpassed XO as a provider of Ethernet service.[8] VSG confirms, moreover, that the Ethernet market is growing overall. In this respect, CenturyLink commends some CLECs for acknowledging that Ethernet and DSn services are part of a single product market.[9] Given the extent of competition as well as the scalability of Ethernet products, this factor alone eviscerates any claim of ILEC market power and demands rejection of calls for additional regulation.

While assessment of the level of competition must inform the Bureau's legal analysis to some degree – even if any of the terms and conditions at issue here could be deemed unlawful in the presence of market power (and they cannot), they could not be so adjudicated in the absence of such market power[10] – it does not constitute the entirety of the task at hand. Instead, the Bureau will have to apply the law to facts presented regarding the operation of the specific terms and conditions at issue. Accordingly, to prevail here, it is not sufficient for the CLECs to show merely that the marketplace is not as competitive as the unrealistic utopia they claim is necessary. Rather, and more importantly, the CLECs must show that the particular tariffs under investigation violate specific statutory provisions.

Some CLECs appear to forget this obligation, suggesting that allegations of business outcomes not to their liking alone demonstrate unlawful terms and conditions and offering

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[8] Vertical Systems Group, 2015 U.S. Carrier Ethernet Leaderboard, Year-End 2015 (rel. Feb. 25, 2016), http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/.

[9] *See, e.g.*, Sprint Opp. at 6.

[10] *See* CenturyLink White Paper at 28-29, 32.

laundry lists of prescriptive requirements that they believe would benefit their businesses.[11] The Bureau must remain focused on the questions posed and decline to entertain these self-serving requests. As detailed in its Direct Case and herein, CenturyLink's terms and conditions are reasonable, procompetitive, and lawful.

II. THE VAST MAJORITY OF CLEC ARGUMENTS DO NOT APPLY TO THE CENTURYLINK PLANS

Even when the CLECs do address specific practices rather than their laments about the marketplace writ large, they more often than not train their fire at terms and conditions not raised by the two CenturyLink plans at issue. Some commenters simply address the four ILECs involved in this investigation collectively, without distinguishing between different carriers' alleged practices.[12] This approach misleadingly suggests that the ILECs' pricing plans are uniform and that any complaint about one also applies to the others. That is not true. More specifically, the CenturyLink plans at issue – the Regional Commitment Program ("RCP") and Special Access Term Discount Plan ("TDP") – do not include all of the same terms as the other ILEC plans and thus are not subject to the same litany of criticisms, regardless of their merits (or lack thereof). In fact, the record shows that in key respects, CenturyLink's terms are more appealing to customers, and that CenturyLink does not employ the practices about which critics complain the most.

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[11] *See, e.g.*, Windstream Opp. at 23-24; XO Opp. at 58-59.

[12] *See, e.g.*, Opposition of Birch Communications, BT Americas, EarthLink, INCOMPAS, Integra Telecom, and Level 3, WC Docket No. 15-247, at 5 (filed Feb. 5, 2016) ("Joint CLEC Opp.") (referring repeatedly to "the incumbent LECs" as a group but then mentioning "the Joint CLECs' individual experiences"); Sprint Opp. at ii (stating that "the incumbent LECs" charge shortfall and overage penalties).

A. Neither the RCP nor the TDP Requires Purchasers to Commit a Total Portion of Their Overall Requirements to CenturyLink Services.

First, the Joint CLECs improperly sweep CenturyLink into a broader indictment of "incumbent LECs' lock-up plans," sketching out an alleged strategy by which this bloc forces purchasers of dedicated services to acquire most if not all of their total requirements from a particular ILEC.[13] But the Joint CLECs' core premise – that "all of the lock-up plans conform to [the same] basic model" and merely "vary in their details"[14] is false. The RCP and TDP offer set discount levels – 22 percent for the RCP and between 15 and 30 percent for the TDP – that are unrelated to the proportion of the customer's total requirements acquired from CenturyLink. Thus, as CenturyLink already has explained clearly, the percentage commitments in its plans "do not establish exclusive dealing arrangements or otherwise undercut competition," even on a *de facto* basis. Instead, its plans "permit customers to purchase as much service as they wish from third-party suppliers without penalty."[15] The customer thus has the benefit of a discount on its

[13] *See generally* Joint CLEC Opp. at 13-24.

[14] *Id.* at 16.

[15] CenturyLink White Paper at ii, 3; *see also id.* at 19-20, 23-24. As CenturyLink has explained in even more detail:

> The plans' percentage commitments function primarily as a means to define the scope of the plans, rather than to "lock in" customer demand. Indeed, many customers have exited the RCP and TDP in recent years. These plans are, and always have been, optional. Moreover, in addition to purchasing special access services on a month-to-month basis, customers are free to remain in circuit-specific term plans, which provide similar discount levels and continue to be available today. The RCP and TDP also do not preclude special access customers from purchasing from alternate providers, as the plans' percentage commitments relate only to customers' purchases from CenturyLink.

CenturyLink Response, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Direct Case, WC Docket No. 15-247, at 14 (filed Jan. 8, 2016) ("CenturyLink Direct Case") purchases under the plan, as well as the freedom to take additional services elsewhere without forfeiting any discount.[16]

Nor is it accurate to assert that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[17] CenturyLink has stated that under both the RCP and the TDP, customers are free to purchase as much or as little as they want, based on their own assessment of their needs.[18] At least one CLEC seems to recognize implicitly this aspect of the CenturyLink plans.[19]

Any doubt about CenturyLink's ability to "lock up" customers in this manner should be eliminated by the steady exodus of customers from the RCP and TDP over time.[20] Indeed, some of the CLECs that have taken issue with the tariff discount plans under investigation in this docket have themselves negotiated new agreements with CenturyLink to replace their RCP

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[16] CenturyLink White Paper at 31-32. Of course, CenturyLink also has explained that even if its plans were deemed exclusive dealing arrangements, they still would be lawful because CenturyLink lacks monopoly power. *See generally id.* at 20-29.

[17] Joint CLEC Opp. at 27.

[18] *See* CenturyLink White Paper at 17-18 ("As a customer establishes a new RCP term, it reviews its need for services, determines the amount it wants to purchase from CenturyLink, and grooms the remainder to its own or third-party networks. *In this way, an RCP customer chooses whatever quantity of service it wishes to purchase during the plan's four-year term.* That level is then defined by a specific monthly revenue threshold or volume commitment.") (emphasis added); *id.* at 19 ("Under the TDP, a customer chooses whatever quantity of service it wishes to purchase during the plan's three- or five-year term.").

[19] *See* Windstream Opp. at 12-13 (discussing only Verizon and AT&T).

[20] CenturyLink White Paper at 27-28.

and/or TDP agreements or left CenturyLink entirely to purchase service from other providers.[21] The new agreements address these CLECs' individual service needs.[22] This belies any claims that they are "locked-in" to the RCP or TDP. CenturyLink remains willing to negotiate with any customer that approaches it with a need for a commercial agreement to address its specific needs.

B. Neither the RCP nor the TDP Requires Purchasers to Commit in One Term to Any Proportion of the Quantity to Which They Committed in a Prior Term.

Even more egregious is the Joint CLECs' incorrect allegation (peppered throughout its Opposition) that CenturyLink's RCP requires particular levels of historic spends, let alone higher percentages than other ILECs.[23] That is unequivocally wrong. As CenturyLink has explained, "the discounts set forth in the RCP and TDP do not require a customer to commit a certain portion of its overall demand to CenturyLink, *nor do they tie customers to their prior purchase volumes (or any proportion thereof)*," but instead "provide significant discounts to customers that in fact consume a quantity of service close to the volume they initially opted to purchase" at the beginning of that particular term.[24] Indeed, as explained above, the RCP and TDP do not tie discounts in any way to the volume of service purchased – whether on its own or in comparison

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[21] *Id.* at 48 n.146. CenturyLink filed these agreements in connection with the filing of its Direct Case, and they thus are available for inspection by the Bureau. *Id.* at 48.

[22] *Id.* Pursuant to the Commission's rules, CenturyLink previously filed contract tariffs summarizing those agreements. *Id.*

[23] *See, e.g.*, Joint CLEC Opp. at 2, 17 n.21, 79-80, 83.

[24] CenturyLink White Paper at 23 (emphasis added); CenturyLink Direct Case at 15-16 (stating that under the RCP, "customers are required to retain 95 percent of their initially-committed revenue under the plan over the term of the original commitment"); *see also* CenturyLink Direct Case at 28-32 (providing examples of how the percentage commitments operate).

to the customer's total requirements or past spend. This is not a matter of differing subjective interpretations but of straight-out error on the part of the Joint CLECs.

There should be nothing confusing about CenturyLink's practice in this respect. Indeed, all of the other CLECs involved in this proceeding appear to recognize – explicitly or implicitly, but in all events correctly – that CenturyLink does *not* require customers to commit to purchases based on historic spending levels.[25] Thus, the Joint CLEC either have suffered a simple (albeit important) misunderstanding, or have not sufficiently studied CenturyLink's plans or its descriptions of them. In either event, their complaints on this issue are inapplicable to CenturyLink.

In light of the above, the Joint CLECs' Section 202 argument does not apply to CenturyLink. They contend that basing percentage commitments and upper percentage thresholds on a customer's historic usage is unreasonably discriminatory under Section 202(a) because different quantities of service purchased by two customers that happen to have different prior usage levels are subject to the same discount, or, conversely, the same amount of service provided to two different customers is subject to different pricing.[26] Because the RCP and TDP commitments and discounts are not based on customers' prior usage, this point does not apply to CenturyLink's tariff pricing plans. RCP and TDP customers, large and small, choose their commitment levels based on their estimated needs, and the discounts and other mechanisms flow

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[25] *See, e.g.*, Windstream Opp. at 13 ("Specifically, in Windstream's experience, Verizon and AT&T can impose penalties if Windstream fails to reach minimum committed terms and volumes based on historic TDM special access purchase levels[.]"); Sprint Opp. at 24 (excluding CenturyLink from its discussion of ILECs' use of "prior-purchase based commitments").

[26] Joint CLEC Opp. at 44-47.

from that choice.[27] Accordingly, there is no "unlike" treatment of "like" services by CenturyLink.[28]

III. CLEC ARGUMENTS THAT DO APPLY TO THE CENTURYLINK PLANS LACK MERIT

Where CLECs *do* purport to address CenturyLink's actual practices (rather than attributing to it practices that may be followed by others), their criticisms fall flat as a matter of law, fact, and common sense.

A. Broad CLEC Complaints Regarding ILEC Discount Plans Do Not Establish Unlawful Behavior.

As noted above, much of the CLECs' advocacy veers from the specific legal issues identified in the *Designation Order* to broader complaints about the marketplace more generally and other types of contracts or contract provisions that they would have preferred – subjects that

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[27] *See supra* at 7. Although the Joint CLECs focus their Section 202(a) claim on plans involving commitments based on "historic purchase levels," *see id.* at 45, 46, which CenturyLink does not employ, CenturyLink notes for the record that there is nothing unlawful about affording similar or identical discounts to customers that adhere to their particular commitment levels, even when those commitment levels themselves differ. In that case, the discount is based not on the unit-cost savings associated with high volumes (as in a basic volume discount), but rather on the certainty provided by the volume commitment over the term of the plan. Put differently, two customers that commit to different volumes but both meet those commitments are "like" in the sense that they provide the seller with the same level of certainty – much as two customers that commit to different tariff or contract lengths are *un*like, and appropriately subjected to different discounts, even if they purchase the exact same service.

[28] It is difficult to envision how a discount program available to all customers willing to meet the conditions could possibly be discriminatory. *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14225 ¶ 156 (1996) (subsequent history omitted) (stating that "term discounts . . . are considered lawful under section 202(a)"); *MCI Telecommunications Corp. Revisions to Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 53 F.C.C.2d 572, 574 ¶ 7 (1975) ("[T]his provision does not discriminate within the meaning of Section 202(a) of the Act, since the credit is available to any subscriber. The fact that some subscribers may be unable to take advantage of the credit because of their financial condition is no more a discrimination than the fact that some potential subscribers to any communications service may be unable to afford that service.").

are outside the scope of this investigation and do not bear on its resolution.[29] Indeed, these CLECs appear to believe that their burden here is simply to show that they would be better off if ILECs offered them discounts with fewer requirements. That is not so. The question posed is not whether different terms and conditions would provide further benefit to purchasers of ILEC transmission – *any* contract can be reimagined in ways that further benefit one contracting party. Nor is the Bureau charged here with identifying instances in which one provider's offering can be interpreted as more beneficial than another's and to conclude – without even considering other aspects of the respective agreements – that the latter's contract must therefore be unlawful.[30] Rather, the question is whether the terms violate Section 201, Section 202, or both. CLECs largely ignore this question.

Integra's experience with **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** is an illustrative case in point.[31] Integra states that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** But that complaint has nothing to do with the lawfulness of **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. Rather, it concerns the question of how competitive the marketplace is – the central subject in the Commission's parallel rulemaking, where an even more robust record

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[29] *See supra* note 5.

[30] *See, e.g.*, XO Opp. at 47-52.

[31] Joint CLEC Opp. at 31.

[32] *Id.* at 31-32.

than is present here shows that the market is, in fact, robustly competitive. And even to that issue, Integra's anecdote **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[33] For purposes of this proceeding, all that Integra's example shows is that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** offered Integra the best deal available – which is a far cry from proving that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** was unlawful.

Relatedly, CLECs' broad suggestions that ILECs should be required to provide cost justifications for their terms and conditions[34] fail to pass even cursory scrutiny. Whether regarding rates themselves or the requirements associated with a voluntary discount plan, the intensive cost-of-service inquiry urged by these commenters has no place in today's dedicated high-capacity marketplace. The whole arc of the Commission's regulatory regime with respect to CenturyLink and other providers whose plans are under consideration here, from rate-of-

[33] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[34] *See* Joint CLEC Opp. at 9 ("[T]he incumbent LECs defend their percentage commitments as a means of compensating for circuit-specific early termination penalties that they do not collect when providing circuit portability and for other costs associated with implementing circuit portability. But the incumbents do not try to quantify these purported costs or to compare them to the extra profits they receive as a result of the volume commitments."); XO Opp. at 45 (complaining that Verizon and AT&T "failed to provide a cost study to justify their shortfall penalties").

return regulation to price-cap incentive regulation through pricing flexibility, has been designed to move away from the utilities-regulation model used in a prior era and towards a paradigm more similar to that governing other functioning markets showing equally robust competition. Outside the world of utilities regulation, in markets showing levels of competition similar to those found here, firms are rarely if ever expected to "prove up" their costs or their rates of return, much less the specific bases on which they offer non-predatory discounts. No regulator scrutinizes the discounts offered by auto dealers or soda manufacturers or providers of hundreds of other goods and services. Likewise, the Commission itself does not (and should not) pore over the cost basis for terms and conditions offered by CLECs, cable companies, and other competitors in the dedicated services market. Whatever the Bureau's views may be as to the outcome of the issues presented here, an analytical framework based on the cost-of-service principles from which the Commission has been working to escape for decades would reflect a step in very much the wrong direction.

B. No Commenter Has Rebutted the Extensive Case Law Showing That the CenturyLink Practices at Issue Pass Muster Under the Antitrust Laws and the Communications Act.

Nor have critics of the RCP and TDP refuted CenturyLink's showing that its terms and conditions are lawful. In its White Paper, CenturyLink demonstrated that the RCP and TDP are not exclusive dealing arrangements and present no competitive threat. They serve valid business purposes, do not foreclose competition, and are lawful. Courts have held in a variety of contexts that volume, market share and term discounts are procompetitive and do not violate the antitrust laws.[35] Moreover, because the RCP and TDP do not require a customer to commit all, or even a certain portion, of its total demand to CenturyLink or tie customers to their prior purchase volumes, such loyalty pricing plans do not foreclose competition in the manner of exclusive dealing contracts and thus do not raise any antitrust issues.[36] Cases such as *Barry Wright* show that, even where a customer agrees to buy a fixed amount that may well come close to its total needs, that contract is not considered an exclusive dealing arrangement that forecloses competition under the antitrust laws.[37] It is only when the contract affirmatively requires the purchaser to commit a certain proportion of its total requirements that exclusive dealing even comes into question. As described above, neither the RCP nor the TDP includes any such requirement. Furthermore, even if these pricing plans *were* exclusive dealing arrangements, they would still be lawful because CenturyLink is not a *monopoly* provider of high-capacity transmission, and entry barriers into the Ethernet market are not significant.[38]

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[35] *NicSand, Inc. v. 3M Co.*, 507 F.2d 442, 452-53 (6th Cir. 2007); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.3d 227, 231 (1st Cir. 1983) (Breyer, J.). *See also* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 768b4 (4th ed. Supp. 2015) ("Areeda & Hovenkamp").

[36] *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059-60, 1063 (8th Cir. 2000), *cert. denied*, 531 U.S. 979 (2000); *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 104, 110 n.24 (3d Cir. 1992) (holding that "[a]n agreement affecting less than all [of a buyer's] purchases does not amount to true exclusive dealing" under the antitrust laws, even though buyer agreed to purchase manufacturer's products "wherever legally permissible to do so" and contracts were designed "to shut ou[t] competitors") (internal quotation marks omitted); *Barry Wright*, 724 F.2d at 229-37.

[37] *See Barry Wright*, 724 F.2d at 229-37. *See also Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 200-01 & n.11 (7th Cir. 1979); *Tampa Elec. Co. v. Nashville Coal Co.*, 276 F.2d 766, 771 (6th Cir. 1960), *rev'd on other grounds*, 365 U.S. 320 (1961).

[38] *McWane, Inc. v. FTC*, 783 F.3d 814, 832 (11th Cir.), *motion to file pet. for cert. granted*, 136 S. Ct. 565 (2015) ("exclusive dealing arrangements" violate the antitrust laws only "when used by a dominant firm to maintain its *monopoly*"); *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011); *Concord Boat*, 207 F.3d at 1059.

As CenturyLink's White Paper explained, the business justifications for the RCP's and TDP's discounts – the need to provide predictability and assurance of supply and demand, as well as price protection, for both parties – are the most important consideration in assessing the legality of this type of contract under the antitrust laws, and can salvage an otherwise unlawful arrangement.[39] That CLECs also use some of these discount practices also weighs heavily in favor of their legality,[40] as does the fact that the RCP and TDP were responses to requests from the customers of CenturyLink's predecessor for discount plans based on a service commitment level.[41] The RCP and TDP thus have been shown to be lawful, two or three times over.

Not surprisingly, most commenters have avoided any discussion whatsoever of this overwhelming body of case law. Those few CLECs that did venture into this minefield tiptoed around the more compelling cases and have studiously avoided confronting the main issues addressed in the governing precedent. In fact, they have remained completely silent regarding the legal issue of business justifications under the antitrust cases, except to argue, against all of the record evidence, that there are no business justifications for these plans. As noted, under the precedents, the

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[39] *See Sterling Merch.*, 656 F.3d at 123 (plaintiff must show that "impairments" to competition resulting from exclusive dealing agreements "outweighed efficiencies or other economic benefits" in order to show antitrust violation). *See also Tampa Elec.*, 365 U.S. at 334; *McWane*, 783 F.3d at 833 (court must decide "whether the conduct's procompetitive effects outweigh its anticompetitive effects.") (citations omitted); *Concord Boat*, 207 F.3d at 1062; *Barr Laboratories*, 978 F.2d at 111; *Barry Wright*, 724 F.2d at 237-38.

[40] *See Kolon Indus. v. E.I. Dupont de Nemours & Co.*, 748 F.3d 160, 178 (4th Cir.), *cert. denied*, 135 S. Ct. 437 (2014) (exclusive dealing contracts not exclusionary where supplier's competitors also used such arrangements); *Sterling Merch.*, 656 F.3d at 124; *NicSand*, 507 F.3d at 454.

[41] *See Kolon*, 748 F.3d at 178; *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 77-83 (3d Cir. 2010); *NicSand*, 507 F.3d at 452-54 (exclusive dealing contracts with deep discounts sought by customers are not anticompetitive).

manifest business justifications for the RCP and TDP are sufficient to uphold the legality of those plans, irrespective of the degree of market foreclosure or CenturyLink's market power.[42]

Though the CLECs do attempt to distinguish a handful of the cases CenturyLink discussed, their efforts fail. Sprint and the Joint CLECs focus first on the *BellSouth* case.[43] They raise technical arguments that it addresses only discrimination in favor of ILEC affiliates under Section 272, rather than the broader concerns of Sections 201 and 202, and that it did not involve the same discount structures contained in the challenged ILEC tariff plans.[44] Those points are true, but unimportant. As CenturyLink explained, *BellSouth* simply illustrates that courts are loathe to discourage parties, under a variety of rubrics, from negotiating "bargain[s] containing terms that both benefit and burden subscribers" and that nondiscrimination provisions generally should not be read to require the "inefficiencies" of "frustrating . . . attempts to maintain stable utilization rates . . . or to lower . . . prices."[45] The Joint CLECs answer *BellSouth* with the assertion that the RCP and TDP do not really offer any discounts at all, which is demonstrably absurd.[46]

Moving on to the antitrust cases, the Joint CLECs assert, with no citation of authority, that the Commission is not bound by antitrust precedent.[47] They do not dispute, however, the more relevant point that the Bureau may not hold to be anticompetitive under the Communications Act behavior that the courts have made clear is *procompetitive* under the

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[42] *See Sterling Merch.*, 656 F.3d at 123. *See also Tampa Elec.*, 365 U.S. at 334; *McWane*, 783 F.3d at 833.

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

[44] *See* Sprint Opp. at 37-38; Joint CLEC Opp. at 62-64.

[45] *BellSouth*, 469 F.3d at 1056-60.

[46] Joint CLEC Opp. at 64.

[47] *Id.* at 67.

antitrust laws.[48] Joint CLECs rely heavily on a consent decree entered into by Intel Corp. with the FTC.[49] All that the Joint CLECs can say about the decree is that it prohibited Intel from conditioning discounts on the share of a customer's total requirements (*i.e.*, purchases from all providers) that are purchased from Intel.[50] This is irrelevant here for two core reasons. First, *Intel* was a negotiated settlement having no precedential value at all. Parties enter into hundreds of consent decrees with the FTC every year, often agreeing to behavioral limitations not otherwise required by law. Indeed, the Supreme Court has expressly endorsed the FTC's authority to "fence in" parties with whom it enters into consent decrees, using "provisions . . . that are broader than the conduct that is declared unlawful."[51] Parties agree to be "fenced in" in order (among other reasons) to mitigate monetary penalties and avoid the cost of litigation. Thus, one entity's settlement concessions do not establish the state of the law for other actors. In any case, the Intel commitment is irrelevant, because it concerned Intel's ability to condition discounts on the share of a customer's total requirements purchased from Intel. As explained above, the RCP and TDP contain no such requirements or exclusive dealing provisions.

Sprint argues that *Barry Wright* is irrelevant because it addressed only a predatory pricing claim and did not involve any of the practices at issue here. This is wrong. After rejecting a

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[48] *See* CenturyLink White Paper at 20 n.65.

[49] *Intel Corp.*, Decision and Order, FTC Docket No. 9341 (Oct. 29, 2010), https://www.ftc.gov-/sites/default/files/documents/cases/101102inteldo.pdf.

[50] Joint CLEC Opp. at 68.

[51] *Telebrands Corp. v. FTC*, 457 F.3d 354, 357 n.5 (4th Cir. 2006). As the Supreme Court has summarized the doctrine: "The [FTC] is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. 'Having been caught violating the Act, respondents "must expect some fencing in."'" *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (quoting *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957)).

claim that a supplier's discounts were anticompetitive or exclusionary,[52] the court addressed a claim that the discounts, which were negated in the event of cancellation by the customer, were part of an alleged requirements contract that was exclusionary and more restrictive than legitimate business considerations could justify.[53] In the latter portion of the opinion, then-Judge Breyer held that the agreement was *not* the type of requirements contract raising concern under the antitrust laws, because the buyer "did not actually promise to buy all its requirements from [the monopoly supplier]; it entered into" contracts "for . . . fixed dollar amount[s]"[54] – amounts that the buyer predicted would be equal to its needs for two years and over 70 percent of its needs in a third year.[55] Judge Breyer explained that this did not render the agreement an unlawful requirements contract:

> A true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others any excess amount that he may want. This flexibility is important here, for it left [the buyer] the legal power to buy small (and then . . . larger) amounts from [a competitor] should they have become available.[56]

Thus, the contract at issue was "not 'exclusionary'" under the Sherman Act.[57] Similarly, the RCP and TDP are also contracts for fixed amounts of service that are offered at a discount that is

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[52] *See Barry Wright*, 724 F.2d at 230-36.

[53] *Id.* at 230, 236-40.

[54] *Id.* at 237.

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

[56] *Id.* at 237.

[57] *Id.* at 238. *See also W.H. Brady Co. v. Lem Prods., Inc.*, 659 F. Supp. 1355, 1374 (N.D. Ill. 1987) (distribution contracts that set "the annual amount to be ordered" "at a level estimated to be the customer's annual need," but "did not expressly prohibit . . . customers from buying . . .

conditioned on the customer's meeting the terms of the contract. RCP and TDP customers are also free to purchase additional amounts of services – whether legacy DSn, or, more likely, Ethernet services – from other carriers.[58] Sprint stresses that the discount conditions in *Barry Wright* were not labeled "shortfall fees" or "loyalty commitments." That superficial distinction, however, made no difference to the outcome of that case and does not affect its key relevance to this investigation.

Sprint also insists that *Concord Boat* and other cases are distinguishable because there were no purchase commitments in those cases. The point of *Concord Boat*, however, is simply that it shows that discount programs are not tantamount to exclusivity arrangements.[59] Sprint overlooks cases holding that a contract for a fixed amount of goods or services at a discounted price is likewise not an exclusive dealing contract raising antitrust issues.[60]

Joint CLECs cite *ZF Meritor* for the proposition that contracts effectively requiring a customer to purchase a large proportion of its requirements from a given seller, even in the absence of an explicit requirements provision, can be viewed as *de facto* exclusive dealing

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from other manufacturers," were not unreasonable requirements contracts under the Sherman Act).

[58] The fact that a buyer with declining need for DSn service might have no need for "additional" legacy capacity beyond the amount committed under a plan is irrelevant in this regard. What matters is that a purchaser can serve any new needs via any technology, any capacity, and any provider without at all affecting the terms of its purchases from CenturyLink.

[59] CenturyLink White Paper at 25 (citing *Concord Boat*, 207 F.3d at 1059-60, 1063).

[60] *See Barry Wright*, 724 F.2d at 229-37. *See also Magnus Petroleum*, 599 F.2d at 200-01 & n.11; *Tampa Elec.*, 276 F.2d at 771. Sprint also argues that various Commission orders recognizing the legitimacy of volume and term discounts are irrelevant, because, *inter alia*, they depend on competitive conditions. Sprint Opp. at 39. In fact, orders such as *Private Line Rate Structure and Volume Discount Practices*, 97 F.C.C.2d 923, 945-48 ¶¶ 36-40 (1984), were released when the telecommunications industry was far less competitive than the special access market is now.

contracts under the antitrust laws.[61] In that case, however, customers were effectively required to meet "market penetration targets" – that is, they were required to purchase a high percentage of their total requirements (90 percent in most cases) from the seller in order to receive certain rebates – and the seller threatened to cut them off if they failed to meet those targets.[62] Thus, the market penetration targets were not merely a condition for receiving rebates; they were "mandatory purchase requirements" constituting "*de facto* exclusive dealing" arrangements.[63]

Here, there is no such coercion and no exclusive dealing agreements, *de facto* or otherwise. The RCP and TDP provisions under investigation do not involve the termination of service under any circumstances, and they are not based on a "market penetration" or any other type of requirements or exclusive dealing "target." In fact, CenturyLink does not know how much service CLECs purchase from other providers – it knows only how much the customer buys from CenturyLink. Unlike the arrangements in *ZF Meritor*, they are contracts for a fixed volume of service, which raise no antitrust issues.[64]

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[61] *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013), cited in Joint CLEC Opp. at 69. Joint CLECs also discuss bundled discounts, Joint CLEC Opp. at 70, which are irrelevant to the RCP and TDP.

[62] *ZF Meritor*, 696 F.3d at 282-83.

[63] *Id.* at 282.

[64] *See Barry Wright*, 724 F.2d at 229-37; *Magnus Petroleum*, 599 F.2d at 200-01 & n.11; *Tampa Elec.*, 276 F.2d at 771. Joint CLECs also cite economic literature for the proposition that "exclusive" wholesale contracts with CLECs "can raise competitive concerns" and the unremarkable observation that contracts that account for a significant portion of total customer demand can make life difficult for competitors. Joint CLEC Opp. at 64-66. As discussed above, however, the RCP and TDP are not "exclusive" contracts under the antitrust laws, and, as Areeda and Hovenkamp point out, the fact that one competitor wins a large portion of a customer's business and that this reduces opportunities for its competitors with respect to that customer is not a cognizable harm under competition law. "Of course, higher output injures rivals, because less of the market remains for them. But to protect rivals from a firm's output-increasing

ZF Meritor is relevant, however, insofar as it highlights the importance of business justifications and competitors' use of the same techniques in saving even outright requirements contracts from invalidation:

> Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition. ("[I]t is widely recognized that in many circumstances, [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like— and pose no competitive threat at all.") For example, "[i]n the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand." From the seller's perspective, an exclusive dealing arrangement with customers may reduce expenses, provide protection against price fluctuations, and offer the possibility of a predictable market . . . .[65]

Accordingly, "due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason," taking into account "any procompetitive effects," including "[t]he use of exclusive dealing by competitors."[66] All of these factors militate strongly in favor of upholding the RCP and TDP.

Windstream endorses CenturyLink's case law highlighting the importance of business considerations in assessing supply contracts but argues that ILECs could still achieve their business planning goals if they allowed customers to count Ethernet circuits in meeting their total

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strategies puts competitors ahead of consumers . . . ." Areeda & Hovenkamp ¶ 749f2. *See also Barry Wright*, 724 F.2d at 236 ("[V]irtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought.").

[65] *ZF Meritor*, 696 F.3d at 270 (citations omitted).

[66] *Id.* at 271-72.

commitments under their pricing plans.[67] None of these cases, however, permitted the customer to compel revisions to a negotiated contract on the grounds that the mutual business benefits might be achieved in some alternative fashion. A customer planning to transition to Ethernet services is free to adjust its TDM service commitment accordingly. Also, contrary to Windstream's assumption, it is not clear that where a customer suddenly changes its plans and decides to transition TDM circuits to Ethernet in the middle of a contract term, such a change would not create planning and network issues for a carrier. The Bureau should resist Windstream's attempt to abrogate the ILECs' pricing plans.

Finally, Joint CLECs argue that *Ryder* does not support early termination fees in ILEC tariff pricing plans because that decision involved the validity of an early termination fee in an AT&T contract tariff where AT&T's own misconduct allegedly caused the customer to terminate the contract and incur the penalty.[68] Plaintiff did raise an argument about AT&T's alleged misconduct in *Ryder*, but that makes it an even *stronger* precedent here, where terminations do not arise from misconduct on the part of the contracting party collecting the termination fee. The Commission held in *Ryder* that "the parties expressly allocated the risk that AT&T might breach . . . and thereby harm" the customer and that, notwithstanding any AT&T breach, the customer "would still have to pay AT&T any charges incurred under [the contract tariff], subject to [customer's] recoupment of those charges as consequential damages" under certain circumstances.[69] Accordingly, the Commission concluded that "it is perfectly reasonable under

[67] Windstream Opp. at 20-22 & n.54.

[68] Joint CLEC Opp. at 89 n.224 (citing *Ryder Communications Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603 (2003) ("*Ryder*")).

[69] *Ryder*, 18 FCC Rcd at 13612 ¶ 21.

section 201(b) for AT&T to seek the benefit of its bargain – payment by [customer] of the early service termination charges."[70] *A fortiori*, in the more conventional situation where the carrier has not breached its tariff pricing plan, there is even less reason not to uphold early termination fees under Section 201(b).

C. CenturyLink's Migration Provisions Are Reasonable and Lawful.

Various parties complain about ILECs' circuit migration practices, as if the inadequacy of such provisions could render an otherwise lawful contract invalid. This is incorrect, especially as it concerns CenturyLink's plans, which are far better than "adequate."

As an initial matter, even the complete absence of migration provisions would not render a contract unlawful. As the material discussed above make clear, courts have held as a matter of black-letter contract law that, absent extraordinary circumstances not present here, parties are held to the bargain that they struck. Moreover, many contracts in a wide variety of industries include no provision whatsoever for a buyer's changing needs over the course of the contract term. Thus, even if CenturyLink's plans lacked any migration provisions (and they do not), this would not undercut their lawfulness.

In any event, as CenturyLink explained in its White Paper, both the RCP and the TDP employ generous migration options that confirm the lawfulness of its tariff offerings. RCP customers can reduce their original commitment when migrating to higher-capacity services and may shift services among locations, so long as they meet their revenue commitments. The TDP, too, allows customers to shift the circuits in use without penalty, and to reduce their

[70] *Id.* at 13613 ¶ 23.

commitments during the contract term by migrating to other services. These provisions further evidence the lawfulness of the CenturyLink terms under investigation.

The specific charges leveled by CLECs either are inapposite as to CenturyLink or fail to establish any valid legal concern:

- Sprint's claim that "[t]he incumbents . . . force their competitors into the unjust choice of (1) giving up portability, which undermines their ability to compete, or (2) agreeing to loyalty provisions,"[71] simply does not apply to CenturyLink. As just described, customers can migrate purchases to Ethernet, and even remove those purchases from their prior commitments, without making any loyalty commitment whatsoever. To the contrary, CenturyLink utilizes no term-to-term "loyalty" terms, and migration to Ethernet has the effect of *reducing* the customer's commitment during the term in progress.

- Windstream's request that the Commission "should require ILECs to count purchases of Ethernet toward the TDM special access spend commitment" and that "[e]arly termination liability also should not apply to any instance where a TDM special access connection is prematurely disconnected and replaced with Ethernet of at least equal capacity to the end of the previously committed term"[72] to CenturyLink's plans. As explained above, the RCP and TDP both reduce the customer's commitment to account for migrations to Ethernet (which of course is even better for the purchaser than counting the Ethernet purchase toward the pre-existing commitment). Moreover, these plans do not apply early termination fees in response to such migrations, assuming that basic conditions are satisfied.

- Joint CLECs contend that the RCP's migration provisions require customers to meet conditions that "most new Ethernet dedicated services purchased by competitive carriers do not meet," but provide no support whatsoever for that proposition.[73] In fact, multiple competitive providers *have* met the modest requirements and migrated services to Ethernet using these provisions.[74]

- Lightower and Lumos suggest that CenturyLink's migration provisions penalize customers that fall below their commitments because they migrate away from

[71] Sprint Opp. at 45.

[72] Windstream Opp. at 19.

[73] Joint CLEC Opp. at 38.

[74] In addition, customers are always free to establish a new Ethernet discount contract without migrating any circuits and subject to no migration requirements.

> CenturyLink in favor of a third party or self-deploy.[75] This, of course, is just another way of stating that ILECs should be barred from applying early termination or shortfall fees – *i.e.*, that CLECs should be permitted to breach their contractual commitments with no consequence. As CenturyLink and others have explained, the courts and the Commission have long disagreed with this position. Indeed, if it were accepted, ILECs would be unable to offer associated discounts in the first place.

Just as there is no merit to any claim that CenturyLink's migration options are somehow unlawful, there also is no force to the Joint CLECs' suggestion that ILEC discount plans force buyers into so-called "lock-up plans" by offering circuit portability – which customers "almost invariably" need – only in conjunction with discount programs.[76] The CLECs' claim that plans without migration provisions are inadequate stands in stark contrast to the fact that *their own* plans often lack migration options, or permit migrations only under severely limited conditions. If, as the Joint CLECs contend, circuit-specific plans (*i.e.*, those lacking migration options) are competitively irrelevant, this fact has not yet come to the attention of their business units.

In short, then, complaints regarding ILEC migration practices are meritless, at least with respect to CenturyLink.

D. Contracts are Not Voidable on the Ground That They Hold Both Sides to the Terms of an Arm's-Length Bargain.

Ultimately, CLEC complaints, insofar as they address the RCP and TDP, boil down to the simple claim that it is unlawful for a contract to enforce the contracting parties' mutual commitments for the length of the contract's term. They act as though a contract were a wholly one-sided arrangement rather than a mutual exchange of benefits. This is nonsense. Contracts of

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[75] Joint Comments of Lightower Fiber Networks and Lumos Networks, WC Docket No. 15-247, at 9-10 (filed Feb. 5, 2016) ("Lightower/Lumos Opp.").

[76] Joint CLEC Opp. at 17-18.

all types regularly include terms that reflect a *quid pro quo* between the contracting parties, and courts routinely uphold and enforce them.

In *Telecom International*, the Second Circuit affirmed a lower court decision upholding a series of contract tariffs containing shortfall fees. Resisting claims reminiscent of the CLECs' complaints here, the court noted the judiciary's institutional skepticism of after-the-fact "tales of oppression and betrayal – told by lawyers in a fashion worthy, not of Dickens, but perhaps, save for the lack of a carnal aspect, of afternoon television" – which turn out to be based on "a rather ordinary, reasonable, contractual allocation of risks."[77] It thus held, based on both the "reasonableness of the . . . contracts" and the filed tariff doctrine,[78] that the parties' "allocation of the risk of failure," by means of "shortfall penalties" as "protection . . . from the risk of opportunistic behavior," reflected a "rational," reasonable bargain."[79]

Courts have also made clear that, in addition to shortfall fees, volume commitments, ,early termination penalties, and other provisions at issue here are enforceable as a matter of contract law, in large part because they offer mutual benefit as opposed to unilateral burden. For instance, in *Global Crossing Bandwidth, Inc. v. OLS, Inc.*,[80] a federal district court found that a minimum monthly volume commitment in a telecommunications service agreement was an enforceable term that not only allowed Global Crossing's customers to receive a discounted rate for its services, but also justified Global Crossing's capital expenditures. The court also held that shortfall fees and an early termination fee equivalent to the monthly minimum usage charges for

[77] *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 188 (2d Cir. 2001).

[78] *Id.* at 200.

[79] *Id.* at 189-90.

[80] 566 F. Supp. 2d 196 (W.D.N.Y. 2008).

the remainder of the contract term were lawful. In a passage reminiscent of the Commission's decision in *Ryder*,[81] the court underscored the importance of respecting the bargain struck by the contracting parties:

> [T]he contracts also set forth a *quid pro quo* between the parties. Global gave consideration, in the form of rate-concessions, for the [monthly minimum usage charges]. Each agreement stated that the "make up minimum charges, shortfall charges and surcharges for which [defendants were] liable under this Agreement [we]re based on agreed upon commitments on [defendants'] part and corresponding rate concessions on Global Crossing's part …." Thus, this was not simply a one-sided provision, the benefits of which inured only to Global, but a mutual agreement imposing obligations, and conferring benefits, on both sides. Defendants were not "mom and pop" stores but sizeable entities engaging in a complex business involving millions of dollars.[82]

The court also declined to interfere with the payment mechanism to which the parties had agreed for early termination.[83] In enforcing that provision, it acknowledged the inherent difficulty of determining what a seller's revenue stream would have been if the contract had remained in force for its entire term. On the one hand, according to the court, had the defendants continued to utilize Global Crossing's services at low monthly usage levels "they would have been obligated to pay the [monthly minimum usage charges], but the cost to Global of providing the service would have been correspondingly low."[84] On the other hand, "had defendant's actual usage far exceeded the [monthly minimum usage charges], Global's costs of providing services

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

[82] *Global Crossing*, 566 F. Supp. 2d at 203 (internal citations omitted).

[83] *Id.* at 204.

[84] *Id.*

to defendants would have risen, but so would its profits."[85] Given these difficulties, where the parties had themselves stipulated by contract the appropriate outcome in the event of early termination, their agreement was not subject to second-guessing by the court.[86]

Likewise, in *American Teleconferencing Services v. Network Billing Systems, LLC*,[87] a Georgia appeals court held that shortfall fees based on minimum monthly volume commitments were lawful. Here, too, the court recognized that the contract at issue established an enforceable *quid pro quo* between the parties:

> As is uncontested in the record, the obvious benefit received by ATS in exchange for agreeing to this minimum [volume] was Network's agreeing to charge the lower rates specified in the contract for the services it gave ATS under the contract. Network was able to commit to certain volumes with its own supplier and thus to negotiate bulk rates based on the guaranteed minimum, which bulk rates would be jeopardized when those volumes were not met. Moreover, knowing that ATS was agreeing to a minimum usage amount persuaded Network to install custom circuits in ATS's facility.[88]

These provisions may be viewed as alternative performance options, rather than penalties. In 2010, the Ninth Circuit upheld an early termination fee in a consumer Internet access contract, explaining that:

> Plaintiffs availed themselves of a defined-length plan that included certain discounts on both up-front and monthly fees. Those fees would have been incurred on a month-to-month plan. They did so, however, with the knowledge that if they wished to terminate the contract early, it would result in a set fee. This presented Plaintiffs

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[85] *Id.*

[86] *Id.* ("Courts are justifiably reluctant to substitute their after-the-fact conclusions regarding the proportionality of liquidated damages provisions for the *ex ante* estimates of the parties.").

[87] 668 S.E.2d 259 (Ga. App. 2008).

[88] *Id.* at 262.

> with a rational choice: they took advantage of lower fees, but with the possibility of an ETF if they cancelled the service early. . . . Where a contract for a specified period of time permits a party to terminate the agreement before its expiration in exchange for a lump-sum monetary payment, the payment is considered merely an alternative to performance, and not a penalty.[89]

This trade-off should be even less vulnerable to challenge "in a complex business" service context,[90] such as special access service pricing plans.

Similarly, payments associated with a contracting party's failure to satisfy volume or revenue commitments are properly viewed as a form of liquidated damages – a well-established and lawful type of contract provision. As the Sixth Circuit has explained, a contractual requirement to pay "stipulated sums is given effect where the damages are uncertain in nature or amount, or are difficult of ascertainment."[91] In *City of Memphis*, the court upheld a provision requiring Ford to pay a minimum monthly amount for the period of an electric service contract, whether or not it took any electricity.

> Ford is not being penalized by being held liable for the payments it agreed to make, even though it does not take the electricity, which it agreed to purchase. The large sums of money, representing the accumulated minimum monthly bills for which Ford was indebted . . . are attributable to the great amount of money invested by the City of Memphis in planning and building for Ford's needs, and in

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[89] *Hutchison v. Yahoo! Inc.*, 396 Fed. Appx. 331, 333 (9th Cir. 2010) (internal quotes and citations omitted).

[90] *Global Crossing*, 566 F. Supp. 2d at 203.

[91] *City of Memphis v. Ford Motor Co.*, 304 F.2d 845, 852 (6th Cir. 1962) (liquidated damages provisions upheld "where the damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss").

> reliance upon Ford's agreement to purchase electricity at the specified rate over a five-year period.[92]

The logic of these and other court decisions applies equally to CenturyLink's RCP and TDP.[93] CenturyLink and CLECs are sophisticated parties acting at arms' length. Furthermore, as CenturyLink explained in its White Paper, the volume commitments and other provisions in its plans are economically efficient because they protect a level of revenues necessary to ensure that CenturyLink recovers its capital and maintenance costs over the life of the plan.[94] When a customer commits to a particular volume, CenturyLink incurs costs to provision service at the committed traffic level, and it expects to recover those costs over the life of the agreement. Revenue predictability is critical for CenturyLink under these plans because (as in *American Teleconferencing Services*) it allows CenturyLink to devote its resources to the work involved in providing circuit portability to its customers. CenturyLink is able to offer a discount on its rate with the knowledge that this commitment will enable it to recoup these investments and maintenance costs. When a customer breaks that commitment, however, the savings that

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[92] *Id.* at 853. As Judge Posner noted in upholding a liquidated damages provision: "It is easy to assign nonexploitive reasons for contractual penalties and hard to give convincing reasons why in the absence of fraud or unconscionability consenting adults [and] substantial organizations . . . should be prohibited from agreeing to such provisions." *Operating Engineers Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 655 (7th Cir. 2001).

[93] *See, e.g.*, *Norfolk Southern Ry. Co. v. Basel USA, Inc.*, 2008 U.S. Dist. LEXIS 62390 (E.D. Pa. 2008) (shipper's failure to meet its minimum volume commitment to an interstate rail carrier constitutes a material breach of contract).

[94] In the *Local Competition Order*, the Commission in principle recognized the risk of stranded investment as a factor to be considered in setting TELRIC prices, observing also that term discounts and long-term contracts mitigate such risks. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15849 ¶ 687 (1996). Accordingly, there is nothing unlawful or anticompetitive about the use of multi-year terms in CenturyLink's plans. In fact, multi-year contracts have been a mainstay of the telecommunications industry for decades.

CenturyLink had shared with its customer are lost. Thus, shortfall and early termination fees help to ensure that the expected revenue stream on which CenturyLink's investment was premised will continue over the life of the customer's commitment, and to provide some compensation to CenturyLink if it does not. As the courts have recognized, such contract terms are entirely consistent with the way in which competitive markets function, and are lawful.

E. The Pricing Plans At Issue Are Not the Result of Duress or Otherwise Akin to Unenforceable Contracts.

Moving beyond the enforceability of particular types of provisions, CLEC critics contend that the terms and conditions at issue here are unenforceable because purchasers are "coerced" or because the agreements are somehow contrary to public policy.[95] These critics offer no support for these *ipse dixit* claims, and familiar canons of contract law (tellingly ignored by the CLECs) show their arguments to be meritless. In fact, CenturyLink's agreements with purchasers under its RCP and TDP bear none of the indicia of contracts that courts may unwind on grounds that they were obtained by coercion or duress. These were entered into voluntarily, for the benefit of both parties to the agreements. Further, purchasers under the RCP/TDP plans are well-resourced and "sophisticated businesses"[96] that enjoy presumptively equal bargaining power.

[95] *See, e.g.*, Joint CLEC Opp. at 13-14 ("The [ILEC Discount] Plans coerce wholesale customers into purchasing a large proportion of their demand for DS1 and DS3 dedicated services from incumbent LECs."); Lightower/Lumos Opp. at 2 (claiming that ILECs "coerce customers into subscribing to successor arrangements with lock up provisions"); XO Opp. at 45 (asserting that XO's Discount Plan contracts with AT&T and Verizon are contracts of adhesion).

[96] *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467, 479 (2002).

The agreements at issue here are not the product of coercion or duress as the law defines them, because they were not obtained by compulsion or threat.[97] ILECs have no obligation to offer these discount plans *at all*, and customers have no obligation to purchase under these plans. Likewise, these are not contracts of adhesion, which typically involve contracting parties with disparate levels of bargaining power and sophistication.[98] RCP and TDP customers are sophisticated and well-heeled businesses represented by counsel, fully capable of understanding the contractual commitments to which they agree. As previously noted, several CLECs, prior to the expiration of their existing terms of their RCP and/or TDP agreements, have requested and negotiated new commercial arrangements with CenturyLink to replace their RCP and/or TDP agreements, undermining any claims that these are contracts of adhesion or the product of coercion.

At bottom, CLECs arguing coercion seem to be suggesting that their discount plan contracts result from something akin to "economic duress," maintaining that they have no practical alternative but to purchase and remain under these plans.[99] But as the Supreme Court has observed, "the word duress implies feebleness on one side, overpowering strength on the

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[97] *See, e.g.*, AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981) (contract voidable where "manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative").

[98] *See, e.g.*, *In Re: Sea Turtles Cinemas, Inc.*, 440 B.R. 438, 442-43 (Bankr. D.S.C. 2010) (noting that contracts of adhesion are typified by form contracts presented by businesses to consumers on a take-it-or-leave it basis, and further observing that "[t]his doctrine does not have application in the commercial context where [parties] are generally sophisticated and represented by counsel"); *Graziano v. Stock Farm Homeowner's Ass'n*, 258 P.3d 999, 1005 (Mont. 2011) (contracts of adhesion typically involve "ordinary citizen with relative lack of sophistication").

[99] *See, e.g.*, Joint CLEC Opp. at 17 (describing the supposed "Hobson's choice" presented by ILEC discount plans).

other,"[100] circumstances not present here given the state of competition in the high capacity transmission marketplace, and given the relative sophistication of purchasing parties.[101] While the economic duress doctrine varies from jurisdiction to jurisdiction, economic duress is a "sparingly" invoked and "narrowly restricted" doctrine.[102] It applies "only to special, unusual, or extraordinary situations in which [the actor] uses unjustified coercion . . . to induce a contract [with the victim.]"[103] For this reason, the doctrine of economic duress is considered a doctrine of "last resort."[104] It has been applied, for instance, in situations involving wrongful conduct, such as a bad faith threat to breach a contract,[105] or cases involving severe financial distress,

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[100] *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 300 (1942).

[101] *See, e.g.*, *Sea Turtles Cinemas*, 440 B.R. at 442 ("[I]n situations where a party is sophisticated and represented by counsel, duress rarely exists."); *Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735, 745-46 (D.S.C. 2001).

[102] *See Am. Int'l Grp., Consol. Derivative Litig. v. Smith*, 976 A.2d 872, 885 (Del. Ch. 2009) ("[g]iven that the doctrine of duress is usually asserted when a person knowingly violates a legal duty, courts rightly employ duress sparingly"); *see also Chase Manhattan Bank, N.A. v. Natarelli*, 401 N.Y.S.2d 404, 409 (N.Y. Sup. Ct. 1977) (naming duress a "narrowly restricted defense").

[103] *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 852 (Ala. 1995); *Dunes Hosp., LLC, v. Country Kitchen Int'l, Inc.*, 623 N.W.2d 484, 489 (S.D. 2001); *see also In re Lehman Bros. Holdings Inc.*, 519 B.R. 47, 62 (Bankr. S.D.N.Y. 2014) ("[Under New York law], successful claims of duress are reserved for 'extreme and extraordinary cases.'") (quoting *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001)); *see also Int'l Paper Co. v. Whildren*, 469 So. 2d 560, 563 (Ala. 1985) ("It is said that economic duress must be based on conduct of the opposite party and not merely on the necessities of the purported victim.") (internal quotation marks omitted).

[104] 28 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 71:19 (4th ed. 2003); *see also San Diego Hospice v. County of San Diego*, 37 Cal. Rptr. 2d 501, 507 (Cal. App. 4th Dist. 1995) (the burden to establish economic duress is high, and courts "will apply 'economic duress' only in limited circumstances and as a 'last resort'").

[105] *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co.*, 584 P.2d 15 (Alaska 1978).

including bankruptcy or financial ruin,[106] or irreparable business injury.[107] Economic necessity alone cannot constitute economic duress.[108]

No party has shown that the contracts here are the product of economic duress. Rather, the record demonstrates that contracts under CenturyLink's RCP and TDP are voluntary and mutually beneficial for both CenturyLink and purchasers under these plans. As CenturyLink previously described, customers are not required to purchase under these plans at all. If they choose to do so, they control the commitment they make for the term at issue, and may purchase under these plans whatever portion of their overall demand that they deem appropriate.[109] The discount does not depend on what proportion of its needs the customer elects to obtain from CenturyLink or how much the customer purchased from CenturyLink during a prior contract term, and the customer is free to purchase additional capacity from other providers.[110] Further, customers are free under these plans to disconnect and move circuits during the commitment period without incurring early termination charges provided they continue to meet the overall service level commitment during the term.[111]

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[106] *Uniwill L.P. v. City of Los Angeles*, 21 Cal. Rptr. 3d 464, 470 (Cal. App. 2d Dist. 2004).

[107] *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521, 536 (N.C. 1973).

[108] *See, e.g.*, *Chouinard v. Chouinard*, 568 F.2d 430, 434 (5th Cir. 1978); *see also Int'l Paper Co.*, 469 So. 2d at 563.

[109] CenturyLink White Paper at 24.

[110] *Id.*

[111] *Id.* at 33. In addition, while both ILEC and CLEC agreements typically have portability provisions, as a purchaser of special access outside of its ILEC footprint, CenturyLink has found the portability provisions in ILEC agreements more customer friendly than those in CLEC agreements. Given these portability provisions, CenturyLink has routinely opted for the longest term available under such discount plan contracts. *See* CenturyLink 2016 Reply Comments Exh. 3, Reply Declaration of Carla Stewart at 4-5.

These voluntary contractual commitments are therefore pro-competitive, and represent a mutual value proposition: The customer gets a lower price, and CenturyLink gets the benefit of certainty, both in terms of network planning and revenue expectations. It is long-standing and familiar law that "linking a price discount to a contractual term is a reasonable, accepted commercial practice, both inside and outside the telecommunications industry."[112] As the D.C. Circuit has held, these kinds of discount plans are "most naturally viewed as a *bargain* containing terms that both benefit and burden subscribers . . . ."[113] This is particularly true given that ILECs have no obligation in the first instance to offer these discount plans.[114] Without this mutual exchange of value – which is the very essence of any contract – neither CenturyLink nor the customer would enter into the agreement. The Bureau should therefore reject CLEC calls to rewrite these contracts or abrogate them altogether.[115]

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

[113] *BellSouth*, 469 F.3d at 1056 (emphasis added).

[114] *Id.* at 1057.

[115] *See, e.g.*, Joint CLEC Opp. at 11 (urging the Commission to invalidate existing volume commitments, or abrogate existing contracts altogether and provide customers a "fresh look"); Sprint Opp. at 5, 53 (asserting that the Commission should give purchasers a fresh look until it can implement comprehensive special access reform). It is fundamental and familiar law that courts will not rewrite contracts to alter the bargained-for benefits and responsibilities of the contracting parties. *See, e.g.*, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013) (courts "rigorously enforce" contracts as written); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007) ("[W]e are loathe to judicially rewrite the parties' contract by engrafting extra-contractual standards[.]"); *Aaron v. State Farm Mut. Auto Ins. Co.*, 34 P.3d 929, 933 (Wyo. 2001) ("The parties have the right to employ whatever lawful terms they wish and courts will not rewrite them."). The same is particularly true for regulatory agencies – the Commission may abrogate existing contracts only in the most extreme circumstances. *Union Pac. Fuels, Inc. v.*

IV. CLECS USE THE SAME TERMS AND CONDITIONS UNDER INVESTIGATION HERE

As CenturyLink's White Paper explains, several of the CLECs that have complained about the ILEC practices under investigation employ many of those same practices, including long-term commitments and early termination fees.[116] This fact alone precludes a finding of unlawfulness.

As an ILEC, CenturyLink generally employs three- to five-year terms, which is consistent with CLEC practices.[117] When CenturyLink's CLEC entity purchases from other vendors as an out-of-region customer, it *requests* a five year term when available, in order to maximize its term discount.[118] Further, CLECs have used early termination fees for years, and in many cases those early termination fees are more stringent than the early termination fees in

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FERC, 129 F.3d 157, 161 (D.C. Cir. 1997) (quoting *Metropolitan Edison Co.* v. *FERC*, 595 F.2d 851, 856 n.29 (D.C. Cir. 1979)) (Commission may "abrogate existing contracts only where the public interest 'imperatively demands' such action"). This core principle is embodied in the *Mobile Sierra* doctrine, which provides that terms resulting from a freely negotiated contract are presumed to be just and reasonable, and may be modified only upon a finding not only that they are unlawful, but also that the public interest "imperatively demands" such action. *Metropolitan Edison Co.*, 595 F.2d at 856, n.29. *See also FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Verizon Comm'ns*, 535 U.S. at 479 (observing that, "[i]n wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power, who could be expected to negotiate a 'just and reasonable' rate as between the two of them," and noting that, under the *Mobile Sierra* doctrine, "[w]hen commercial parties did avail themselves of rate agreements, the principal regulatory responsibility was not to relieve a contracting party of an unreasonable rate . . . .").

[116] CenturyLink White Paper at 47-48.

[117] *Id.* at 46.

[118] *Id.* CenturyLink did not attach these specific CLEC contracts (governing CenturyLink's purchase of services) to its White Paper, given applicable confidentiality restrictions. CenturyLink will submit these materials if required to do so by the Bureau or the Commission, subject to appropriate protections.

CenturyLink's tariff plans.[119] For example, several contracts impose 100 percent termination liability on CenturyLink's CLEC affiliate during year one of the agreement, as opposed to the 50 percent charge in the CenturyLink tariff plans, followed by similar or lower percentages for each remaining year.[120] Competitors' use of early termination fees and long-term commitments confirms the procompetitive nature of CenturyLink's terms and conditions.[121]

Some parties attempted to rebut this evidence by simply listing CLECs that allegedly do not employ term commitments or early termination fees.[122] These assertions carry no weight, because even if some CLECs do not employ such practices, that does not change the fact that others do. Sprint also cites a statement by **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[123] But that statement is flatly contradicted by CenturyLink's own experience with its CLEC affiliate, as explained directly above.

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[119] *Id.* at 48.

[120] *Id.*

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

[122] Sprint Opp. at 34-35.

[123] *Id.* at 37.

V. CONCLUSION

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

Respectfully submitted,

CENTURYLINK

/s/ *Russell P. Hanser*

Russell P. Hanser
Brian W. Murray
Frank W. Krogh
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, D.C. 20036
(202) 783-4141

Its Attorneys

Craig J. Brown
CENTURYLINK, INC.
1099 New York Avenue, NW, Suite 250
Washington, D.C. 20001
(303) 992-2503

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