



wholesale business and resale lines. It also provides long distance and high-capacity business services. Hawaiian Telcom faces stable and growing competitors in the state. tw telecom of hawaii and Wavecom Solutions, for instance, both provide voice, private line (i.e., special access services), and broadband communications services to residential and/or business subscribers. The broadband marketplace in Hawaii greatly benefits small and medium-sized businesses under current regulatory provisions.

The FCC adopted price cap regulation in 1991 when incumbent LECs still had few competitors.<sup>3</sup> Price cap regulation replaced the more traditional method of rate regulation, rate-of-return, and was designed to provide incentives that would encourage incumbent LECs to become more efficient, while ensuring that rates remained within a zone of reasonableness.<sup>4</sup> It was established as a transitional mechanism until market forces obviated the need for rate regulation.<sup>5</sup>

As marketplace and competitive forces grew, price cap regulations were substantially changed as the FCC gained more experience with the regulations. The Commission increased pricing flexibility in 1999, recognizing that competition in the marketplace had been growing.<sup>6</sup> In the *Pricing Flexibility Order*, the Commission eliminated most of the constraints on geographic deaveraging for trunking basket services, including special access services. The FCC has also taken measured steps to forbear from Title II regulation for broadband special access services, such as for Ethernet, Frame Relay, Cell Relay, and other broadband services utilized by

---

<sup>3</sup> See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990).

<sup>4</sup> *Id.*, at ¶¶ 2-4.

<sup>5</sup> *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd 8961, 9055 (1995).

<sup>6</sup> *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”).

business customers.<sup>7</sup> The FCC has repeatedly acknowledged that competition for special access services has grown faster than that for switched services.<sup>8</sup>

## **II. THE MARKETPLACE IS PROVIDING REASONABLY PRICED BROADBAND SERVICES TO SMALL AND MEDIUM-SIZED BUSINESSES.**

A number of commenters have provided substantial record evidence about the competitiveness of broadband services available to business customers both small and large. High capacity DSL services, cable modem services, Ethernet services, as well as a host of other broadband offerings, are provided throughout the country, offering speeds of between 6 and 100 Mbps advertised download speeds.<sup>9</sup> Advances in wireless communications, both from burgeoning 4G network rollouts and fixed wireless offerings, provide additional strong business-capable broadband solution to small and medium-sized businesses.<sup>10</sup> In addition, customers have enjoyed the benefit of forbearance from regulation for so-called high-capacity broadband services.<sup>11</sup> Although the market is moving to IP-based transmission services, existing, regulated telecommunications services that provide broadband capability remain widely available for use

---

<sup>7</sup> See, e.g., *Petition of the Embarq Local Operating Companies for Forbearance Under 47 USC § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance Under 47 USC § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007).

<sup>8</sup> See, e.g., *Pricing Flexibility Order*, ¶ 110.

<sup>9</sup> Comments of Verizon and Verizon Wireless, WC Docket No. 10-188, at 10-35 (Oct. 15, 2010) (“Verizon Comments”); Comments of AT&T, Inc., WC Docket No. 10-188, at 10-29 (Oct. 15, 2010) (“AT&T Comments”); Comments of Comcast Corp., WC Docket No. 10-188, 4-7 (Oct. 15, 2010); Comments of Qwest Communications International, Inc., WC Docket No. 10-188, 3-6 (Oct. 15, 2010).

<sup>10</sup> Verizon Comments at 27-34; AT&T Comments at 17-19.

<sup>11</sup> See note 7, *supra*.

in providing broadband access. Wholesale competitors do little to demonstrate that available reasonably priced offerings are unavailable under the current regulatory mechanism.<sup>12</sup>

### **III. NO COMMENTER HAS PROVIDED FACTS WHICH JUSTIFY RE-REGULATING SPECIAL ACCESS SERVICES, PARTICULARLY WITH RESPECT TO MID-SIZED CARRIERS.**

All of the deregulatory steps taken with respect to special access services have been a measured response to marketplace facts by the Commission over a period of two decades. The FCC adopted conservative, yet increasing, pricing flexibility for incumbent LECs, particularly for special access services, based on these marketplace facts. Although certain parties have sought for a number of years to turn back this clock based on incomplete evidence and questionable facts, the FCC has so far rightly refused to alter price cap regulation of special access services.<sup>13</sup> Reregulation is inconsistent with the previous findings of the Commission. For instance,

the Commission expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any

---

<sup>12</sup> Ad Hoc Telecommunications Users claim that there is little competition for business broadband services, but does not argue that useful services are unavailable to its members. Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 10-188 (Oct. 15, 2010). The U.S. Small Business Administration posits concern about the unavailability of sufficiently high-speed broadband where middle mile facilities are unavailable (presumably in remote areas), but this issue is not different for residential subscribers located in those same high cost areas. Comments of the Office of Advocacy, U.S. Small Business Administration, WC Docket No. 10-188, 4 (Oct. 15, 2010). The availability of middle-mile facilities may implicate where universal service funding should be made available to network providers, but says little about the need to regulate business broadband services.

<sup>13</sup> *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002). AT&T has also retracted the position it took eight years ago. *See, e.g.*, Comments of AT&T, WC Docket No. 05-25, at 21 (filed Jan. 19, 2010).

impairment where—as here—unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.<sup>14</sup>

Alteration of existing regulations will undermine investment incentives, by producing new insecurity in the marketplace, and therefore interfere with the very competition that the Commission wants to foster. Staying the course will produce the stability needed by the markets, which would be more consistent with the National Broadband Plan’s warning that it do no harm.<sup>15</sup> None of the commenters on the Public Notice provided any facts which could justify placing regulations on particular broadband service providers. Rather, at most, CLEC comments focus either on their own ability to enter the marketplace or the practices of large RBOCs.

Some of the commenters have used the Notice to reargue their case for eliminating special access pricing flexibility.<sup>16</sup> The FCC should reject this repeated request. Hawaiian Telcom’s generally available special access rates, such as non-term DS-1 and DS-3 rates, have not increased since 2000. Hawaiian Telcom has been afforded Phase I pricing flexibility in the non-MSA areas of Hawaii and Phase II pricing flexibility in the Honolulu, Hawaii MSA for its dedicated transport and special access services, other than channel terminations between its end offices and end user customer premises, because it faces substantial competition in this market.<sup>17</sup>

---

<sup>14</sup> *Unbundled Access to Network Elements*, WC Docket No. 04-313, 20 FCC Rcd 2533, ¶ 218 (2005)(footnotes omitted).

<sup>15</sup> See National Broadband Plan at 4 (“Our plan must be candid about where current government policies hinder innovation and investment in broadband . . . [and] correct the problematic policies found here.”).

<sup>16</sup> Comments of Sprint Nextel Corp., WC Docket No. 10-188, 3-6 (Oct. 15, 2010).

<sup>17</sup> *Petition of Hawaiian Telcom, Inc. for Phase I Pricing Flexibility Pursuant to Section 69.709 of the Commission’s Rules*, WCB/Pricing File No. 08-01, 23 FCC Rcd 7856 (Wir. Comp. Bur., 2008); *Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 01-27, 17 FCC Rcd 5359 (Wir. Comp. Bur., 2002), and WCB/Pricing File No. 03-10, 18 FCC Rcd 11356 (Wir. Comp. Bur., 2003).

tw telecom,<sup>18</sup> and Wavecom<sup>19</sup> provide special access services in the Hawaii market. Hawaiian Telcom customers enjoy substantial benefits from the flexibility it has been afforded. Hawaiian Telcom is able to offer customers contract tariffs on one day's notice, and volume and term offerings that permit customers to obtain discounted pricing. Eliminating pricing flexibility is likely to damage customers who would face increases because the rates found in Hawaiian Telecom's generally available tariffed rates may be higher. Requiring tariffing of all special access rates in a generally available tariff will undermine competition by permitting competitors to know Hawaiian Telcom's bid in any particular situation and prevent Hawaiian Telcom from meeting the lower prices of competitors.<sup>20</sup>

A group of CLECs argue that the FCC should reregulate ILEC provision of Ethernet special access services in order to allow CLECs to purchase such services at lower wholesale rates.<sup>21</sup> Although tw telecom claims it cannot obtain reasonably priced Ethernet services at wholesale, the joint CLEC comments provide no facts to show that customers cannot obtain Ethernet services at reasonable prices. Therefore, they have provided nothing to justify elimination of the Commission's carefully considered deregulatory actions, particularly with respect to mid-size carriers. Forborne high-capacity broadband services are not subject to the

---

<sup>18</sup> tw telecom is authorized to provide special access services, *see* Docket No. 94-0093, Decision & Order No. 14145 (Haw. Public Util. Comm., rel. Aug. 17, 1995), and dedicated transport services, *see* Docket No. 95-0329, Decision & Order No. 14842, (Haw. Pub. Util. Comm., rel. Aug. 5, 1996).

<sup>19</sup> Wavecom is the trade name for Pacific Lightnet, Inc., which is also authorized to provide special access services. *See Application of Pacific Lightnet, Inc., for a Certificate of Authority and for Approval of Ownership of More than Twenty-Five Percent of Voting Stock of Pacific Lightnet, Inc.*, Docket No. 01-0157, Decision & Order No. 18868 (Haw. Pub. Util. Comm., rel. Aug. 31, 2001).

<sup>20</sup> The Commission has long recognized the potential competitive impact of tariffs. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004, ¶ 2 (1999).

<sup>21</sup> Comments of CBeyond, Inc., Integra Telecom, Inc., Megapath, Inc., Covad Communications Co. and tw telecom Inc., WC Docket No. 10-188, 34 (Oct. 15, 2010).

FCC's price cap or tariffing rules because marketplace forces are working to ensure the availability and reasonableness of service offerings without regulation.<sup>22</sup> These pro-consumer benefits should be allowed to continue. Therefore, the commission should reject the CLEC's request to reregulate Ethernet special access services.<sup>23</sup>

#### IV. CONCLUSION

A plethora of reasonably priced broadband services are available to small and medium-sized businesses throughout the United States. In particular, the market for special access services is vibrant and is working as intended, even for those services that are deregulated or to which pricing flexibility rules apply. There is no basis provided in the record for making any further changes to the regulations affecting business broadband services, especially those offered by mid-size carriers such as Hawaiian Telcom.

Respectfully submitted,

By: */s/ Gregory J. Vogt*

Steven Golden  
Vice President External Affairs  
Hawaiian Telcom, Inc.  
1177 Bishop Street  
Honolulu, Hawaii 96813

Gregory J. Vogt  
Law Offices of Gregory J. Vogt, PLLC  
2121 Eisenhower Ave.  
Suite 200  
Alexandria, VA 22314  
(703) 838-0115  
Fax: (703) 684-3620  
[gvogt@vogtlawfirm.com](mailto:gvogt@vogtlawfirm.com)

November 4, 2010

---

<sup>22</sup> For instance, Verizon's high-capacity broadband services are not subject to Title II regulation at all, and therefore, do not fall within the Commission's Title II jurisdiction. The instant notice, as well as the *2005 Special Access NPRM*, are exclusively focused on Title II regulation of special access services. *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005) ("*2005 Special Access NPRM*").

<sup>23</sup> For similar reasons, the FCC should reject the request to unbundle fiber and hybrid fiber loops.