

wholesale market.<sup>53</sup> Fiber is not a novel mode of transmitting DS1 and DS3 traffic. Fiber has been in existence since the 1970s, and legacy loops comprised of fiber were installed as very low-risk investments. Indeed, in upholding the requirement that incumbents provide competitive access to newly deployed entrance conduit in brownfield areas at regulated rates, the Commission highlighted the inherently “more favorable environment” incumbents have for building out last-mile facilities “due to existing relationships with property owners and prospective customers.”<sup>54</sup>

Without ongoing unbundling obligations for DS1 and DS3 capacity loops, Verizon would be able to eliminate this source of competition to the post-transaction firm. Verizon could continue to use legacy copper and fiber loops to provide its own IP services, but could block CLECs from doing the same or permit them to do so only at much higher cost. In addition, Verizon could prevent CLECs from similarly utilizing its “new” fiber builds that repurpose legacy UNE infrastructure, such as buried conduit, pole attachments, and building entry portals.

**C. The Commission Must Prevent Verizon from Raising Rivals’ Costs Through Inappropriate Special Construction Charges.**

In addition, for this transaction to serve the public interest by enhancing the sustainability of replacement competition for XO, the Commission must impose a condition on the transaction to prevent Verizon from raising rivals’ costs through inappropriate and excessive special construction charges. ILECs impose special construction charges, in addition to regular charges for service, where new deployment of fiber or other facilities is necessary to provide the

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<sup>53</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8670 ¶ 90 (2010).

<sup>54</sup> *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) From Enforcement of Obsolete ILEC Legacy Regulations that Inhibit Deployment of Next-Generation Networks*, Memorandum Opinion and Order, FCC 15-166, ¶ 83 (rel. Dec. 28, 2015).

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wholesale special access service and the ILEC has no other requirement for the facilities.

However, competitive LECs and business services customers have increasingly observed the imposition of unwarranted special construction charges by Verizon as a way to impose de facto, additional last-mile price increases. This is particularly the case with fiber. In fact, XO itself noted last year that the percentage of cases in which special construction is imposed is more than 80 times higher for Verizon than AT&T.<sup>55</sup> Windstream's own data shows—based on an analysis submitted to the Commission that compares special construction quotes to completed orders for the first three quarters of 2015—that Verizon is more than 40 times as likely to impose Ethernet special construction charges than AT&T, and much more likely to impose special construction charges on Ethernet as compared to TDM special access services.<sup>56</sup>

Unwarranted special construction charges, whether imposed on orders for TDM-based or IP-based services, have a negative impact on business, nonprofit, and government consumers—by driving up prices these customers pay, and by often erecting a pricing barrier to use of competitive alternatives that is so high that customers essentially have no choice but to stay with the incumbent. The Commission has long recognized that charges for facilities construction can be a source of impermissible unreasonable discrimination, and a means to attempt to avoid the “basic common carrier responsibility” for “planning and investing in facilities” to respond to reasonable requests for service.<sup>57</sup> The Commission should not allow these harms to continue—or potentially be enhanced—with further consolidation of Verizon's market power.

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<sup>55</sup> Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, WC Docket No. 05-25 (April 23, 2015).

<sup>56</sup> Windstream Declaration ¶ 101.

<sup>57</sup> See *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, FCC 84-51, 97 FCC 2d 1082, 1212-13 (1984).

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To address Verizon's unjustified, competition-impeding special construction practices, the Commission should impose a condition to mandate that, where a CLEC is ordering TDM-based or packet-based special access services, Verizon may only impose special construction charges for network build-out where *both* of the following two conditions are met. *First*, existing Verizon or XO facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the CLEC. In the case of a CLEC requesting a service that requires fiber, this condition is fulfilled where Verizon or XO does not already have fiber connecting to the relevant location.<sup>58</sup> In the case of a CLEC requesting a service that can be provided over copper, this would be fulfilled where (a) Verizon has tested and found that no spare copper loop facilities would be capable of fulfilling the CLEC's order, even with routine maintenance and conditioning,<sup>59</sup> and (b) Verizon or XO does not have fiber at the relevant location. *Second*, the special construction charges must not address the costs of network delivery infrastructure that Verizon will use for its own operations. Verizon should only impose special construction charges where it must deploy new network delivery infrastructure (e.g., conduit, subduct, buried, aerial infrastructure) to fulfill a CLEC's request, and where it certifies

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<sup>58</sup> Verizon also should not be permitted to charge for construction of duplicative fiber if it already has fiber with capacity available at the customer location. This includes instances where Verizon has fiber running to a building but the fiber's Optical Line Terminal may not connect to the appropriate port to support the requested service (e.g., a GPON network that does not connect from the OLT to an Ethernet port). To the extent new electronics must be added either at the Central Office or the customer premises, or additional intra-building cable must be installed, that work may be subject to special construction charges if other conditions are satisfied.

<sup>59</sup> Examples include removal of bridge taps and loading coils.

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that it will not use the infrastructure—including the supporting infrastructure, such as conduits and poles—for any of its or its affiliates' retail services in the future.<sup>60</sup>

In addition, to ensure special construction charges do not cause significant delay in deployment of competitive services to customers, the Commission should require that Verizon

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<sup>60</sup> This ILEC certification is consistent with—and, indeed, cannot and should not override—the basic requirement that the ILEC cannot charge for any facilities that it can use to serve other customers. In application, this means the ILEC should not charge special construction for any of the following:

- Construction and interconnection of a link between the GPON ONU and, as applicable, an ILEC's serving Ethernet or TDM node; x Poles that are not limited to the CLEC customer's exclusive future use;
- Any costs for conduit, subduct, buried or aerial infrastructure when
  - o This infrastructure is located in a public right-of-way, except in circumstances where the ILEC certifies that it will not have any other future use for the infrastructure (e.g., the infrastructure runs to a single customer at a particular location, and no other customers are located along the route or at the terminus point of the infrastructure); or
  - o The infrastructure traverses private property but will serve a multi-tenant location; x Fiber or cable that is not limited to the CLEC customer's exclusive future use;
- Any splitters, amplifiers, or other passive infrastructure that have the capability to serve more than the CLEC's customer at the same location or locations that could be served from the same fiber;
- Any network electronics and/or equipment that have the capability to serve more than the CLEC's customer;
- Any intra-building cable that could be used to serve more than the CLEC's customer;
- Power plant augmentation (e.g., battery backup, commercial power feed, rectifiers, uninterruptable power supply) required for electronics that have the capability to serve more than the CLEC's customer; or
- Labor for which an ILEC would derive any benefit other than that needed to fulfill the CLEC's order (for example, an ILEC should not be able to charge all the way from a central office to a building when the bulk of the fiber on the run from a central office to a splice box, or place where a splice box could be placed, will support service to other customers, either at that location or at locations passed en route).

*See* Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593 (October 6, 2015).

respond to a CLEC's request within five days with an explanation of the basis for its conclusions that special construction is needed (consistent with the tariff) and a detailed cost estimate for the special construction.<sup>61</sup> Furthermore, Verizon should be required to submit to a reasonable number of audits per year to ensure that its no-use certifications remain valid.

**D. The Commission Must Prevent Verizon From Raising Rivals' Costs Through Imposing TDM Special Access Shortfall Liability When Migrating to Ethernet.**

Another way in which Verizon is raising rivals' costs is through manipulation of its shortfall penalty terms. Verizon is continuing to assess shortfall liability for TDM services, even when a wholesale customer is replacing these services with purchases of Ethernet services that more than cover the shortfall, and even when the TDM tariff option includes circuit portability such that the wholesale purchaser's spend is not tied to a specific end user location. And with the acquisition of XO's network assets, Verizon will increase its market power within its incumbent service areas by eliminating XO, making it all the more important for the Commission to eliminate other ways in which Verizon raises rivals' costs so that other competitive providers can continue to discipline Verizon's increased market power.

The Commission can address this concern by, as a condition of permitting the proposed transaction, (1) requiring Verizon to count Ethernet purchases toward the attainment of legacy TDM volume commitments with circuit portability, and (2) preventing Verizon from applying early termination liability to instances where a TDM special access connection is prematurely disconnected and replaced with Ethernet, either at the same customer location or at any customer

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<sup>61</sup> This should include information on whether the building already has a GPON and/or Ethernet connection, the specific route designed between Verizon's central office and the CLEC's customer location, labor hours and associated tasks included in the quotation, and proposed installation location and description of any electronics included in the quotation.

location for disconnected TDM connection that included circuit portability, of at least equal capacity to the end of the previously committed term (or if the remaining TDM term is longer than the longest Ethernet term commitment, to the end of that Ethernet term commitment). Such conditions would advance the public interest, and there is no reasonable, pro-competitive rationale for not imposing them.

As Windstream noted in its opposition to the ILECs' direct cases in the tariff investigation,<sup>62</sup> Verizon's tariffed commitment plans impose punitive shortfall charges if a wholesale customer fails to meet the minimum committed volumes based on historic TDM special access purchase levels, and do not allow the customer to "count" purchases of Ethernet circuits toward that minimum commitment. This regime substantially raises wholesale input costs—either through the purchase of unneeded circuits or through penalties—for rivals that are seeking to expand their offerings using Ethernet inputs, and makes it increasingly difficult for competitive providers to compete with Verizon's retail offerings.

Verizon asserts that its "technology-transition provisions" permit carrier customers to "move to new technologies."<sup>63</sup> However, Windstream has found that these provisions, while ostensibly providing the ability to migrate from a DS1 or DS3 special access service to Ethernet, are very narrow and difficult, if not impossible, to invoke and implement.<sup>64</sup> First, no new customer location can qualify for the transition and count toward Windstream's commitment level. Second, any Ethernet circuit that Windstream leases at the same location to replace a DS1

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<sup>62</sup> See Opposition of Windstream Services, LLC at 15, WC Docket No. 15-247 (filed Feb. 5, 2016).

<sup>63</sup> Verizon Direct Case at 38.

<sup>64</sup> The Verizon commitments are expressed in terms of DS1s, and DS3s and converted to DS1 equivalents for the purpose of fulfilling the commitments.

or DS3 circuit will not qualify as a migration unless it has a term limit at least as long as, if not longer than, the prior circuit, which means Windstream often has to sign up for a longer term and potentially incur a larger early termination liability. (Usually the potential term of the wholesale input is misaligned with the term of the retail service provided by Windstream, so Windstream either would have to renegotiate its customer contract or pay for an unused circuit.) Third, the replacement circuit has to cost at least as much as the DS1 or DS3 circuit, even though Ethernet is more cost-efficient than TDM. Fourth, the tariff imposes short timeframes for notifications and disconnections, and the failure to meet any of these timing requirements disqualifies the Ethernet circuit from counting toward the commitment.<sup>65</sup>

This leads to a situation whereby even though a CLEC pays rates reflecting the circuit portability option (thus covering any costs related to early terminations and customer changes) and even though a CLEC's total spend on last mile access (including DS<sub>n</sub> and Ethernet) is increasing—and thus the CLEC is delivering more revenue than was assured through the percentage volume commitment—the CLEC can still be subject to shortfall penalties because the CLEC's volume of DS1 and DS3 circuits is deemed to be too low.<sup>66</sup> This is economically irrational, and only serves the purpose of raising rivals' costs during a time of technology transition. Indeed, Verizon's approach is an outlier as compared with other large ILECs.

And while a wholesale purchaser overall is paying Verizon *more* than ever before for BDS inputs, Verizon's overall costs for provisioning these services, in contrast, are *less* than when provisioned exclusively with legacy technology and facilities. Verizon would not have

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<sup>65</sup> Windstream Declaration ¶ 104.

<sup>66</sup> See Verizon Telephone Companies, Tariff FCC No.1 § 25.3.7(C) (May 25, 2007), <https://www.verizon.com/tariffs/PDFViewer.aspx?doc=172553> (calculating shortfall penalties).

voluntarily transitioned to newer technologies if the latter were not the case. Indeed, Verizon has consistently failed to provide any facts that establish its voluntary transition to IP-based BDS offerings overall is resulting in a net increase to its costs.<sup>67</sup>

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<sup>67</sup> Verizon has attempted multiple, strained arguments; none justify its practices. Verizon contends that it “has to bear the costs of physically connecting new circuits and disconnecting old ones when customers take advantage of circuit portability.” *See* Rebuttal Case of Verizon at 7, WC Docket No. 15-247 (filed Feb. 26, 2016). These costs, however, are not related to circuit shortfall, but are related to portability, and thus are already priced into the DS1 and DS3 rates paid for portability. As noted above, Verizon itself voluntarily chooses to deploy Ethernet to any given location; if recovery of other costs were really such a concern, Verizon rationally would decline to offer the less profitable service. To the extent Verizon may be arguing that there would be unrecovered costs of establishing the Ethernet circuit, that seems fanciful. First, such an argument assumes that the costs of setting up the Ethernet circuit exceed the costs of establishing the TDM circuit. Second, it assumes that Ethernet recurring and non-recurring charges (including potential early termination fees if all expected monthly payments are not made) are insufficient to recover the costs of the Ethernet circuit over the term applicable to such circuits, which are not governed by the NDP. Third, it ignores the fact that Verizon prices its wholesale Ethernet services at per-Mbps levels above the rates for comparable capacity provisioned by DS1 services. Fourth, it disregards Verizon’s own claims elsewhere that provisioning Ethernet over fiber is more efficient than operating legacy technologies over time, and thus can enable higher margins than TDM services. *See* Comments of Verizon at 5-8, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593 (filed Feb. 5, 2015) (stating that fiber offers increased reliability, better performance, and improved energy efficiency). Verizon adds that “portability reduces the time over which Verizon can recover those circuit-specific, non-recurring costs,” Verizon Direct Case at 61, but this cannot justify ignoring Ethernet purchases when calculating shortfall penalties for TDM circuits that are purchased at rates reflecting portability. Again, the hypothesized decreased time over which Verizon can recover its costs of establishing the TDM circuit are already priced into its DS1 and DS3 rates with portability. Furthermore, counting the amounts spent on Ethernet circuits toward the minimum commitment levels should not increase an ILEC’s absorbed costs in planning and deploying its TDM and IP networks. The TDM network is already in place, and TDM purchases with portability do not establish any expectation of location-based demand. With respect to the IP network, if the ILEC lacks the requisite facilities at any given location to provide a CLEC customer with the Ethernet service input, then the CLEC customer has to purchase either a TDM circuit at that location to fulfill the commitment or an Ethernet circuit located elsewhere. As noted before, neither wholesale nor retail customers possess the ability to force an ILEC to deploy Ethernet service to a location against its will.

**E. The Commission Should Mandate That Verizon Comply With Any Requirements Imposed on Other Price Cap ILECs in the Business Data Services Proceeding.**

Finally, the Commission should require, as a condition of this transaction, Verizon to agree to comply with any requirements imposed on the industry in the Business Data Services proceeding. Because Verizon's Ethernet forbearance petition was "deemed granted" rather than ruled on by the Commission,<sup>68</sup> as was the case with all other similar petitions, Verizon has asserted that it has broad forbearance from Title II with respect to the services enumerated in its Petition, and has used this leeway to engage in anticompetitive behavior, as discussed above.

If the Commission does not act formally to reverse Verizon's grant of forbearance (entirely or at least insofar as it exceeds the grants to other ILECs), the Commission should impose a condition on this transaction that Verizon must agree to comply with any requirements imposed on other price cap ILECs in the Business Data Services proceeding. To the extent the Commission chooses to rely on Section 251 for any reforms, this will prevent any uncertainty regarding even application of the reforms to all ILECs.<sup>69</sup> And for any reforms adopted pursuant to Sections 201 and 202, Verizon will not be unjustifiably excluded.

Indeed, Verizon agreed in its recent joint letter with INCOMPAS in the Business Data Services proceeding that it "would not oppose an order placing Verizon on the same footing

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<sup>68</sup> See News Release, FCC, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, 2006), *pets. for review pending*, Sprint Nextel et al. v. FCC, No. 06-1111 (and consolidated cases) (D.C. Cir. filed Mar. 29, 2006); Petition of the Verizon Telephone Companies For Forbearance at 1, WC Docket No. 04-440 (filed Dec. 20, 2004).

<sup>69</sup> Windstream Business Data Services Comments at 72-73 (explaining that Verizon does not have forbearance from Section 251).

today with regard to Ethernet services” as other ILECs who have received forbearance relief.<sup>70</sup>

The Commission, likewise, recognizes in its recent Business Data Services Notice of Proposed Rulemaking, that parity in regulation of price cap ILECs’ BDS offerings and such reversal of Ethernet forbearance would be “appropriate.”<sup>71</sup>

## V. CONCLUSION

The Applicants wholly have failed to provide an adequate basis for the Commission to conclude that the transaction furthers the public interest by enhancing competition. To the contrary, without significant safeguards and conditions, the transaction is likely to reduce competition in the Verizon ILEC region, to reduce competition in the AT&T ILEC regions where XO is likely to cease being an aggressive competitor and wholesale service provider, and to facilitate coordinated conduct between Verizon and AT&T to raise rivals costs so as to preclude effective threats to their positions as the nation’s largest suppliers of complex enterprise communications solutions. The Commission thus should adopt multiple conditions and

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<sup>70</sup> See Letter from Kathleen Grillo, Senior Vice President, Public Policy & Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 05-25, RM-10593 (filed Apr. 7, 2016).

<sup>71</sup> *Tariff Investigation Order and FNPRM* ¶ 517.

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safeguards that will allow the remaining providers other than Verizon and AT&T to compete sustainably even when purchasing wholesale last mile access from Verizon and AT&T.

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