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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Portals II, Room TW-A325
Washington, DC 20554

Ex Parte Submission

Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Docket No. 15-247*

Dear Ms. Dortch:

On March 30, 2016, David Lawson, Bob Quinn, and the undersigned, of AT&T, met with Jonathan Sallet and Bill Dever of the Office of General Counsel. We discussed several topics relating to the above-captioned matters, including the extent to which the Commission should account for competition from cable companies (particularly the services they offer over their HFC networks) and nearby CLEC fiber facilities. Those discussions reviewed and were consistent with AT&T's recent filings on those issues.¹ We also discussed the Special Access Tariff Investigation and how AT&T's portability pricing plans under investigation work, consistent with AT&T's descriptions of those plans in its Direct Case and the short description of our discussion included below.²

In addition, we discussed the argument, advanced by INCOMPAS and other CLECs, that the Commission's 2007 grant of forbearance for AT&T's packet-switched broadband telecommunications services and optical transmission services was limited to the specific set of services AT&T offered at the time AT&T's forbearance petition was granted.³ The CLECs

¹ See, e.g., Letter from Christopher T. Shenk, counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Mar. 21, 2016).

² *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, Brief of AT&T Inc. in Support of its Direct Case, Attachment 1 (Declaration of Paul Reid) (filed Jan. 8, 2016).

³ Letter from Karen Reidy to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Dec. 1, 2015) ("INCOMPAS Ex Parte"); Letter from Karen Reidy to

argue in particular that AT&T's Switched Ethernet service ("ASE") is not subject to forbearance because AT&T did not offer ASE until after the date of the grant of forbearance and that ASE is not related to any of the services specifically listed in AT&T's petition. INCOMPAS and the CLECs have advanced this somewhat tortured reading of the AT&T Forbearance Order in an effort to provide the Commission with an easy strategy for making an end run around the existing broadband Forbearance Orders. However, for the reasons stated below, this approach is inherently flawed, and cannot be used to avoid the steep hurdles the Commission faces if it attempts to "unbear" and reregulate AT&T's (and other ILECs') packet-switched broadband telecommunications services.⁴

The CLECs misread AT&T's Forbearance Order and its Forbearance Petition.⁵ As AT&T has explained,⁶ the AT&T Petition requested forbearance from the services listed in "Appendix A" to the Petition.⁷ In Appendix A, AT&T listed "Ethernet-Based Service," which it described as a service that provides "point-to-point and/or Local Area Network connectivity by utilizing Ethernet protocol technology" and that "transmits variable length packets and typically operates at speed in the range of 50 Mbps to 10 Gbps."⁸ The Commission granted forbearance for the "broadband services that AT&T currently offers and lists in its petition[]."⁹ AT&T at that time offered Ethernet services with the functionality described in Appendix A. AT&T therefore obtained forbearance for all such Ethernet services, including all the Ethernet services it offers today, which meet the description included in Appendix A and thus fall within the scope of the Forbearance Order.

Marlene H. Dortch, Secretary, FCC, Docket No. 05-25 and RM-10593 (filed Jan. 12, 2016); *see also* Comments of INCOMPAS On The Further Notice of Proposed Rulemaking, 14-15 (filed Jan. 27, 2016) ("INCOMPAS Comments"); Comments of Windstream Services, LLC On The Further Notice of Proposed Rulemaking, 92-97 (filed Jan. 27, 2016) ("Windstream Comments").

⁴ *See* Letter from Keith Krom, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Sept. 28, 2015); Reply Comments of AT&T Inc. On The Further Notice of Proposed Rulemaking at 36-45 (filed Feb. 19, 2016) ("AT&T Reply Comments").

⁵ Petition for Forbearance, Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Consumer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (filed July 13, 2006) ("AT&T Petition"); Memorandum Opinion and Order, *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*, 22 FCC Rcd. 18705 (2007) ("AT&T Forbearance Order").

⁶ AT&T Reply Comments at 43-44; AT&T Petition at 8-9 & n.22. Indeed, AT&T specifically requested relief for "packet-switched services capable of transmitting 200 kbps or greater in each direction," which included "all services that route or forward packets, frames, cells, or other data units based on the identification, address, or other routing information contained in the packets, frames, cells, or other data units, and include Frame Relay services, ATM services, IP-VPN services and Ethernet services." AT&T Petition at 8-9 (quotation omitted).

⁷ AT&T Petition at 9 n.22.

⁸ *Id.* Appendix A.

⁹ AT&T Forbearance Order ¶ 40.

The CLECs' strained reading of the Forbearance Order would lead to patently absurd and indefensible results. Under the CLECs' view, a carrier providing a service that is so competitive as to have warranted deregulation through forbearance would be unable to respond to competition and the evolving dictates of the marketplace by upgrading its service without losing the service's deregulated status. Reading such a limitation into the Commission's forbearance decision would establish a powerful disincentive for innovation – which would be a nonsensical interpretation of the order contrary to all prior precedent. Indeed, the CLECs' own basis for claiming that their competing Ethernet services are detariffed are forbearance orders from the mid-1990s.¹⁰ The CLECs cannot credibly argue that the forbearance AT&T obtained for “Ethernet-Based Services” does not extend to incremental improvements in such services, when the CLECs' own claim of forbearance rests on orders that were issued long before Ethernet was even introduced into the marketplace.¹¹

The absurdity of such a reading is exemplified by AT&T's switched Ethernet offering. As INCOMPAS acknowledges, AT&T's principal switched Ethernet service at the time forbearance was granted was called OPTical Ethernet Metropolitan Area Network service (“OPT-E-MAN”). Since 2007, customer demand for greater bandwidth and additional features have pushed AT&T to improve its OPT-E-MAN service, which has now been rebranded as ASE. ASE is not some “theoretical broadband telecommunications service[]”¹² AT&T might offer in the future, nor a functionally different service than OPT-E-MAN, as the CLECs incorrectly claim, but is merely the next generation of OPT-E-MAN service. In fact, it was originally to be called “OPT-E-MAN Advanced Connection,” since it is essentially the same product with more advanced features and additional connection types.

Like OPT-E-MAN, ASE is “carrier Ethernet,” a full-feature, highly reliable switched Ethernet service which enables custom networks of point-to-point or multipoint configuration

¹⁰ See *Hyperion Telecommunications Inc. Petition Requesting Forbearance*, 12 FCC Rcd. 8596 (1997) (granting competitive access provider (“CAP”) petition for permissive detariffing of interstate exchange access services for non-dominant carriers); see also Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 (1996) (granting forbearance for competitive interexchange services).

¹¹ The same concerns would apply in countless other contexts. For example, the forbearance the Commission granted for mobile wireless services in 1994 has always been thought to apply to such services as they have evolved and developed over the last two decades. See Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd. 1411 (1994). Similarly, the forbearance the Commission granted for broadband Internet access services in its recent *Open Internet Order* undoubtedly extends to natural improvements in such services introduced after the issuance of that order, such as AT&T's upgraded 1 Gbps wireline service offerings. See Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015).

¹² Memorandum Opinion and Order, *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160 (c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, ¶ 112 (rel. Aug. 20, 2007) (“ACS Forbearance Order”).

using a meshed network, “vertical circuits,” and scalable core switching managed by AT&T Ethernet Network Operations Center. In addition, both products:

- offer only native Ethernet interfaces, and do not support TDM services;
- are built on an MPLS-protected scalable core network;
- offer multiple grades or classes of service, speeds, interfaces, and loop media;
- offer port speeds of 100 Mbps and 1 Gbps;
- offer “private” and “service multiplexed” ports;
- offer many incremental “Committed Information Rates;”
- use Ethernet Virtual Connections (“EVCs”) to interconnect ports via software;
- offer the same maximum number of EVCs per port (8 at 100 Mbps; 64 at 1 Gbps);
- have certain EVC limits based on aggregate speed of shared core network transport;
- offer multiple classes of service for different priority traffic;
- carry many customers’ traffic on a common switched platform, using AT&T controlled VLANs to securely separate and transport data; and
- are widely available within the AT&T ILEC franchise areas subject to loop and interoffice facility availability.

Both services have been sold in large volumes to both retail customers (to support enterprise, health care, government, education, small- and medium-businesses), and to wholesale customers (such as IXC, CLECs, ISPs, and system integrators). Both OPT-E-MAN and ASE can be used by wholesale customers as access to their own networks and can also be resold as-is to customers. And, both services face serious competition in the marketplace from IXCs, CLECs, carrier hotels and hosted data centers, cable companies, and private fiber construction.¹³ The FCC’s special access data collection affirms the ubiquitous presence of direct competition in the special access market — special access competitors are present in nearly all MSA census blocks with special access demand nationwide, and these census blocks contain nearly all of the businesses within those MSAs.¹⁴ And, the cable industry has confirmed that “[v]irtually any area with special access demand will contain cable company facilities that serve, or are capable of serving, business customers.”¹⁵

In order to keep pace in this highly competitive market, AT&T included additional functionality (which was not technologically available at the time OPT-E-MAN was introduced) when it released the next generation of OPT-E-MAN service, ASE. As the CLECs note, these additions include upgraded class of service prioritization, a 10 Gbps port speed option, and an enhanced ability for wholesale customers to talk to each other with peer-to-peer interconnection. These upgrades do not make ASE “a functionally different service to

¹³ Over the past decade companies have spent billions of dollars to deploy Ethernet services to serve their customers. Today, there are today nine Ethernet providers with port shares of four percent or more, including three CLECs and three cable companies, with the second largest provider being Level 3. *See* Vertical Systems, 2015 U.S. Carrier Ethernet Leaderboard (Feb. 25, 2016), <http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/>.

¹⁴ *See* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, White Paper: Competitive Analysis of the FCC’s Special Access Data Collection (filed Jan. 28, 2016).

¹⁵ Reply Comments of the National Cable & Telecommunications Association at 14 (filed Feb. 19, 2016) (“NCTA Reply Comments”).

customers than OPT-E-MAN,”¹⁶ but, instead, provide customers with the next generation of switched Ethernet service, while offering the same fundamental switched Ethernet service features as OPT-E-MAN.

Accepting the CLECs’ arguments and finding that ASE is not subject to the AT&T Forbearance Order would result in an absurd regulatory regime in which companies would be discouraged from innovating in order to maintain some semblance of regulatory certainty. Such an outcome could potentially yoke AT&T’s broadband services with regulations over and above those faced by its competitors, and would be paradoxical to the Commission’s position that old-fashioned monopoly regulation is “unnecessary in a marketplace where the provider faces significant competitive pressure.”¹⁷ Therefore, any attempt to “unbear” and impose monopoly-era regulation on ASE is subject to the substantial procedural hurdles AT&T has explained in that past.

Finally, with respect to the Special Access Tariff Investigation, we reiterated that the CLECs bear a heavy legal burden here both in the face of the facts that overwhelmingly refute their “lock-in” market foreclosure claims and the D.C. Circuit’s recognition that tariffed options such as these, which expand customers’ ability to move circuits to other providers while avoiding early termination liabilities, are generally not unlawful.¹⁸ It is important to emphasize, however, that in many cases the CLECs are asking for “remedies” that would, in effect, abrogate contracts that they have negotiated with AT&T in ways that would permit the CLEC to keep the benefit of its bargain while writing AT&T’s corresponding benefit out of the contract. Any attempt to re-write (and unbalance) contracts in such a fashion faces yet additional legal hurdles. It is well-settled that the Commission may re-write a contract tariff “only if there exists a compelling public interest in doing so, or convincing evidence of unfairness in the contract formation process.”¹⁹ No such showing could be made here. To the contrary, in broadly similar circumstances, the Commission has recognized that “[t]here is simply no justification for allowing [a party] . . . to negotiate for concessions on price, to sign a contract containing customized provisions that are the product of voluntary agreement, and then to run to the Commission to have the Commission reform a provision of the contract that

¹⁶ INCOMPAS Ex Parte Letter at 4.

¹⁷ AT&T Forbearance Order ¶ 30; *see also* ACS Forbearance Order ¶ 103; Second Report and Order, *Policies and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730, ¶¶ 14-66 (1996).

¹⁸ *See, e.g., BellSouth v. FCC*, 469 F.3d 1052, 1055-60 (D.C. Cir. 2006); Fourth Memorandum Opinion And Order On Reconsideration, *Transport Rate Structure and Pricing*, 10 FCC Rcd. 12979, ¶ 13 (1995) (*citing Expanded Interconnection Order*, 7 FCC Rcd. 7369, ¶ 199 (1992)) (“both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships”); Third Report and Order, *Access Charge Reform*, 11 FCC Rcd. 21354, ¶ 187 (1997) (volume and term “discounts should be permitted . . . because they encourage efficiency and full competition”).

¹⁹ *See e.g., Ryder Commc’n*, 18 FCC Rcd. 13603, ¶ 24; *see also Federal Power Comm’n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipeline Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

was an integral part of the *quid pro quo* bargain but which subsequently produces hardship to the customer.”²⁰

Sincerely,

/s/ Caroline R. Van Wie
Caroline R. Van Wie

cc: Jonathan Sallet
William Dever

²⁰ *Ryder Commc'ns v. AT&T Corp.*, 18 FCC Rcd. 13603, ¶ 28 (2003).