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February 26, 2016

**REDACTED FOR PUBLIC INSPECTION**

**By ECFS**

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20054

Re: WC Docket No. 15-247; **Public** Version of AT&T's Reply Brief in Support of Its Direct Case

Dear Ms. Dortch:

Pursuant to the Order and Protective Orders adopted by the Commission in this proceeding,[1] AT&T Inc. respectfully submits the enclosed **Public** version of its Reply Brief of In Support of Its Direct Case in response to the Wireline Competition Bureau's October 16, 2015 *Order Initiating Investigation and Designating Issues for Investigation* in WC Docket No. 15-247.

Respectfully submitted,

Kyle Fiet

Kyle J. Fiet

Enclosure

cc: Jim Lichford (two copies)
Melvin Saks (two copies)

[1] Order and Protective Orders, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; 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*, WC Docket Nos. 15-247, 05-25, RM-10593, DA 15-1387 (Dec. 4, 2015) ("Protective Order").

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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

# REPLY BRIEF OF AT&T INC. IN SUPPORT OF ITS DIRECT CASE


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**REPLY BRIEF OF AT&T INC. IN SUPPORT OF ITS DIRECT CASE**

Pursuant to the Order Initiating Investigation and Designating Issues for Investigation in the above-captioned docket, released October 16, 2015 ("*Designation Order*"),[1] AT&T submits this Reply Brief in Support of Its Direct Case.

**INTRODUCTION AND SUMMARY**

The CLECs are having trouble sticking to their story. For years, they have been telling the tale that they have no choice but to take service under the four AT&T pricing plans at issue, which cover only DS1 services. They have claimed that these four tariffed pricing plans have "locked in" such an overwhelming portion of the available demand in the special access marketplace that they cannot invest in alternative networks or move their circuits to other providers. Following a relentless drumbeat of these complaints, the Commission opened this proceeding to investigate these claims and sought extensive data from the ILECs.

The facts the Commission has gathered make quite clear that the CLECs' tale, at least as it relates to AT&T, is not true. The CLECs do not dispute any of the facts that decisively refute

[1] Order Initiating Investigation and Designating Issues For Investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 ("*Designation Order*").

their "lock-in" theory. The four AT&T pricing plans at issue account for less than 10 percent of all available special access demand in AT&T's regions,[2] and thus the vast majority of special access demand in those regions is outside these tariffs and available to rivals. Moreover, sales of DS1 services are declining rapidly: AT&T lost more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of its DS1 business from non-affiliates between January 2013 and October 2015, and the rate at which AT&T is losing DS1 sales is accelerating.[3] Special access customers today have many options available from multiple providers, including Ethernet, UNEs, and other TDM services. DS1s represent an increasingly small portion of the marketplace, and only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's DS1s are purchased under the plans at issue.[4] Drs. Carlton, Israel, Shampine and Sider – in an unrebutted declaration – carefully examined the data and showed that there is a very large base of demand outside these plans that competitors can win.[5]

More recent analysis of the Commission's mandatory data collection in the Special Access proceeding further disproves the CLECs' "lock-in" story. Those analyses reveal that any attempt by AT&T to force customers into unwanted tariff terms would fail because customers have alternative options in the marketplace. Indeed, these data show that competitors have deployed their own competitive facilities in nearly all MSA census blocks with special access

[2] Brief of AT&T Inc. in Support of Its Direct Case at 3, 14-15, 34 (filed Jan. 8, 2016) ("AT&T Opening Br."); Declaration of Dennis Carlton, Mark Israel, Allan Shampine & Hal Sider ¶¶ 12, 21, 34 ("Carlton-Israel-Shampine-Sider Decl."), attached as Attachment 3 to AT&T's Opening Brief.

[3] AT&T Opening Br. at 3, 13, 24, 34; Declaration of Paul Reid ¶¶ 4, 18, 37 ("Reid Decl."), attached as Attachment 1 to AT&T's Opening Brief.

[4] AT&T Opening Br. at 3, 14-15, 24, 34, 40; Reid Decl. ¶¶ 4, 21.

[5] *See* Carlton-Israel-Shampine-Sider Decl. ¶¶ 29-38 & Table 1.

demand, and those census blocks, in turn, account for virtually all special access connections and almost all business establishments.[6] With CLEC competition just about everywhere, the CLEC's theory of ILEC anti-competitive lock-ins fails as a matter of basic economics.[7]

To be sure, TDM services are still used by CLECs. The CLECs emphasize that point as if the mere fact that they use TDM services somehow entitles them to whatever relief they seek. But the issue in this proceeding is not whether TDM services are still "important," at least in the short-term. The issue is whether CLEC lock-in theories centered on these four tariffed pricing plans are substantiated by the facts, and the facts show that they are not. Put simply, these four pricing plans do not – and indeed, cannot possibly – foreclose competition in the special access marketplace.

The best that the CLECs can muster in the face of this dispositive evidence is what they present as a purported building-specific market share analysis based on the 2013 data special access collection. But that analysis is grossly flawed because it ignores substantial sources of competition, including (1) CLEC fiber that is nearby, but not currently connected to, a building, including fiber that runs directly in front of the building, and (2) *all* competition from cable companies, including cable Ethernet services, even though the cable companies themselves show

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[6] Comments of AT&T Inc., *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 Service*, WC Docket No. 05-25; RM-10593, at 12 (filed Jan. 27, 2016) ("AT&T Special Access Comments"); Mark Israel, Daniel Rubinfeld & Glenn Woroch, White Paper: Competitive Analysis of the FCC's Special Access Data Collection, filed in *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 Service*, WC Docket No. 05-25; RM-10593, at Section III.B & Table C (filed Jan. 27, 2016) ("Israel-Rubinfeld-Woroch Analysis").

[7] *E.g.*, Carlton-Israel-Shampine-Sider Decl. ¶¶ 39-46.

in no uncertain terms that they do compete – hard and successfully – for special access business.[8] In other words, the CLECs' analysis assumes that any building with an ILEC and cable fiber connection, plus fiber from three large CLECs running immediately in front of the building, is not subject to competition – an assumption that is clearly erroneous and which renders the CLECs' market share figures useless for any economic purpose.

Beyond their flawed market share analysis, the CLECs also continue to press arguments that rely on mischaracterizations of the plans at issue. Contrary to the CLECs' (and the *Designation Order*'s) contentions, the AT&T pricing plans do not require customers to make a "percentage commitment" to receive rate discounts. Rather, as AT&T explained, the portability plans at issue are "ETL avoidance plans," which presuppose that the customer has a base of term-plan circuits and permit such customers to break a portion of their term commitments early without penalty. The plans thus shift a substantial portion of the risks and costs associated with prematurely disconnected circuits from the customer to AT&T. The quid pro quo for this increased flexibility is an assurance (in the form of potential shortfall liability) that limits the number of circuits that can be moved off of AT&T's network before the term commitments for those circuits have been satisfied.

The CLECs try to suggest that such plans discriminate against larger CLECs because they allegedly impose higher commitment levels without regard to "cost" differences. But these arguments make no sense given that the plans at issue relate solely to the avoidance of ETLs, rather than rate discounts. A large CLEC may make a larger volume commitment under one of

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[8] *See* Reply Comments of National Cable & Telecommunications Ass'n, *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 Service*, WC Docket No. 05-25; RM-10593, at 14 (filed Feb. 19, 2016) ("[v]irtually any area with special access demand will contain cable company facilities that serve, or are capable of serving, business customers").

these plans than a smaller carrier, but the large CLEC will also be able to avoid ETLs on a proportionally larger number of circuits (and thus impose substantially greater risks and lost revenues on AT&T). The balance of benefits and risks under these plans thus scales linearly – even though the D.C. Circuit has held that the Communications Act does not require volume-related benefits to scale linearly (or even to be offered at all).[9]

The data also refute the CLECs' more particular complaints about the percentage commitments. For example, the CLECs argue that AT&T's shortfall penalties harm competition, but the Joint CLECs have submitted data showing that, from 2012-2014, total shortfall penalties under all of the plans at issue have been **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[10] Even those figures overstate the impact on CLECs, because (1) about [**BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of those penalties were paid by affiliates of AT&T, CenturyLink, or Verizon, and (2) in many instances CLECs have separate business services agreements in which they receive credits to offset any shortfall penalties they may incur. Similarly, the CLECs argue that the principal problem with the percentage commitment plans is that CLECs cannot reduce their commitment levels when they renew. The data refute this claim as well. Between 2012 and 2015, AT&T's special access customers reduced their DS1 commitment levels in the majority of instances in which their plans came up for renewal, and those commitment decreases have averaged about

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[9] *See, e.g.*, *BellSouth Telecommunications Inc.* v. *FCC*, 469 F.3d 1052, 1057 (D.C. Cir. 2006) (incumbent LECs have "no obligation to offer a volume discount plan at all, much less a linear one").

[10] Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, App'x G (filed Feb. 5, 2016) ("Joint CLEC Opp.").

**[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of the prior commitment level.

It is thus no wonder that, although the CLECs agitated for this tariff investigation, they no longer seem terribly interested in the AT&T plans at issue. In fact, while the CLECs each attempt to give examples of how the ILEC plans here are harming them, most of these examples do not involve AT&T, and the ones that do are mostly focused on *other* agreements that are not at issue here. For example, Level 3 – whose subsidiaries in many cases do not take service under the AT&T plans – complains almost entirely about its unregulated business service agreement ("BSA") with AT&T that address Ethernet and other services. Apart from the fact that these claims are beyond the scope of this proceeding, they have no merit. Indeed, whereas Level 3 asserts that its commitments under the BSA are preventing it from moving services to lower priced competitors, in fact **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. Similarly, Windstream complains (in essence) that its **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** is not generous enough in eliminating shortfall penalties when Windstream wants to migrate a DS1 circuit to Ethernet. But Windstream **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. XO goes through the motions of complaining but it really has nothing to complain about: it too **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

**[END HIGHLY CONFIDENTIAL]**. Finally, Sprint's claim concerning its near-complete transition to Ethernet for wireless backhaul does not relate to the portability plans at issue and in all events simply confirms that AT&T's tariffed pricing plans did not prevent Sprint from moving a large amount of its services to competitors.

The CLECs' proposed "remedies" are equally divorced from the facts. Indeed, the various CLECs' proposals are mutually inconsistent and undermine each others' substantive positions: Sprint and XO want all percentage commitment plans declared unlawful; the Joint CLECs have no objection to such plans and ask only that the Commission adjust the percentage commitment levels and termination penalties; and Windstream has no objection even to the percentage commitments or shortfall charges but merely wants the Commission to make ILECs count Ethernet services toward the DS1 commitment levels. As explained below, there is no lawful basis or record evidence for any of these proposed remedies.

In short, the CLECs' "lock in" story has run head-long into the facts that refute it. Accordingly, this investigation should be closed without further action.

## I. THE SPECIAL ACCESS MARKETPLACE IS ROBUSTLY COMPETITIVE AND THE AT&T TARIFFED PRICING PLANS AT ISSUE ARE PRO-COMPETITIVE.

The *Designation Order* raises a very specific issue: whether the four AT&T tariffed pricing plans unlawfully "lock up" so much of the available special access demand that they result in market foreclosure.[11] As AT&T showed in its Direct Case, the facts show (1) that AT&T's DS1 sales are declining rapidly[12] and these four tariffed plans simply do not account for

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[11] *See Designation Order* ¶ 1.

[12] *E.g.*, AT&T Opening Br. at 3, 13, 24, 34 (noting that between January 2013 and October 2015, AT&T's non-affiliate-billed revenues for TDM-based DS1 services declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent); Reid Decl. ¶¶ 4, 18, 37 (same).

enough demand to facilitate a market foreclosure strategy,[13] and (2) contrary to the CLEC theories put forward in the *Designation Order*, AT&T's "percentage commitments" have nothing to do with rate discounts and, indeed, are pro-competitive because they permit customers to move circuits without incurring early termination liability.[14] The CLECs do not challenge any of the essential facts establishing these propositions, nor have they provided any basis for finding any of the AT&T plans at issue unlawful.

### A. The Undisputed Facts and Data Confirm That the AT&T Tariffed Plans at Issue Do Not Have a "Lock-In" Effect.

As AT&T demonstrated in its Direct Case (with actual data and economic testimony), there is no merit to any of the CLEC arguments (as set forth in *Designation Order*) that the four AT&T tariffed plans under investigation "lock up" so much of the available special access demand that special access competition is foreclosed.[15] The CLECs do not dispute these facts or economic testimony. Instead, they devote the bulk of their comments to merely re-iterating their now debunked *theories* about lock-ups and foreclosure. But the Commission must act on the data before it, not on theories that the actual data disprove.

The facts clearly and decisively refute the CLECs' "lock-in" theory. The crux of the CLEC "lock-in" theory is that the AT&T plans under investigation prevent customers from diverting demand to alternative providers, thus precluding competitors from winning business.

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[13] AT&T Opening Br. at 3, 14-15, 34 (noting that the four AT&T tariffed pricing plans at issue in this investigation represent well below 10 percent of the total special access marketplace in AT&T's in-region territory); Carlton-Israel-Shampine-Sider Decl. ¶¶ 12, 21, 34. *See also* AT&T Opening Br. at 25 (noting that the CLEC's foreclosure theory fails because, among other reasons, the AT&T tariffed pricing plans at issue "represent far too small a share of the marketplace to have any impact on competition or investment incentives"); Carlton-Israel-Shampine Decl. ¶¶ 29-38 (showing that a significant volume of DS1 circuits currently served by AT&T are not covered by portability agreements).

[14] *See* AT&T Opening Br. at 16-19.

[15] *Id*. at 23-27.

But as AT&T thus demonstrated, this theory cannot be squared with the enormous growth and success of competitors in the marketplace. In fact, from January 2013 through October 2015, AT&T's non-affiliate billed revenues for TDM-based DS1 services declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[16] percent and the rate at which AT&T is losing DS1 sales is accelerating.[17] This fact alone is dispositive proof that CLECs are *not* locked into the four TDM plans at issue in this proceeding.

Much of this erosion in AT&T's TDM-based DS1 revenues is attributable to the rapid and accelerating migration of customers from TDM services to Ethernet, and a wide variety of companies, including ILECs, CLECs, cable companies and others, have invested billions of dollars to deploy Ethernet services for their customers. There are today nine providers with port shares of four percent or more, including three CLECs and three cable companies, with the second largest provider being Level 3.[18] Indeed, competition from cable companies is

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[16] AT&T Direct Case at 3, 13, 24; Reid Decl. ¶ 18. The **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent decline in DS1 non-affiliate revenues is since 2013 consistent with the trend since 2010. In this respect, it is important to note that the 2010-2013 trend in DS1 revenues cannot be computed by comparing AT&T's response to the voluntary 2010 data request and the 2013 mandatory data request, because those data are apples and oranges. The 2013 data provides all DS1 revenues, whereas the 2010 revenue provides only a subset of revenues (mainly monthly recurring revenues), and omits certain revenues, such as non-recurring revenues. Therefore, a comparison of the 2010 and 2013 data will understate (or even erroneously indicate an increase in) the difference between AT&T's 2010 and 2013 DS1 revenues. An apples-to-apples comparison of AT&T's 2010 and 2013 DS1 revenues shows a decrease of about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent during that period.

[17] AT&T Opening Br. at 3, 13, 24, 34; Reid Decl. ¶¶ 4, 18, 37. *See also* Carlton-Israel Shampine-Sider Decl. ¶ 19.

[18] Vertical Systems, 2015 U.S. Carrier Ethernet Leaderboard (Feb. 25, 2016), http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/. Lightower argues that the CLECs' high market shares in this report largely reflects their use of wholesale services. Lightower-Lumos Comments at 15. It is unclear from the Vertical Systems report whether this is true. But even if it is true, the fact that CLECs and cable companies have had such enormous success relying on ILEC-supplied wholesale services only further confirms that the wholesale

intensifying.[19] Further, the CLECs' own analysis in the special access rulemaking proceeding shows that, even excluding cable companies from the equation, CLECs have won a very large share of Ethernet services.[20]

The Joint CLECs actually concede that the four tariffs at issue do not lock in *retail* demand.[21] But even in the face of evidence that refutes their assertions, they cling to their "lock-in" theory, claiming that the amount of service *in the ILECs pricing plans under investigation* declined by only **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent between 2012 to 2014.[22] To begin with, this substantial reduction proves that competitors can and do migrate services away from the tariffed plans. Further, this reduction omits the reductions that occurred in 2015. AT&T experienced about a **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent reduction in

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marketplace facilitates competitive entry and competition, and is not in need of Commission intervention.

[19] Cogent recently noted in an earnings call that competition from cable companies is driving down their special access prices. http://seekingalpha.com/article/3931246-cogent-communications-holdings-ccoi-david-schaeffer-q4-2015-results-earnings-call-transcript?part=single ("[w]e continue to benefit off-net from lower loop prices, which we pass on to our customers, particularly as cable has competed in the off-net footprint with the incumbent telco has provided a good tension, and allowed us to drive loop prices down, still maintaining our margin"); *see also* Reply Comments of National Cable & Telecommunications Ass'n, *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 Service*, WC Docket No. 05-25; RM-10593, at 14 (filed Feb. 19, 2016) ("*[v]irtually any area with special access demand* will contain cable company facilities that serve, or are capable of serving, business customers" (emphasis added)).

[20] AT&T Special Access Comments at 28, 37 (citing Declaration of Stanley M Besen and Bridger M. Mitchell, Table 2 ("Besen-Mitchell Decl."), attached to the Comments of Sprint Corporation, *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*, WC Docket No. 05-25; RM-10593 (filed Jan. 27, 2016) ("Sprint Special Access Comments")).

[21] Joint CLECs at 3.

[22] Joint CLEC Opp. at 25 (citing App'x E to the Joint CLEC Opp.).

DS1 revenues under the four pricing plans being investigated here from January 2013 through December 2015. Instead of being "locked-in," the exodus from these pricing plans is accelerating.

But, in all events, focusing just on the reductions in demand for the pricing plans at issue in this case misses the point. The relevant issue is whether these plans "locked in" so much DS1 demand in the marketplace as a whole so as to foreclose competition. That question cannot be answered by looking solely at the rate at which customers are churning off of these plans; it requires a much broader analysis that addresses whether customers have the *ability* to move demand off of these plans whether or not they choose to do so, as well as whether there is demand *outside* of these plans for which CLECs may compete. The answer to those questions is made crystal clear from the facts AT&T submitted in its Direct Case. As we showed, CLECs that do purchase service under these pricing plans typically have substantial "headroom" to move circuits to other providers without penalty,[23] and as XO confirms, customers have been able to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** upon renewal.[24] No less important, there also is plenty of special access business outside of these plans for which CLECs can and do compete. In fact, the AT&T plans at issue do not even represent **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** AT&T's DS1 sales.[25] And, of course, more broadly special access customers have many options in the marketplace other than TDM DS1 services, including Ethernet, UNEs, and other services.

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[23] AT&T Opening Br. at 3, 5, 14, 21, 22, 25, 35-36, 42; Reid Decl. ¶¶ 21-25; Carlton-Israel-Shampine-Sider Decl. ¶¶ 25-37.

[24] Comments of XO Communications, LLC on ILECs' Direct Cases at 26 (filed Feb. 5, 2016) ("XO Comments"); *see also infra*, p. 30.

[25] AT&T Opening Br. at 3, 14-15, 24, 34, 40; Reid Decl. ¶ 21.

Overall, as AT&T has explained, the data show that the AT&T pricing plans at issue account for well below 10 percent of the total special access marketplace in the AT&T regions.[26] Accordingly, these plans simply do not have enough demand in them to facilitate a market foreclosure strategy. Indeed, Drs. Carlton, Israel, Shampine and Sider showed that the AT&T pricing plans at issue leave a large amount of demand available to rivals that is unencumbered by *any* contractual restrictions related to term and volume commitments, including those outside of the plans at issue.[27] The CLECs do not dispute these facts, nor has any CLEC submitted a declaration from an economist that takes issue with the analysis of Drs. Carlton, Israel, Shampine and Sider. That should be the end of the matter: the facts show that these pricing plans could not foreclose competition and thus there can be no finding of liability under Sections 201 or 202.

But recent analyses of the Commission's mandatory data collection in the Special Access proceeding further puts to bed any claim that the ILECs have market power and thus could implement the anticompetitive lock-in schemes theorized by the CLECs. These data show that competitors have deployed their own competitive facilities in nearly all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** MSA census blocks with special access demand, and those census blocks, in turn, account for virtually all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** special access connections and virtually all **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** business establishments.[28] Moreover, these figures hardly

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[26] AT&T Opening Br. at 3, 14-15, 34; Carlton-Israel-Shampine-Sider Decl. ¶¶ 12, 21.

[27] Carlton-Israel-Shampine-Sider Decl. ¶¶ 29-38 & Table 1.

[28] AT&T Special Access Comments at 3, 12; Mark Israel, Daniel Rubinfeld & Glenn Woroch, White Paper: Competitive Analysis of the FCC's Special Access Data Collection, *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*, WC Docket No. 05-25; RM-10593 (filed Jan. 27, 2016) ("Israel-Rubinfeld-Woroch Analysis").

change if competition from cable companies is excluded.[29] Further, the data show that the competitors located in these census blocks can serve all or most demand located within those census blocks. The average size of these census blocks is only about 0.15 square miles, with half of them being less than 0.02 square miles.[30] The CLECs admit that they compete for customers in buildings within about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** feet to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** miles of their fiber facilities.[31] Therefore, even if only a single competitor had deployed services to just one corner of a census block with special access demand, it could still compete for customers in all or a large portion of the census block. With CLEC competition just about everywhere, the CLECs' theory of ILEC anti-competitive lock-ins fails as a matter of basic economics.[32]

The CLECs cannot dispute these facts. Instead, they downplay the evidence of competition and develop their own "market share" metrics that unreasonably assume away most competition. As AT&T and the economic testimony submitted in the special access proceeding demonstrated,[33] these market share figures are completely meaningless because they systematically ignore enormous portions of existing competition. Specifically, the CLEC market

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[29] *See* AT&T Special Access Comments at 15; Israel-Rubinfeld-Woroch Analysis, Table F.

[30] AT&T Special Access Comments at 16-17; Israel-Rubinfeld-Woroch Analysis at 4, 11.

[31] *See* Reply Comments of AT&T at 7, *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 Service*, WC Docket No. 05-25; RM-10593 (filed Feb. 19, 2016) ("AT&T Special Access Reply Comments") (citing Declaration of Michael Chambless (XO) at ¶ 26 and Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith (Windstream) at ¶ 51).

[32] *E.g.*, Carlton-Israel-Shampine-Sider Decl. ¶¶ 39-46.

[33] *See*, *e.g.*, AT&T Special Access Reply Decl. 7, 20-23 (discussing the expert declarations submitted by Sprint); *id*. at 4-5, 16-17 (discussing the Declaration of Jonathan B. Baker).

share figures account for only CLEC building connections and exclude (1) *all* CLEC fiber that is nearby, but not currently connected, to a building, and (2) *all* competition from cable companies, including even cable Ethernet services. In other words, the CLECs erroneously assume that any building with an ILEC and cable fiber connection, plus fiber from three large CLECs running immediately in front of the building is not subject to competition, a clearly erroneous assumption that renders these market share figures useless for any economic analysis of competition in the marketplace.

In the end, the CLECs can only argue that they still purchase large numbers of DS1 services and that such services continue to be very important to them.[34] It may be true that the CLECs still purchase DS1s for now, as the transition to Ethernet is still under way. However, that does not establish that the CLECs are "locked in" to these services by any of the AT&T tariffed plans subject to this investigation. And, for the reasons explained above, the data show that the CLECs are not locked in to any of these pricing plans.

Ironically, even as the CLECs are seeking regulatory actions that would artificially discourage the replacement of TDM services with Ethernet services, they claim that the DS1 pricing plans are preventing competition in Ethernet services.[35] Their principal claim, reflected in their requests for relief (*see* Section III, *infra*), is that the AT&T tariff pricing plans at issue prevent them from upgrading their DS1 services to AT&T's Ethernet services.[36] That contention

[34] *See*, *e.g.*, Joint CLEC Opp. at 50; Sprint Corporation Opposition to ILEC Direct Cases at 20-22 (filed Feb. 5, 2016) ("Sprint Opp."); XO Comments at 13-15; Opposition of Windstream Services, LLC at 5-7 (filed Feb. 5, 2016) ("Windstream Opp.").

[35] *E.g.*, Joint CLEC Opp. at 3, 37-38; Joint Comments of Lightower Fiber Networks And Lumos Networks at 8-12 (filed Feb. 5, 2016) ("Lightower-Lumos Comments"); Comments of TDS Metrocom, LLC at 7-27 (filed Feb. 5, 2016) ("TDS Metrocom Comments"); Windstream Opp. at 12-18.

[36] *E.g.*, Windstream Opp. 2; Sprint Opp. at 23. *See also* Joint CLEC Opp. at 3.

is flatly refuted by the record which shows that: (1) customers have substantial headroom under these pricing plans and can therefore migrate DS1s to AT&T's Ethernet services; (2) customers can migrate DS1 services to Ethernet when the terms of the pricing plans at issue expire; and (3) customers can and do negotiate business service agreements with AT&T that provide credits for any shortfall penalties they might otherwise incur from moving DS1 services subject to these tariffs to Ethernet. The portability that is the raison d'être of the pricing plans at issue, coupled with the ability to negotiate additional concessions in unregulated Ethernet agreements, is already taking care of the CLECs' concerns. That is why, as AT&T has pointed out, its TDM DS1 revenues are declining precipitously.

At other times, the CLECs acknowledge that they in fact are migrating DS1s to Ethernet, but suggest that because the BSAs only credit shortfall penalties for services migrated to AT&T's Ethernet service, these BSAs favor AT&T's Ethernet services over those of competitors.[37] These claims have nothing to do with the terms of the pricing plans at issue, but they are false in all events. Even the flawed analyses by the CLECs' experts in the special access rulemaking proceeding show that CLEC market share for services ranging from 50 Mbps and higher, as of 2013, was almost **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent measured by circuit counts and over **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent measured by revenues – and those figures omit all cable Ethernet providers.[38] Moreover, the record shows that CLECs

[37] *E.g.*, Joint CLEC Opp. at 3, 39-40; Lightower-Lumos Opp. at 8.

[38] Declaration of William P. Zarakas and Susan M. Gately, App'x C, Tables 2 & 3 ("Zarakas-Gately Decl."), attached to the Sprint Special Access Comments.

and cable companies are among the most successful competitors, comprising six of the top nine largest providers in the U.S., with Level 3 taking the number two position.[39]

Finally, the Joint CLECs stress that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** It is not clear why the Joint CLECs believe that these data are helpful to their "lock-in" theory. Indeed, these metrics actually confirm AT&T's point that CLECs and cable companies have won more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of the industry's Ethernet retail business largely *without* using ILEC wholesale services.[41] These facts thus confirm that Ethernet services are robustly competitive irrespective of the AT&T pricing plans at issue here.[42]

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

[40] *See* Joint CLEC Opp. at 26. The Joint CLECs seem to believe that the fact that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** *Id*. This statistic, by itself, proves nothing about the ILEC pricing plans. For all the reasons discussed above, the four AT&T plans at issue do not prevent substantial migrations to Ethernet nor have they prevented massive investment in competitive Ethernet facilities – which these statistics actually confirm.

[41] *See* AT&T Special Access Comments at 28, 37 (citing Besen-Mitchell Decl., Table 2).

[42] Windstream says that the 2013 data show that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T affiliate spend was on TDM-based services, and concludes that AT&T affiliates still rely heavily on TDM-based services. But the 2013 data relied upon by Windstream shows only AT&T's affiliate revenues from only a subset of all non-TDM-based services purchased and those revenues are only under *monthly* plans, and thus omits a large portion of AT&T's non-TDM-based affiliate services revenues. Accounting for all affiliate revenues (not just those obtained from monthly plans or a few PBDS services) shows that in 2013, about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's affiliate revenues were from non-TDM-based services. That number rose to about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent for 2015.

**B. The CLECs Continue to Mischaracterize the Nature of the Terms and Conditions At Issue.**

The CLECs' arguments against the pricing plans at issue continue to be based on the assumption that the customer must make "percentage commitments" to receive rate discounts.[43] As AT&T has explained, the percentage commitments in AT&T's pricing plans are not tied to rate discounts, and indeed, none of the AT&T tariffs at issue offer volume-based discounts.[44] Rather, the portability plans at issue are really "ETL avoidance plans." The plans assume that the customer has made term commitments for the circuits it has chosen to purchase, and the plan offers the customer the *option* to cancel and move DS1 circuits without having to pay the ETL. The quid pro quo for this increased flexibility is an assurance (in the form of potential shortfall liability) that limits the number of circuits that can be moved off of AT&T's network before the term commitment for those circuits has been satisfied. Because of its willingness to forgo the ETLs, AT&T in essence agrees to give up the benefit of its bargain on a potentially substantial number of circuits. And, by doing so, it also allows the customer to enjoy the lower rates associated with longer-term plans without actually honoring the full, associated term commitment.[45]

Because the percentage commitments in AT&T's pricing plans are not in exchange for rate discounts, the CLECs' arguments that the plans are "discriminatory" or otherwise unfair to large customers make no sense. For example, Level 3 argues (at 45-46) that percentage commitments result in "differential treatment" for customers with different historic purchase

[43] *See, e.g.*, Joint CLEC Opp. at 15; XO Comments at 16-17.

[44] *See* AT&T Opening Br. at 16-19.

[45] *See id*.

volumes.[46] Similarly, Sprint protests that it "'costs no more to provide 10 DS1s to a small but loyal customer than to provide 10 DS1s to a large but 'disloyal' customer.'"[47] These "discrimination" arguments, however, do not apply to AT&T's pricing plans. AT&T's customers can get the same term discounts whether they participate in a portability plan (and make the percentage commitment) or not; a small CLEC and a large CLEC would pay the same term-discounted rate on all of their term-plan circuits either way.

Moreover, because the pricing plans at issue permit the avoidance of ETLs that a customer would otherwise owe, the benefits to a customer in these plans do in fact scale with size. A customer that has 1,000 circuits in an AT&T portability plan can avoid ETLs on ten times as many circuits as a customer that has 100 circuits in such a plan. Accordingly, AT&T assumes a far greater risk of lost revenues with a customer that has a large number of circuits in a portability plan than it does with a smaller customer. Although Section 202(a) does not require even true volume-related rate discounts to provide benefits that scale linearly,[48] the "percentage commitments" here do in fact scale linearly and thus ensure that the benefits and risks to both the customer and AT&T remain in the same proportion whether the customer has a large or a small amount of circuits in the portability plan.[49]

The CLECs' claim that AT&T has not justified the percentage commitments based on "cost" is similarly misguided, because the percentage commitments do not relate to rate discounts.[50] The portability plans involve a bargain for benefits that are to a significant degree

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[46] Joint CLEC Opp. at 45-46.

[47] Sprint Opp. at 26.

[48] *See, e.g., BellSouth*, 469 F.3d at 1057 (incumbent LECs have "no obligation to offer a volume discount plan at all, much less a linear one").

[49] *See* AT&T Opening Br. at 33.

[50] *E.g.*, XO Comments at 31-34; Joint CLEC Opp. at 9.

intangible. The terms of the portability plans reflect the marketplace value that the two parties place on those benefits. The portability plan offers the customer substantial savings and increased flexibility by giving the customer the ability to cancel a percentage of its term-plan circuits without incurring the penalties it would otherwise owe. In essence, the parties are shifting much of the risk and costs of premature disconnections to AT&T, and the percentage commitment to honor the remaining term-discount plans reflects the value the parties place on that customer benefit.

For similar reasons, the CLECs' claim that different plans have different percentage commitments and penalties does not constitute evidence that any particular bargain is unlawful. As AT&T demonstrated in its Direct Case,[51] the AT&T tariff pricing plans at issue here were developed by independent companies that have since been merged with AT&T, and thus it should not be surprising that the tariffs have different bargains and thus different terms, including different commitment levels. Different entities could reasonably be expected to strike a number of different balances in trading off the largely intangible benefits of flexibility and predictability, and there would inevitably be a wide range of such bargains that would fall within the statute's zone of reasonableness. Further, the CLECs have offered no reason to believe that any of the AT&T pricing plans at issue here fall outside that zone.[52]

In all events, as AT&T has previously shown, customers typically do not incur shortfall penalties under these plans, and when they do they are very small.[53] Level 3 actually confirms

[51] AT&T Opening Br. at 17.

[52] Notably, the CLECs appear to accept the lawfulness of the ACP plan in the BellSouth region, which permits the customer to choose how many circuits it wants to place in the portability plan. *See, e.g.*, Joint CLEC Opp. at 75; XO Comments at 49; *see also* AT&T Opening Br. at 32 & n.92.

[53] AT&T Opening Br. at 19.

this reality in a table it has submitted purporting to show **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** shortfall penalties for the periods covered by the Commission's collection of data from AT&T in this investigation.[54] The table shows that from 2012-2014, total shortfalls have generally been **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of revenues spent on DS1 services. CLECs (*i.e.*, customers other than ILEC affiliates of AT&T, CenturyLink, and Verizon) account for only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of those shortfall amounts, and as discussed below, in many instances those CLECs do not actually pay the shortfall amounts because they receive credits for such payments under other agreements. Thus, Level 3's assertion that shortfall liability raises competitive concerns is clearly refuted by the evidence.[55]

The Joint CLECs also falsely assert that the data submitted by AT&T show that wholesale customers cannot effectively reduce their volume commitments when portability contracts expire.[56] In fact, the opposite is true. The data show that about half of new "successor" agreements between 2012 and 2014 resulted in a significant reduction of DS1

[54] Joint CLEC Opp., App'x G.

[55] The Joint CLECs argument is that "as the overall volume of TDM-based dedicated services sold by the incumbent LECs has declined, buyers' exposure to shortfall penalties under the lock-up plans has increased," Joint CLEC Opposition at 27, but in fact, as discussed above, the amounts involved are very small (**[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**). Moreover, because a very large portion of these shortfalls were paid by AT&T, Verizon, and CenturyLink affiliates, the Joint CLECs' table overstates the amount of shortfalls incurred by the *CLECs* (which in all events, as noted, are often credited back under other agreements).

[56] Joint CLEC Opp. at 5, 20 ("[a]ccordingly, wholesale competitors often find that they have no choice but to renew their lock-up plans with the incumbent LECs, and when they do so, they are unable to reduce their purchase volumes"); *see also* Level 3 at 55 (claiming that the "real" argument against the pricing plans is the inability to reduce commitment levels when the plan is renewed).

channel termination volumes under the AT&T pricing plans at issue. These reductions ranged from about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent, with a median reduction of about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent. And these figures do not include the very substantial reductions that occurred in 2015. In 2015, AT&T entered into an additional **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** successor agreements with reductions that ranged from about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent, with a median and average reduction of more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent. Notably, these reductions were implemented by entities that are some of the loudest complainers in this proceeding, including **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**.[57]

## II. THE CLECs FAIL TO SHOW HARM FROM ANY OF THE AT&T PRICING PLANS THE COMMISSION IS INVESTIGATING.

The CLECs attempt to illustrate and bolster their "lock-in" claims by showing how the specific pricing plans at issue here have "harmed" them. Most of their complaints and examples,

[57] As AT&T previously noted, CLECs often have term plans that offer the same or even less generous terms than AT&T's. XO claims that it does not impose similar contractual terms on their customers, but in fact it does. *See* XO Comments at 54-55. In fact, XO admits that it offers three-year term plans that are enforced by ETLs. *Id*. at 55. Under this XO offer, if the service is canceled in month 1-12, the customer must pay for the entire amount it promised to pay for the whole term. If it is canceled in month 13-24, the customer pays 75 percent of the amount. If it cancels after month 25, it must pay 50 percent of the amount. *See* XO Communications, Product Terms and Conditions, http://www.xo.com/legal-and-privacy/product-terms-and-conditions/. These terms are in stark contrast to AT&T's terms, in which the ETL is set at around 40 percent of the remaining term (and, of course, XO offers no portability).

however, do not concern AT&T, and even when they turn their attention to AT&T, many of their complaints relate to BSAs involving Ethernet services that they have negotiated with AT&T rather than the tariffed pricing plans that are the subject of this proceeding. Those negotiated agreements are not within the scope of the Commission's investigation.[58]

In any event, the CLECs' attempts to show that they are harmed either by the tariffed plans at issue or by these separate agreements fall flat. As shown below: (1) Level 3's **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**; (2) XO **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**; (3) Windstream **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**; and (4) Sprint's claims concerning its near-complete transition to Ethernet for wireless backhaul do not relate to the portability plans at issue and in all events simply confirm that AT&T's term discount plans did not prevent Sprint from moving its services to competitors.

***Level 3.*** Level 3 focuses almost entirely on **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[58] As AT&T previously explained, the services in these agreements have been the subject of forbearance and have been detariffed, and in all events, the substance of those agreements is clearly not at issue in this investigation. *See* AT&T Direct Case at 55-57.

[redacted] **[END HIGHLY CONFIDENTIAL]**

Level 3 nevertheless contends that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[60] Each step of this argument is factually incorrect.

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[59] A copy of this **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Declaration of Gary Black, Jr. on Behalf of Level 3 Communications, LLC ("Black. Decl."), which accompanies the Joint CLEC Opp.

[60] *See* Joint CLEC Opp. at 35.

*First*, Level 3 was not **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Level 3 is comprised of three legacy entities: (1) legacy Level 3; (2) Time Warner Telecom; and (3) Global Crossing. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** These facts refute the argument that Level 3 **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]**

*Second*, it follows that participation in the tariffed pricing plans subject to this investigation did not **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

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[61] *See* AT&T Opening Br. at 20; Reid Decl. ¶ 20.

*Third*, the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. Level 3 asserts that **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] [redacted] **[END HIGHLY CONFIDENTIAL]** But Level 3 has provided no evidence that it has **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. It has provided only unverifiable assertions that cannot be relied upon. Indeed, Level 3 has not identified the purported providers of those services, the actual prices, or the quality of the services.

These omissions are particularly noteworthy because Level 3's actions refute its assertions. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[62] Joint CLEC Opp. at 35. *See also id*. at 57.

[63] *Id*. at 35.

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

[redacted] **[END HIGHLY CONFIDENTIAL]**

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

[66] Level 3's claims with respect to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** are equally baseless. The **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** The notion that such terms are unjust or unreasonable is refuted by the fact that the terms and conditions under which **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** provides services to AT&T also use a MARC with the same approach to shortfalls. *See* Declaration of Parley Casto ¶ 20 ("Casto Decl."), attached as Attachment 2 to AT&T's Opening Brief. In all events, to date, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

Level 3 also has no response to the fact that AT&T has worked with Level 3 in other ways to help Level 3 manage the inventory of services it purchases from AT&T under the tariffed pricing plans at issue in this proceeding. As noted, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** AT&T agreed to allow Level 3 to manage its DS1 services in this way.

Level 3 does not dispute these facts. Instead, it asserts that AT&T has **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

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[67] Reid Decl. ¶ 20.

[68] Joint CLEC Opp. at 4; Black Decl. ¶ 6.

[69] *See* Joint CLEC Opp. at 4.

[redacted] **[END HIGHLY CONFIDENTIAL]**

Level 3 also has no persuasive answer to the fact that the only tariffed pricing plans subject to this investigation to which its affiliates subscribe expire very soon, at which time Level 3 can simply migrate its circuits to alternative services without incurring the shortfall or early termination penalties about which it purports to be so concerned.[70] Indeed, Level 3's only response is that "Level 3 is often unable to reduce its volume commitments to an incumbent LEC when it renews a [volume-based portability] plan."[71] But the data submitted by AT&T in response to the Commission's data requests show the opposite. For example, in November 2014, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

Finally, Level 3 argues that it recently reduced its purchases **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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

[71] Black Decl. ¶ 22.

[redacted] **[END HIGHLY CONFIDENTIAL]** at which time it can move as many DS1 services at it likes to competitors. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Lastly, as AT&T explained in its Direct Case, these tariffs allow these companies to "buy down" their commitments if they wish to migrate additional services to competitors.

**XO.** XO's claims that it is harmed by AT&T's tariffed plans are refuted by its own experience under these plans. The facts show that XO has always had **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[72] *See* Reid Decl. ¶ 26. For example, in AT&T's Southwest region, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Similarly, in AT&T's Pacific region, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[73] Reid Decl. ¶ 26.

[redacted] [END HIGHLY CONFIDENTIAL]

Indeed, just this past year, XO **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[74] *Id*.

[75] XO concedes that it has had some "success with reducing its commitment level under the AT&T Discount Plans when they were renewed in the past few years." XO Comments at 26.

[76] In the BellSouth region, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]** wholly refute the CLECs' arguments that AT&T is "locking in" potential demand through such commitments.

XO argues that it has been able to maintain its commitments under these AT&T DS1 tariff pricing plans by migrating its UNEs services to these plans.[77] In fact, the opposite is true. As the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** UNEs.

XO further argues that AT&T's 80 percent commitment level under the DS1 TPP plans is too high and that it may run out of headroom at some unspecified time in the future and incur shortfalls.[78] But there is no evidence of that occurring. Indeed, XO itself has stated that it does not expect to see DS1 declines of more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** in 2016,[79] and its current agreements expire in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[redacted] **[END HIGHLY CONFIDENTIAL]** during 2014 and 2015. Declaration of Michael Chambless ¶ 8 ("Chambless Decl."), attached to the XO Comments.

[77] XO Comments. at 26-27.

[78] *Id.* at 33 ("But the fact of the matter is that, as demand for DS1 declines, especially if that decline accelerates, there will be insufficient 'headroom,' and shortfall penalties will begin to apply.").

[79] *Id.* at 15.

[redacted] **[END HIGHLY CONFIDENTIAL]** when its current tariff pricing plans expire.

Finally, XO argues that AT&T's rates for DS1 and DS3 special access are "considerably higher" than facilities-based rates offered by competitors.[81] As support for this assertion, XO compares AT&T's month-to-month rates in **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** with an unidentified "representative" carrier, which XO claims charges only **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** per DS1 channel termination (including mileage up to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** miles).[82] XO's claim is not credible, and it provides absolutely no documentation to substantiate its claim. XO does not name the supposed "representative" carrier that offered this rate, nor does XO provide any information about the nature of the service itself, or the term involved. Without this information, there is simply no way to determine whether this is an apples-to-apples comparison.

Moreover, XO's own conduct belies its assertion that it can obtain comparable DS1 service at a price of only **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** per channel termination per month. XO argues that, "[b]ecause the price differentials are so great, XO would, if it could, use alternative competitive provider pricing whenever possible."[83] But as discussed above, XO had, on average, between **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent headroom

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[80] *Id*. at 26 ("[XO] has the theoretical ability, at least, to move [UNEs] back subsequently to special access to try to stay above the percentage minimum commitment and avoid shortfall penalties.")

[81] *Id*. at 18.

[82] *Id*.; *see also* Chambless Decl. ¶ 10 & Ex. A.

[83] XO Comments at 19.

during the period being investigated in the *Designation Order*.[84] If XO were able to obtain truly comparable DS1 service for only **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** per channel termination per month, one would expect that a sophisticated company such as XO would have used the ample headroom that it enjoys under AT&T's tariffs to migrate as many channel terminations as possible to this unnamed competitor, consistent with its available headroom.[85] And, when XO's **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** one would have similarly expected XO to have migrated a significant volume of channel terminations to this competitor. The fact that XO has done neither of these things calls into question its assertion that comparable DS1 service is available from "representative" competitors for **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** per month.

**Windstream.** Windstream's claims of harm focus on its assertion that AT&T's pricing plans "lock [it] into multi-year spends on individual TDM circuits," and also lock it into "aggregate DS1 and DS3 volume commitment levels."[87] These claims are incorrect. First, the AT&T tariffs under investigation relate solely to DS1 services, not DS3 services, and therefore,

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[84] Reid Decl. ¶ 24, Table 2.

[85] At a minimum, one would expect that XO would switch enough channel terminations to this unnamed carrier to reduce its headroom with AT&T to 0 percent, since by so doing, XO would substantially reduce its overall spend while avoiding paying even one dollar in shortfall penalties to AT&T.

[86] *See* Reid Decl. ¶ 26.

[87] Windstream Opp. at 17-18. *See also id.* ("These tariff provisions mean Windstream may be subject to penalties for not maintaining individual TDM circuit terms as well as aggregate TDM-specific volumes. In particular, if Windstream wishes to migrate a DS1 or DS3 special access circuit to AT&T's Switched Ethernet Service, AT&T's term plans only permit avoidance of early termination liability charges for disconnection of individual circuits if Windstream meets several conditions.").

Windstream's claims that AT&T's tariffs prevent Windstream from entering into overlay agreements to efficiently migrate DS3 services to Ethernet services is beyond the scope of this proceeding.

Second, Windstream has not been forced into commercial Ethernet agreements to avoid DS1 shortfall liability under the DS1 tariffs being investigated here. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

[redacted]

[redacted] **[END HIGHLY CONFIDENTIAL]**

Third, Windstream's suggestion that the Ethernet agreement it has with AT&T somehow undermines the IP transition is false.[89] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[88] In all events, as AT&T demonstrated in its Direct Case, Windstream's average headroom for DS1 services under the tariffs being investigated here for 2012-2014 (the years for which the Commission has collected data in this proceeding) ranged from **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Therefore, even without the pricing flexibility contract, Windstream could migrate a substantial portion of the DS1 services it purchases from AT&T to competitors' offerings (including Ethernet) without incurring any shortfall liability under the portability plans subject to this investigation.

[89] Windstream Opp. at 17-18.

[redacted] **[END HIGHLY CONFIDENTIAL]**

Windstream's complaints about the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

Windstream also argues that AT&T's wholesale Ethernet prices are too high, but provides no valid evidence to support its assertion. According to Windstream, "ILECs charge *substantially more* for Ethernet than for TDM special access at lower levels of bandwidth."[91] As an example, it states that "[a] comparison of the prices for TDM and Ethernet services at the AT&T IP trial wire center in Kings Point, Florida shows that the tariffed monthly price for a DS1 circuit (1.5 Mbps) is $126 per month under a 36-month commitment plan," while AT&T's wholesale Guidebook lists the price of a comparable Ethernet connection of 2 Mbps at $1,075

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[90] *Id.*

[91] *Id.* at 11 (emphasis in original).

per month on a three-year term.[92] But as Windstream is well aware, wholesale customers often negotiate prices well below those listed in AT&T's Guidebook. Indeed, Windstream admits a few sentences later that it can purchase a 2 Mbps Ethernet Connection for **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**[93] Even then, Windstream's comparison is erroneous. First, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Second, Windstream appears to be comparing an end-to-end Ethernet service to the price of a single bare DS1 channel termination. An end-to-end DS1 service would cost more, after additional rate elements, such as multiplexing and transport, are added. Without ensuring that the configurations of the Ethernet and DS1 service provide equivalent service, which Windstream has not done, comparisons of Ethernet and DS1 rates are apples to oranges.

**Sprint.** Sprint's claim of harm focuses on ETLs ("early termination liabilities") that it incurred in connection with transitioning its wireless network to IP.[94] This argument is meritless for two reasons. First, Sprint is mixing and matching volume and term-based commitments. As Sprint itself explained, the liability it is referring to here was early termination liability – it had nothing to do with any volume-based commitments associated with the portability plans under investigation.[95] Second, this argument only confirms that the ETLs did not prevent Sprint from migrating to competitive providers, and that there are many options in the marketplace. As Sprint has explained, it sought bids for the provision of these services and apparently correctly

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[92] *Id*. at 11-12.

[93] *Id*. at 12.

[94] Sprint Opp. at 47-51.

[95] *See* Letter from Paul Margie (representing Sprint Corporation) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593 at 7 (Sept. 23, 2015).

predicted that it would end up "with 25 to 30 significant backhaul providers that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers."[96] Indeed, Verizon has stated that "Sprint had awarded Verizon the backhaul business at only [a very small percentage] of the total number of [Sprint's cell] sites in the Verizon incumbent footprint."[97] Moreover, the ETLs incurred by Sprint were only a small portion of its total $2.4 billion in operating costs, and Sprint has stated that its overall backhaul costs declined,[98] which means that Sprint has since recovered a significant portion (or even all) of the ETLs it incurred.[99]

## III. THERE IS NO LAWFUL BASIS TO ADOPT ANY OF THE CLECS' PROPOSED "REMEDIES."

The CLECs urge the Commission to adopt a wide variety of often conflicting remedies that reflect their company-specific wish lists of the moment. Although Sprint and XO want sweeping condemnation of the percentage commitment plans (with radical replacements),[100] their position is undercut by the Joint CLECs, who have no objection to such plans but merely ask that the Commission adjust the percentage commitment levels and termination penalties.[101] Windstream, for its part, does not even object to the percentage commitments or shortfall charges; it simply wants the Commission to make ILECs count Ethernet services toward the DS1

[96] Carol Wilson, Sprint to Reveal Backhaul Contract Winners Friday, Light Reading (Oct. 5, 2011), http://www.lightreading.com/ethemet-ip/sprint-to-reveal-backhaul-contract-winnersfriday/d/d-id/690452.

[97] *See* Letter from Kathleen Grillo (representing Verizon) to Marlene H. Dortch (FCC), WC Docket No. 05-25, RM-10593 at 2 (Sept. 12, 2012).

[98] *See* Sprint Quarterly Investor Update, Fiscal 1Q15, at 8 (August 4, 2015), *available at* http://investors.sprint.com/files/doc_financials/quarterly/2015/1500074513.PDF.

[99] To the extent that TDS Metrocom,(at 24-27), and Lightower/Lumos (p. 12) argue that the Commission should regulate Ethernet pricing due to an alleged "price squeeze" by CLECs, AT&T has refuted that argument in its Comments in the Special Access proceeding. *See* AT&T Special Access Reply Comments at 46-50.

[100] *See* Sprint Opp. at 51-52; XO Comments at 58-59.

[101] *See* Joint CLEC Opp. at 92.

commitment levels.[102] As explained below, there is no record evidence or sound basis for ordering any of these proposed remedies.

For its part, XO urges the Commission to hold "void and unenforceable" all of the challenged provisions of the pricing plans at issue and instead require the ILECs to offer discount plans "based upon traditional volume discounts, balancing the rates charged by the volume purchased."[103] XO's proposal that the Commission require traditional volume discounts is a non-starter, because the D.C. Circuit has squarely rejected the notion that carriers can be required to offer volume discounts. In *BellSouth Telecommunications Inc.* v. *FCC*, the D.C. Circuit expressly held that incumbent LECs have "no obligation to offer a volume discount plan at all, much less a linear plan."[104] Accordingly, the Commission could not lawfully find that volume discounts are statutorily required.

The Joint CLECs, by contrast, argue that the Commission "should declare the volume commitments in the incumbent LEC . . . plans to be unlawful" and should also "specify that the incumbent LECs' prior purchase-based commitments cannot exceed fifty percent of a customer's historic spend with the incumbent LEC."[105] This proposal, which would require the Commission to prescribe a maximum volume commitment level, ignores the requirements of Section 205 of the Communications Act, which provides that the Commission may order a carrier to offer its services on different rates or terms only after it (1) makes definitive findings that the existing charges or practices for these services are "in violation of any provisions of this chapter" and (2) determines "what will be the just and reasonable" charges or practices "to be thereafter

[102] *See* Windstream Opp. at 18-20.

[103] XO Comments at 58.

[104] 469 F.3d 1052, 1057 (D.C. Cir. 2006).

[105] Joint CLEC Opp. at 92.

observed."[106] Indeed, it is well-established that the Commission must find both that the carrier's terms are unlawful *and* that the Commission-prescribed terms are lawful.[107]

Such findings cannot be made here. There is simply no record basis for the Commission to reasonably conclude that AT&T's current volume commitment levels (80 and 90 percent) are unlawful but that the Joint CLECs' proposed 50 percent maximum level is lawful. As AT&T explained in its Opening Brief, these commitment levels are an essential component of any discount program; if the commitment levels are set too low, the portability plans would effectively eliminate ETLs over the entire range of likely early terminations.[108] In other words, a 50 percent volume commitment in a portability plan could for all practical purposes eliminate ETLs altogether, and AT&T would in effect be offering term discounts with no meaningful way to enforce them. Such an order would radically upset the balance of AT&T's overall rate structure, as all CLECs would rush to combine the lowest discounts with the newly imposed low-commitment portability plans, confident that they would never incur any ETLs for early termination. AT&T in those circumstances would be forced either to make compensating changes in its other rates or discontinue the portability plans in their entirety.[109] The Commission thus could not even consider this CLEC proposal without investigating what the full impact would be on all of AT&T's pricing plans.[110]

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[106] 47 U.S.C. § 205.

[107] *See AT&T* v. *FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973) (express Commission findings that the carrier-initiated term is unjust and unreasonable and the prescribed term is just and reasonable "are essential to any exercise by the Commission of its authority" to prescribe terms).

[108] AT&T Opening Br. at 19, 32-33.

[109] *See, e.g.,* AT&T Opening Br. at 19 (discussing the substantial risk and costs associated with prematurely disconnected circuits, and explaining that the commitment levels and shortfall penalties establish a reasonable outer boundary on AT&T's risk).

[110] The Joint CLECs also ask the Commission to make sure the shortfall and other penalties are "just and reasonable," but they have nothing to say about exactly how the current terms might be

Sprint's request that the Commission immediately suspend enforcement of the penalty provisions of the pricing plans is even more radical and unlawful.[111] As explained above (p. 17), the ETLs are an essential element of the bargain in the term agreements. They are a necessary *quid pro quo* for the rights and benefits that the CLECs obtain under these agreements, and the CLECs agreed to them. The Commission therefore cannot rewrite the parties' agreement by taking away one side of the *quid pro quo* and thereby stripping AT&T of its half of the bargain. Such a "remedy" would blatantly skew the competitive landscape in favor of the CLECs and provide them with a one-sided windfall.

The Joint CLECs and Sprint further argue that the Commission should permit a "fresh look," under which CLECs would be allowed to move circuits to competitors without penalty for a period of time.[112] Such a "remedy," however, is both unnecessary and inappropriate. The pricing plans under investigation are *portability* plans. The whole point of these plans is to allow customers to avoid ETLs. As such, they already provide a kind of perpetual "fresh look" that permits customers to move circuits to competitors without consequence. The record confirms both that the CLECs generally have substantial headroom under their existing agreements and that they have been successful in reducing their percentage commitment levels over time as they renew their plans. As noted above (p. 10), AT&T has lost **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of its DS1 sales from the

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unlawful or what alternative the Commission might determine to be lawful or required. *See* Joint CLEC Opp. at 92.

[111] Sprint Opp. at 51 ("[T]he Commission should declare that incumbent LECs cannot enforce the punitive shortfall, termination, and overage penalties that they currently use to force loyalty on their [customers]."); *id.* at 52 ("[T]he Commission should immediately suspend enforcement of all incumbent LEC penalties associated with terminating circuits that are subject to a plan at issue in this investigation, pending the completion of comprehensive reform.").

[112] Joint CLEC Opp. at 92-93; Sprint Opp. at 52-53.

four pricing plans at issue from January 2013 to December 2015. Consequently, no CLEC needs a "fresh look" on top of the ample portability options they already have.

In addition, contrary to the CLECs' arguments, the circumstances in this case are not analogous to the *Special Access Expanded Interconnection Order*.[113] In that case, the Commission ordered a temporary fresh look because it had just directed the ILECs to permit special access competitors to collocate in ILEC central offices, thus creating a brand new source of competition. Rather than waiting for existing term and volume discount plans to expire, the Commission gave long-distance carriers a brief opportunity to jump to the new competitors without having to pay the full termination penalties.[114] There is no such epoch-defining event here; special access competition has existed for years and the record confirms that the CLECs routinely take advantage of these plans to move circuits.[115]

Finally, Windstream, the Joint CLECs, and XO argue that the Commission should require AT&T to permit customers to count Ethernet services toward the volume commitments under the DS1 plans at issue.[116] Such terms, again, are neither necessary nor appropriate. Indeed, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]

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[113] Report and Order and Notice of Proposed Rulemaking, *Expanded Interconnection with Local Telephone Company Facilities; Amendment to the Part 69 Allocation of General Support Facility Costs*, 7 FCC Rcd. 7369, ¶¶ 201-02 (1992) ("*Special Access Expanded Interconnection Order*").

[114] *Id.* ¶ 201.

[115] In addition, unlike the term and volume discount plans at issue in that order, the plans here are portability plans that already provide for the avoidance of ETLs. As the passage the Joint CLECs quote makes clear, the Commission in the *Special Access Expanded Interconnection Order* merely *limited* termination penalties to the difference between what the customer had paid and what it would have owed under the term actually served; the Commission did not eliminate the termination penalties altogether. *See id*. ¶ 202; Joint CLEC Opp. at 93. The Joint CLECs do not explain how the Commission could implement a comparable "make whole" provision for the portability plans at issue here without permitting the ILECs to collect most if not all of the shortfall penalties it would have collected anyway.

[116] Windstream Opp. at 18-20; Joint CLEC Opp. at 92; XO Comments at 58-59.

[redacted] **[END HIGHLY CONFIDENTIAL]** As a consequence, the requested relief is not needed. It is not appropriate because the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** governing services subject to forbearance like Ethernet are not at issue in this proceeding. In any event, the very fact that these CLECs have been able to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

**CONCLUSION**

For the forgoing reasons, and for the reasons set forth in AT&T's Direct Case, the Commission should conclude that the AT&T tariffs at issue are consistent with the Communications Act and close the investigation.

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