

Morgan Lewis

Tamar E. Finn
Partner
+1.202.373.6117
tamar.finn@morganlewis.com

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March 24, 2016

Via Hand Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Written Ex Parte Letter - WC Docket No. 05-25; RM-10593

Dear Secretary Dortch:

In this written ex parte letter, TDS Metrocom, LLC (“TDS CLEC”) responds to a number of points raised in Reply Comments filed in the above referenced proceedings.

The Commission does not have to reverse its forbearance orders to affirm that RBOCs must sell wholesale Ethernet at an avoided cost discount. AT&T argues that the Ethernet pricing relief sought by TDS CLEC and others would require the Commission “to overturn several prior forbearance decisions.”¹ Similarly, CenturyLink argues that the Commission may not create “new Section 251 resale mandates”² or “impose this pricing straitjacket on Ethernet special access pricing.”³ To the contrary, Section 251(c)(4), the Commission’s 1998 and 1999 *Advanced Services Orders*⁴ and Rule 51.605(d) already require ILECs to resell Ethernet at an avoided cost discount.⁵ The FCC refused to forbear from the ILEC resale obligations under 251(b)(1) and 251(c)(4), finding that such forbearance was not

¹ Reply Comments of AT&T at 40 (“AT&T Reply Comments”).

² Reply Comments of CenturyLink Reply at iv.

³ *Id.* at 68.

⁴ *Deployment of Wireline Services Offering Advanced Telecommunications Capacity et al.* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998), (“*Advanced Services Order*”) remanded on other grounds, *US West v. FCC*, 1999 WL 728555 (D.C. Cir. 1999); see also *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, Second Report and Order, 14 FCC Rcd 19237 (“*Advanced Services Second Report and Order*”).

⁵ See Comments of Windstream Services, LLC at 68-77 (filed Jan. 28, 2016).

Morgan, Lewis & Bockius LLP

2020 K Street, NW
Washington, DC 20006-1806
United States

 +1.202.373.6000
 +1.202.739.3001

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warranted and did not meet the statutory standard.⁶ With respect to resale of Ethernet under Section 251(c)(4), there is no need to reverse forbearance because the Commission did not grant such forbearance. All the Commission need do here is reiterate that ILECs must comply with this longstanding requirement upon the request of a CLEC.

Likewise, Verizon asserts that “the record does not contain information about avoided costs.”⁷ It is not necessary that the Commission calculate an avoided cost percentage in this proceeding. The fact that, as shown below, RBOCs are charging more for wholesale than for retail Ethernet shows that they are not complying with the current avoided cost requirements. TDS CLEC believes that avoided cost discounts have been calculated and

⁶ See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18739 paras. 65-68, 69-70 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19507-09 paras. 57, 61-62 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260, 12290-93 paras. 62, 66-67 (2008) (denying parts of petitions by AT&T/BellSouth, Embarq/Frontier and Qwest seeking forbearance from “Title II economic obligations...including those ...that apply generally to [ILECs]” such as the “interconnection, unbundling, and resale obligations” imposed under “section 251(c)” and those that apply to all LECs such as the “Section 251(b)... duty not to impose unreasonable or discriminatory conditions or limitations on resale of their telecommunications services.”).

The same limit on forbearance applies to CenturyLink’s ILECs and services not already covered by the Embarq and Qwest forbearance orders by virtue of the deemed grant of CenturyLink’s similar petition *See* FCC News Release, *Pursuant to section 10(c) of the Communications Act of 1934, as amended, the relief requested in CenturyLink’s December 13, 2013 petition for forbearance was deemed granted by operation of law, effective March 13, 2015* (rel. Mar. 16, 2015); *CenturyLink’s Petition for Forbearance Pursuant to 47 U.S.C. sec. 160(c) from Dominant Carrier Regulation and Computer Inquiry Tariffing Requirements on Enterprise Broadband Services*, at pp. 7-8 (filed Dec. 13, 2013) (only seeking forbearance from the same services for which other ILECs were granted forbearance in above-referenced FCC orders; relief sought was limited as follows: “Dominant carrier tariff filing and price cap regulations, including the duty to file cost support; Dominant carrier discontinuance requirements; Dominant carrier domestic transfer of control requirements; and [t]he *Computer Inquiry* tariffing requirement.”).

⁷ Reply Comments of Verizon at 39 (“Verizon Reply Comments”).

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placed in effect in every affected jurisdiction. If Verizon or any other ILEC believes that a different avoided cost discount should be applied to wholesale Ethernet, it is free to request the appropriate regulatory commission establish a different discount rate.

Hawaiian Telcom claims that “the Commission has already established that special access prices are not subject to Section 251(c)(4), a conclusion contained in a final order which has been in place for over fifteen years,” citing 47 C.F.R. § 51.605(b).⁸ This argument ignores § 51.605(d), providing that “[n]otwithstanding paragraph (b) of this section, advanced telecommunications services that are classified as exchange services are subject to” the wholesale discount rules “if such services are sold on a retail basis to residential and business end-users that are not telecommunications carriers.”⁹

Ethernet services qualify as advanced telecommunications services subject to rule 51.605(d). The Commission’s *Advanced Service Order* concluded that “advanced services sold to residential and business end users are subject to the section 251(c)(4) discounted resale obligation, ***without regard to their classification as telephone exchange service or exchange access service.***”¹⁰ The term “advanced services” means “high-speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology.”¹¹ “Broadband” includes “services based on packet-switched technology” and “wireline” “refer[s] to facilities that have traditionally been deployed by telephone companies,” as distinguished from “coaxial and other cable facilities that traditionally have been deployed by cable companies.”¹² In short, the *Advanced Services Order*, which adopted

⁸ Reply Comments of Hawaiian Telcom, Inc. at 15 (“Hawaiian Telcom Reply Comments”).

⁹ 47 C.F.R. § 51.605(d) (2015).

¹⁰ *Advanced Services Second Report and Order*, 14 FCC Rcd 19237, 19241, para. 8 (emphasis added).

¹¹ *Advanced Services Second Report and Order*, n.2

¹² *Id.* at nn.2, 3. In light of the Commission’s determination that Ethernet special access should be sold at an avoided cost discount under Section 251(c)(4), the Commission should reject Hawaiian Telcom’s contention that CLECs should be forced to (1) purchase UNEs or (2) construct their own networks. In enacting Section 251(c)(4), Congress determined that resale at an avoided cost discount would be a third available option. The cases on which Hawaiian Telcom relies for its assertion that “the Commission has repeatedly rejected calls to set special wholesale rates” (Hawaiian Telcom Reply Comments at 16 and n. 65) are inapposite. The first proceeding cited by Hawaiian Telcom (*Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, First Report & Order, 11 FCC Rcd 18455 (1996), *aff’d sub nom. Cellnet Communs v. FCC*, 149 F.3d 429 (6th Cir. 1998)) related to wireless service, which is

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both 47 C.F.R. § 51.605(b) and (d), subjects the type of Ethernet service at issue here to the § 251(c)(4) requirement that it be sold at an avoided cost discount.

We discuss other issues raised by ILECs' Reply Comments below.

I. Response to AT&T Reply Comments

- A. TDS CLEC Does Not Propose that the Commission Reimpose Price Cap Regulation on Ethernet Services or Set Specific Ethernet Rates.

AT&T concedes that “the Commission has legal authority to regulate Ethernet rates pursuant to Sections 201 and 202, and did not grant forbearance with respect to those provisions.” Yet AT&T contends that the Commission may not “simply reimpose the regulations from which it forbore without a rulemaking proceeding,” suggesting that this is what TDS CLEC requests the Commission do.¹³ AT&T misconstrues TDS CLEC's request. TDS CLEC has not requested that the FCC reimpose the price cap regime that was the subject of forbearance. Rather, as discussed above, TDS CLEC has requested that the Commission require RBOCs to sell wholesale Ethernet at retail rates minus costs that they avoid when selling at wholesale. Both Sections 202(a) and 251(c)(4) impose that obligation.

(Footnote continued from Previous Page.)

not subject to § 251(c)(4) and could not trump an FCC Rule that applies expressly to advanced wireline service. The second proceeding cited by Hawaiian Telcom (*Applications Filed for Transfer of Control of Embarq Corporation to CenturyTel, Inc.*, WC Docket No. 08-238, Memorandum Opinion & Order, 24 FCC 8741 (2009)) was CenturyTel's acquisition of Embarq. While the negotiated conditions require the merged company to resell ADSL at a price no higher than retail for 3 years, the order does not suggest that the FCC rejected any requirement to resell advanced services at a wholesale discount.

¹³ AT&T Reply Comments, n. 115. Similarly, in a recent blogpost, AT&T argued that to regulate Ethernet, the FCC “would have to initiate a new proceeding that tees up that issue; it cannot simply bootstrap that issue into a proceeding about TDM services.” Caroline Van Wie, “CLEC End Game is Ethernet Re-Regulation,” posted March 16, 2016, available at <http://www.attpublicpolicy.com/special-access/clec-end-game-isethernet-re-regulation/>. AT&T ignores the fact that when the FCC initiated this docket in 2005, it explicitly sought comment on whether price caps should apply to packet switched services. *Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 52 (2005).

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AT&T asserts that the Commission should not regulate ILEC Ethernet services because it would be “extraordinarily difficult to come up with the ‘right’ prices and the ‘right’ regulatory regime.”¹⁴ *TDS CLEC does not suggest that the Commission set prices for retail Ethernet service at all.* Wholesale prices should be set by reference to the retail prices that AT&T and other ILECs establish. This wholesale pricing methodology was established by Congress in Section 252(d)(3) and has proven workable for the last 20 years.

The Commission has relied on Sections 201 and 202 to require carriers to reprice like services without specifying the specific rate that must be charged and it can do so again here.¹⁵ For example, where “the facilities provided to the IRCs were ‘essentially identical’ to those provided to the domestics”, the Commission found that “the disparate rate structure was accordingly discriminatory under Section 202(a)” and ordered AT&T “to eliminate the discrimination between the domestic and IRC circuits.”¹⁶ Similarly, the Commission’s action was upheld when it had “not fixed the levels of TelPak rates” but “merely said that those rates and the Company’s private line rates must be reasonably similar.”¹⁷ TDS CLEC does not propose that the Commission fix specific Ethernet retail or wholesale rates. Rather, the Commission should confirm that the wholesale Ethernet rate RBOCs offer to CLECs must be priced below their retail rate for the same or similar service by the amount of the avoided cost discount applicable in the relevant state.

B. CLECs Have Provided Evidence of a Price Squeeze that Violates the Communications Act

TDS CLEC and other CLECs have asserted that they are subject to a price squeeze because ILECs’ wholesale Ethernet rates exceed their retail Ethernet rates, in violation of Sections 201, 202 and 251(b)(1) of the Communications Act. Whether a price squeeze exists is somewhat moot in light of the fact that ILECs are obligated under Section 251(c)(4), the *Advanced Services Order*, and 47 C.F.R. 51.605(d) to sell wholesale Ethernet at an avoided cost discount. Nevertheless, TDS CLEC responds below to the claims of AT&T and other ILECs that no price squeeze exists.

¹⁴ AT&T Reply Comments at 45.

¹⁵ See Comments of TDS Metrocom, LLC at 11-12 (filed Jan. 27, 2016) (“TDS Comments”).

¹⁶ See *Western Union Int’l, Inc. v. FCC*, 568 F.2d 1012, 1016 (2d Cir. 1977) (upholding Commission decision).

¹⁷ *America Trucking Ass’n, Inc. v. FCC*, 377 F.2d 121 (D.C. Cir. 1966).

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AT&T attacks the price squeeze claims by asserting that CLECs have not offered hard evidence of a price squeeze.¹⁸ As AT&T is aware, the prices it charges to Ethernet customers are subject to confidentiality agreements, preventing TDS CLEC from submitting for Commission review the precise rates charged by AT&T. Indeed, TDS CLEC explained that it could not submit these rates into the record “even under Highly Confidential treatment, unless required by law, governmental authority or legal process.”¹⁹ Because of these confidentiality restrictions, TDS CLEC’s Vice President of Sales, Matthew Loch, explained (without disclosing specific rates) that the RBOC wholesale rates offered to TDS CLEC are typically higher than the RBOC retail rates.²⁰

Since AT&T believes that the Commission should base its decision on the specific evidence, TDS CLEC now presents the percentage comparison between AT&T wholesale and retail Ethernet rates for 10 Mbps, 20 Mbps, and 50 Mbps through the Fourth Declaration of Matthew J. Loch, attached hereto. This Declaration shows that AT&T’s wholesale rates for these bandwidths are *****BEGIN HIGHLY CONFIDENTIAL** [REDACTED] **END HIGHLY CONFIDENTIAL*****²¹ respectively of AT&T’s retail rates for the same or similar service. These comparisons do not take into consideration additional costs that a CLEC purchasing wholesale Ethernet service from AT&T must incur, including electronics,²² equipment, transport,²³ retail billing and collection, customer

¹⁸ AT&T Reply Comments at 47-48. AT&T also cites a trade press article based on an interview with a TDS employee over which Mr. Loch has supervisory responsibility for the proposition that TDS can “make a few bucks” purchasing wholesale Ethernet from AT&T. As Mr. Loch made clear in his First Declaration, the TDS employee interviewed “has not been involved in TDS CLEC’s attempts to rely on Ethernet services purchased from RBOCs as a last-mile solution.” Declaration of Matthew J. Loch, ¶ 3, attached to Ex Parte Letter from Thomas Jones, Counsel for TDS Telecommunications Corporation to Marlene Dortch, Secretary (filed June 22, 2015) (“Loch First Declaration”). Mr. Loch stated unequivocally that TDS CLEC’s six customers served with AT&T wholesale Ethernet “are not representative of traditional SMBs” and the “economics are not attractive” because of the much lower rate of return “with a negative net present value.” *Id.*, ¶ 6. AT&T’s continued reliance on this TDS employee interview, as though it were still viable, shows that AT&T has little support for its claim that TDS can make a profit purchasing wholesale Ethernet from AT&T and selling it at retail.

¹⁹ Second Declaration of Matthew J. Loch, ¶ 15, attached to Comments of TDS Metrocom, LLC (filed Jan. 27, 2016) (“Loch Second Declaration”).

²⁰ Loch Second Declaration, ¶ 19.

²¹ Fourth Declaration of Matthew J. Loch, ¶ 5 (“Loch Fourth Declaration”).

²² Third Declaration of Matthew J. Loch, ¶ 9, (“Loch Third Declaration”), attached to TDS Metrocom, LLC Reply Comments, (filed Feb. 19, 2016) (“TDS Reply Comments”).

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service and marketing/sales costs.²⁴ Mr. Loch addressed those additional costs in his Second Declaration, which included a chart showing the percentages by which RBOC wholesale Ethernet rates plus TDS CLEC's additional costs exceeded RBOC retail Ethernet rates for various bandwidths, ranging from 10 Mbps to 100 Mbps.²⁵

AT&T also contends that CLECs should have submitted evidence of their transport costs to establish that a price squeeze exists.²⁶ Because AT&T's retail rates are lower than its wholesale rates, there would be a price squeeze even if a CLEC's transport costs (and the other costs identified above, including sales, marketing, billing and collection, customer service, and overheads) were zero.

AT&T also claims that the Supreme Court rejected a similar price squeeze claim raised under the antitrust laws.²⁷ As AT&T recognizes, the case upon which it relies found that the price squeeze did not violate the *antitrust* laws because the defendant there had "no *antitrust* duty to deal with its competitors at wholesale."²⁸

Here, CLECs alleging price squeeze are not relying either on the *antitrust* laws or on any claimed *antitrust* "duty to deal." Rather, they are relying on the duty to offer service to all customers, wholesale and retail, in Section 201 of the *Communications Act*, as well as the ILECs' duty under Section 251(c)(4) and 47 C.F.R. § 51.605(a) and (d) to offer for resale at an avoided cost discount advanced services that they offer at retail to end users that are not telecommunications carriers, regardless of whether the service is classified as exchange or exchange access. As noted above, AT&T concedes that Sections 201 and 202 apply to its sale of Ethernet. This Commission's responsibility is to enforce the *Communications Act*, not the *antitrust laws*.

C. A LEC's Ability to Construct Laterals Must Be Measured from Splice Points, not Any Point on a Fiber Network

(Footnote continued from Previous Page.)

²³ Loch Fourth Declaration, ¶ 6.

²⁴ Loch Second Declaration, ¶ 24.

²⁵ *Id.*, ¶ 22.

²⁶ AT&T Reply Comments at 48.

²⁷ AT&T Reply Comments, n. 124.

²⁸ *Id.* (emphasis added).

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In support of its contention that CLECs can build fiber economically to reach new customers, AT&T cites statements by XO and Windstream as to the distances they can economically build from their fiber facilities to reach customers. AT&T cites the distances as being measured from the XO and Windstream “fiber facilities” and claims “[t]here is no contrary evidence in the record to support the CLEC claims that their fiber facilities are generally too far way from buildings with special access demand to justify extending a lateral if they win customers in those buildings.”²⁹ AT&T is wrong. Mr. Kumanovski makes it clear that in deciding whether to build, XO measures the distance in “linear feet from a *splice point* on XO fiber,”³⁰ not from any point on XO fiber. Likewise, the Declaration of the Windstream employees upon which AT&T relies references a distance that was measured not from the fiber but from the *****BEGIN HIGHLY CONFIDENTIAL**  **END HIGHLY CONFIDENTIAL** *******.³¹

Similarly, TDS CLEC has established that the critical distance in determining whether it is economical to construct fiber to reach a prospective customer is the distance to the nearest splice point, not the distance to the nearest point on the fiber, as AT&T suggests. As Mr. Loch explained in his Third Declaration, in Madison, Wisconsin TDS CLEC only has splice points in approximately 10% of the census blocks through which its fiber ring runs.³² Moreover, it is not practical to extend a lateral from the nearest point on a fiber route by introducing a new splice point because “cutting into a continuous undisturbed fiber to add a splice point into the fiber ring in every census block would add significant extra cost to the project and could degrade the network by creating a potential new fault point in the fiber, thus impacting the overall integrity of the fiber transmission characteristics.”³³

Thus, Mr. Loch concluded, consistent with XO and Windstream Declarants, that “the determining factor for serving a business customer location is how close is the nearest

²⁹ Ex Parte Letter from Christopher T. Shenk, Attorney for AT&T Inc. to Marlene H. Dortch, Secretary, at 13 (filed March 21, 2016) (“AT&T March 21 Ex Parte”).

³⁰ Declaration of George Kuzmanovski, ¶ 51 (emphasis added), attached to the Comments of XO Communications, LLC (filed Jan. 27, 2016).

³¹ See Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith, ¶ 51, Attachment A to the Comments of Windstream Services, LLC (filed Jan. 28, 2016).

³² Loch Third Declaration, ¶ 9.

³³ *Id.*, ¶ 4.

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splice point . . .? If a business is 100 feet from a fiber optic cable but the nearest splice point where a lateral can be run is 1,200 feet away, the proximity of the fiber (100 feet) to the business does not accurately represent the potential to build a lateral economically to serve that customer.”³⁴ Although proximity to splice points, not proximity to fiber, is the determining factor, none of the ILECs have offered any evidence as to the number of census blocks with CLEC splice points or the proximity of customers to CLEC splice points.

In addition, it is worth noting that in the market in which TDS CLEC has most aggressively constructed laterals to reach customers (Madison), the average length of a lateral is *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL*****.³⁵ The vast majority of TDS CLEC’s on-net builds are shorter than *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL*****³⁶ from the splice point. Across all TDS CLEC markets, approximately two-thirds of its on-net builds are less than **[BEGIN HIGHLY CONFIDENTIAL [REDACTED] [END HIGHLY CONFIDENTIAL]** from the splice point and approximately 95% of its on-net builds are less than **[BEGIN HIGHLY CONFIDENTIAL [REDACTED] [END HIGHLY CONFIDENTIAL]** from the splice point.³⁷

In a footnote, AT&T contends that CLECs “can get over the fiber build expense” by “pre build[ing] routes along streets in a community near buildings with a particular focus on multi-tenant buildings,” quoting an article in the trade press based on an interview with a front-line product manager for TDS CLEC.³⁸ AT&T submitted this same quotation from the trade press in a June 9, 2015 *ex parte* in this docket, likewise arguing that TDS CLEC can pre-build fiber economically.³⁹ As TDS CLEC explained in the First Declaration of Mr. Loch, who has supervisory responsibility over the employee who was interviewed, the TDS CLEC employee was referring to a single limited fiber deployment trial.⁴⁰ Mr. Loch further explained that this limited trial generated a “modest” profit that “was well below the standards of a viable business case” and that in nearly 18 months since the trial, TDS

³⁴ *Id.*, ¶ 6.

³⁵ Loch Fourth Declaration, ¶ 7.

³⁶ *Id.*

³⁷ *Id.*

³⁸ AT&T Reply Comments, n. 43.

³⁹ *Ex Parte* Letter from Keith M. Krom, AT&T Services, Inc., to Marlene H. Dortch, Secretary, at 3, WC Docket 05-25 (filed June 9, 2015).

⁴⁰ Loch First Declaration, ¶ 4.

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CLEC had “been unable to find a second workable target location for a fiber deployment trial” in its market footprint and had “concluded that the modest profit margin yielded by the [trial] project is as good as it gets and has accordingly abandoned the initiative.”⁴¹ That continues to be true today.

In light of this declaration, stating unequivocally that TDS CLEC has “abandoned the initiative,” AT&T’s continued reliance on this long-abandoned TDS CLEC initiative, as though it were still viable, shows that AT&T has little support for its claim that CLECs have a commercially viable method of pre-building fiber routes.

D. AT&T Ignores TDS CLEC Evidence to Overstate Cable Competition

TDS has stated that 75% of its market consists of customers with 10 or fewer employees and these companies sometimes “compromise on their preference for reliable and secure service by downgrading to best efforts broadband Internet access service for cost savings.”⁴² Based on this, AT&T leaps to the conclusion that “TDS is competing with cable companies for 75% of its customer base.”⁴³ This conclusion is based on two unstated premises, each of which is untrue. First, AT&T incorrectly assumes that because cable facilities reach *some* businesses with 10 or fewer employees, cable facilities reach *all* businesses with 10 or fewer employees. To the contrary, as TDS’s Vice President-Network Services and Chief Technology Officer explained when referring to TDS-owned cable companies, “cable networks were, at their heart, built for residential, not business customers”⁴⁴ and therefore “did not pass many commercial establishments” and TDS needs to expand its cable network to reach business customers.⁴⁵ Second, AT&T assumes that because *some* businesses that are offered service by cable companies are willing to “compromise on their preference for reliable and secure service by downgrading to best efforts broadband Internet access service for cost savings,” *all* businesses are willing to do so. That assumption is unfounded, untrue, and another example of AT&T leaping to conclusions that ignore evidence TDS CLEC has put in the record. As Mr. Loch has stated: best efforts broadband “is not sufficient for the majority of the SMBs that TDS CLEC serves and it will likely be even less sufficient as

⁴¹ *Id.*

⁴² See Declaration of James Butman, ¶¶ 5, 15 attached to Ex Parte Letter from Thomas Jones, Counsel for TDS Telecommunications Corporation to Marlene H. Dortch, Secretary, (filed March 26, 2015).

⁴³ AT&T Reply Comments, n. 59. See also AT&T March 21 Ex Parte, n.28.

⁴⁴ Declaration of Kenneth H. Parker, ¶ 14, attached to TDS Reply Comments.

⁴⁵ *Id.* ¶ 6.

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SMBs['] bandwidth demands increase in the future.”⁴⁶ Verizon affirms the limited extent of cable competition, explaining that the current 10 Mbps limit of Ethernet over Hybrid Fiber Coax (“HFC”) offered by cable companies would be sufficient for the more than *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL***** of the Ethernet services Verizon currently sells at 10 Mbps or less.⁴⁷ Verizon thus implies that cable company Ethernet products are not competitive with the nearly *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL***** of Ethernet services above 10 Mbps sold by Verizon.

II. Verizon Reply Comments

A. CLECs Cannot Construct Laterals to Every Customer at the Maximum Distance

Like AT&T, Verizon discusses the maximum distance that TDS CLEC and other CLECs can build laterals from their fiber without recognizing that the distance limitations are from the nearest fiber splice point.⁴⁸ The distance limitation on TDS CLEC’s fiber builds cited by Verizon is misleading. As stated in Section I.C., above in its largest market (Madison), TDS CLEC’s average lateral fiber build is *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL***** and 95% of its lateral fiber builds across its footprint are less than *****BEGIN HIGHLY CONFIDENTIAL [REDACTED] END HIGHLY CONFIDENTIAL***** from the splice point.

B. The Commission Should Address the Price Squeeze in a Rulemaking Because It Relates to the Public Interest in Competition and Is Widespread

Verizon argues that the Commission should not consider the claims of price squeeze that TDS CLEC and others have raised because “the appropriate venue to address price-squeeze claims is in a Section 208 proceeding.”⁴⁹ In support of this assertion, Verizon cites two

⁴⁶ Loch Third Declaration, ¶ 24.

⁴⁷ *Ex Parte* Letter from Maggie McCready, Verizon to Marlene H. Dortch, Secretary, at 3, WC Docket 05-25 *et al.* (filed March 1, 2016) (“Verizon March 1 Ex Parte”).

⁴⁸ Verizon Reply Comments, n. 81 (citing maximum “fiber build distance” limiting TDS CLEC bids for projects).

⁴⁹ *Id.* at 34-35.

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cases. The first is the Commission's *Pricing Flexibility Order* that led to this Docket.⁵⁰ The Commission stated that Intermedia's concerns about a "potential price squeeze" should be addressed in a Section 208 Complaint. At the time of the Commission's Order, no price squeeze had taken place, since contract tariffs had not yet been authorized. Intermedia's concern was speculative, and the Commission wanted to consider it in the context of the actual rates that ILECs would charge in future contract tariffs. Here, by contrast, the ILEC pricing activity that gives rise to the price squeeze has already occurred, several CLECs have claimed to be victims of such a price squeeze, and as discussed above, data has been placed into the record. There is no need to defer the issue, which relates to the public interest in competition and appears to be widespread, to multiple one-on-one Section 208 proceedings.

The second case cited by Verizon is a docket considering the application of a Bell Operating Company for interstate authority pursuant to Section 271.⁵¹ There, the Commission found "that commenters fail to demonstrate that Pacific Bell is engaged in a price squeeze" and explained why.⁵² The footnote regarding "the appropriate venue" for a price squeeze allegation is not only *dictum* but is contradicted by the Commission's action addressing and rejecting the CLECs' price squeeze claim on its merits. The Commission demonstrated its willingness to resolve the claim in the proceeding in which it was raised. It should do the same here.

III. Verizon March 1, 2016 *Ex Parte* Letter (Cable Broadband Competition)

In its March 1, 2016 *ex parte* letter, Verizon asserts that it has heard that cable providers are offering broadband at high bandwidths that is not a "best-efforts" service even though "cable does not guarantee certain speeds or bandwidths."⁵³ In fact, if speed and bandwidth cannot be guaranteed, the service is by definition "best efforts." While Verizon points to the fact that repair intervals and availability are specified, that does not remove the cable product from the "best efforts" classification or provide service quality. State public utility

⁵⁰ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221,14292 ¶ 131 (1999).

⁵¹ *Application by SBC Communications Inc., et al., for Authorization to Provide In-Region, InterLATA Services in California*, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25736-37 ¶ 156 (2002).

⁵² *Id.*

⁵³ Verizon March 1 Ex Parte, at 3.

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commissions specify repair intervals and availability for POTS service, but that does not make POTS service competitive with Ethernet special access.

IV. NCTA Reply Comments (Two Market Participants)

NCTA claims that the presence of two facilities-based providers is sufficient to ensure that rates will be reasonable under Section 201(b), pointing out that under the Commission's high-cost universal service regime, support is not provided where an unsubsidized competitor is present.⁵⁴ In its Reply Comments, TDS CLEC has shown that the Commission does *not* take the position that the presence of one unsubsidized competitor provides customers with the benefits of competition, nor is such a position consistent with the economic literature or the data collected by the Commission in this docket.⁵⁵ NCTA's citation to USF funding policy is inapposite. In allocating scarce USF funds, the Commission is addressing how to accomplish the most public benefit with limited dollars, and is not making a determination that high-cost locations that do not receive subsidies are receiving the full benefit of competition. Moreover, USF funding goes to unserved or underserved areas (mostly rural) that possess very different characteristics than the areas with special access demand that are under consideration in this Docket.

V. Hawaiian Telcom (Wholesale Rate Caps)

Hawaiian Telcom mistakenly asserts that TDS CLEC argues that "the Commission should establish 'rate caps' so that any prices that exceed the cap would have to be lowered."⁵⁶ In fact, what TDS CLEC has suggested is that the Commission require ILECs to provide wholesale Ethernet service at an avoided cost discount below retail prices set by the RBOC, as required by Section 251(c)(4). As noted in Section I.B., above, this wholesale avoided cost methodology is required for advanced services by 47 C.F.R. § 51.605(a) and (d). Moreover, the Commission has in the past required carriers to eliminate unreasonable discrimination, as required by Section 202(a), by requiring them to charge different types of customers similar rates for the same service.⁵⁷

⁵⁴ Reply Comments of The National Cable & Telecommunications Association at 7.

⁵⁵ TDS Reply Comments at 18-26.

⁵⁶ Hawaiian Telcom Reply Comments at 8.

⁵⁷ See *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1016 (2d Cir. 1977), *America Trucking Ass'n, inc. v. FCC*, 377 F. 2d 121 (D.C. Cir. 1966).

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Hawaiian Telcom also mistakenly contends that TDS CLEC “suggests that any rate cap be set at the NECA Tariff No. 5 band 10 rates.”⁵⁸ This, too, misstates what TDS CLEC is advocating. In its Opening Comments, TDS CLEC pointed to the NECA band 10 rates as “another method of judging the reasonableness of RBOCs’ wholesale Ethernet rates.”⁵⁹ TDS CLEC concluded by asserting that “Given that costs should be much lower in RBOCs’ more densely populated territory” than in NECA band 10, “this comparison provides further confirmation that RBOCs’ wholesale rates to CLECs, which typically are above the RBOCs’ retail rates, are unjust and unreasonable.”⁶⁰ As shown in Section II.C., above, the RBOCs are in fact charging wholesale rates that are above retail. That is the principal basis for TDS CLEC’s claim that RBOC wholesale rates are unjust and unreasonable. The comparison to NECA band 10 rates is further support, not an absolute limit on rates.⁶¹ *TDS CLEC does not suggest that wholesale rates be capped at NECA band 10 rates.*

The Commission has enough data in the record to require ILECs to eliminate discrimination between their retail and wholesale customers. Hawaiian Telcom suggests that the Commission lacks the data regarding ILEC costs that would be necessary to specify a specific rate. But TDS CLEC only asks the Commission to prohibit ILECs from charging a wholesale rate that would be discriminatory when compared with their retail rate for the same service. That does not require the Commission to set a specific rate.

Finally, Hawaiian Telcom incorrectly argues that the 2012 *Special Access NPRM* “does not in substance seek to prescribe rates or rate caps” and “therefore there is insufficient notice” under the APA.⁶² Apart from the fact that TDS CLEC is only asking the Commission to prohibit unreasonable discrimination between wholesale and retail customers, the Commission provided the notice that Hawaiian Telcom asserts is lacking in an earlier order in this Docket, stating that:

⁵⁸ Hawaiian Telcom Reply Comments at 8.

⁵⁹ TDS Comments at 27.

⁶⁰ *Id.*

⁶¹ See *AT&T Corp. v. Business Telecom, Inc.* 16 FCC Rcd. 12312, 12324 at n. 73 (citing *Freight Bureau v. Cincinnati, N.O. & Tx. Pac. Ry. Co.*, 4 ICC 92 (1894) for the proposition that “where the reasonableness of rates is in question, comparison may be made, not only with rates on another line of the same carrier, but also with those on lines of other and distinct carriers”), ¶ 27 (establishing appropriateness of looking to rates of other carriers for the same service), ¶¶ 57-59 (using changes in NECA rates as a proxy for “defining the retrospective path that [defendant’s] reasonable rate should have followed.”).

⁶² Hawaiian Telcom Reply Comments at 8.

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We tentatively conclude that we should . . . establish initial rates under a new price cap plan for services for which a LEC currently has pricing flexibility, but will have none going forward under any new criteria we adopt in this proceeding, and for services for which a LEC never had pricing flexibility and for which it would have none under any new pricing flexibility criteria.”⁶³

All the Commission need do here is reiterate that RBOCs must comply with the longstanding requirements of Sections 201, 202(a), 251(b), 251(c)(4), the Commission’s 1998 and 1999 *Advanced Services Orders* and Rule 51.605(d) by offering Ethernet, an advanced telecommunications service, upon CLEC request at a wholesale, avoided cost discount below the rate offered to the RBOCs’ retail customers for the same or similar service.

Respectfully Submitted,

/s/ Tamar E. Finn

Tamar E. Finn
Eric J. Branfman

Counsel for TDS Metrocom, LLC

cc: Christopher Koves
Marvin Sacks
Deena Shetler (Redacted Version)
Eric Ralph (Redacted Version)
David Zesiger (Redacted Version)
William Layton (Redacted Version)

⁶³ *Special Access Rates for Price Cap Local Exchange Carriers and AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, (2005), ¶ 127; *see id.*, ¶ 126; *see also id.*, ¶ 52 (raising question of whether to include packet-switched services in price caps).

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Joseph Price (Redacted Version)
Shane Taylor (Redacted Version)
William Kehoe (Redacted Version)
Steve Pitterle