SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
HOUSTON
LONDON
LOS ANGELES
NEW YORK
PALO ALTO
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

dlawson@sidley.com
(202) 736 8088

FOUNDED 1866

March 28, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25

Dear Ms. Dortch:

It is now clearer than ever that competitive provider responses to the Commission's voluntary data requests in this proceeding have been wholly inadequate to allow the Commission to assess the availability of alternatives to incumbent local exchange carrier ("ILEC") special access facilities. Many important competitors simply declined to respond, or only partially responded, to the Commission's voluntary data requests, leaving the Commission without significantly better information than it had before it issued the voluntary requests.

Moreover, the little information that was provided is already outdated. The voluntary data requests sought data from 2010 – or even 2009 – and the responses thus fail to reflect the sea change that occurred in 2011 in the special access marketplace. Although most observers have understood for some time that Ethernet services would eventually supplant legacy time division multiplex ("TDM") services (DS1s and DS3s), in 2011 those trends accelerated dramatically as many special access customers, and especially wireless carriers, made major, strategic commitments to a large-scale shift from TDM to Ethernet. This irreversible shift to Ethernet became the overriding feature of the marketplace in 2011, and legacy TDM services have now entered a period of permanent decline.

The Commission should therefore issue a third data request that has three essential features. First, the Commission should collect updated data that would allow it to take account of the fundamental marketplace developments that have occurred in recent years. Second, it should make the requests *mandatory* on CLECs and other competitors, to ensure that it has at least a somewhat more complete picture of marketplace conditions and to end the regulation proponents' established practice of asking for draconian and self-serving rate reductions while refusing to provide the information in their possession that would be necessary to assess the veracity of their claims. Third, the Commission should specifically require all non-ILEC

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships.

competitors to provide detailed data mapping the location of their facilities and infrastructure that put them in a position to bid and compete for business.

1. The Special Access Marketplace Has Changed Dramatically Since 2010. The Commission issued its voluntary data requests in October 2010[1] and September 2011,[2] but the Commission only asked for data from 2010 or earlier.[3] The special access marketplace experienced a major turning point in 2011. Although special access customers have been shifting from traditional TDM services to Ethernet for a number of years, 2011 marked the year in which the shift toward Ethernet services finally sent legacy TDM services into decline, and as a result, the data the Commission has collected is already out of date.

Wireless carriers that purchase special access represent the leading edge of this industry-wide conversion to Ethernet services, because they are experiencing exploding growth in data services and thus have an urgent need to convert to scalable, high-capacity services for their backhaul needs.[4] In fact, AT&T's internal data can actually pinpoint April 2011 as the irreversible turning point in this process. In that month, AT&T for the first time disconnected more DS1 circuits than it added for its wireless carrier customers. This trend accelerated rapidly throughout the second half of 2011; the number of DS1 disconnects rose substantially, while the number of new adds continued a steady decline. As a result, the total number of DS1s purchased by wireless carriers peaked in April 2011 and by the end of 2011 had declined by almost 20

---

[1] Public Notice, *Data Requested in Special Access NPRM*, 25 FCC Rcd. 15146 (2010) ("First Voluntary Data Request").

[2] Public Notice, *Competition Data Requested in Special Access NPRM*, 26 FCC Rcd. 14000 (2011) ("Second Voluntary Data Request").

[3] Although the Second Voluntary Data Request was issued in September 2011, the Commission specifically "request[ed] that parties submit *calendar-year 2010 data* for most questions to provide us with the most current, thorough, and accurate snapshot of pricing and competition issues in this proceeding." Second Voluntary Data Request, at 2 (emphasis added); *see also* First Voluntary Data Request, § II.8 (data is requested as of December 31, 2009).

[4] Wireless Backhaul, *Special Analyst Partner Report*, Virgo Communications, at 7 (Jan. 2012) ("[a]ll wireless providers are actively migrating from TDM-based services to fiber-based backhaul, and wireless providers are actively upgrading capacity between major facilities to support increased capacity"); *id*. at 9 ("[m]etro Ethernet transport will continue to serve as the primary answer to backhaul demand for the foreseeable future. Wholesale metro transport revenue is expected to grow from 2010 to 2016 by a CAGR of 3 percent, and there are no signs of that abating"); *id*. at 12 ("Wireless providers will gradually decommission DS3 and below cell-site backhaul solutions as they upgrade to Ethernet-based services").

percent. AT&T has observed the same phenomenon with DS3s: AT&T's total number of DS3s sold to wireless carriers also peaked in April 2011 and has declined substantially as disconnects have increased. Ethernet, meanwhile, has seen dramatic growth; wireless carriers now purchase far more Ethernet circuits from AT&T (and the many other facilities-based Ethernet providers) than they did at the beginning of 2011.

These statistics should not be surprising, because almost all major wireless carriers announced in 2010 or 2011 that they were committing to a large-scale replacement of their existing bases of TDM-based backhaul with Ethernet services.[5] For example, Sprint announced it was conducting competitive bids for contracts to provide Ethernet backhaul to 40,000 of its approximately 45,000 cell sites, which would be awarded to dozens of different providers.[6] It awarded contracts for 10,000 sites in early 2011 and another 15,000 cell sites in October, and it plans to announce a third round of awards for another 15,000 sites in mid-2012 – many of which are in less populated areas.[7] Sprint has made clear that it "will end up with 25 to 30 significant backhaul providers that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers, all of whom will be expected to deliver Ethernet predominantly over fiber for Sprint's new multi-node network, which will combine the CDMA, IDEN and WiMax networks it uses today."[8] Sprint has emphasized to its investors that it will no longer be a "T1 organization," but it is now committed to "backhaul flexibility" that has significantly reduced its backhaul costs and given it "a very much improved cost structure."[9] And, Sprint has noted that it "could still build its own backhaul facilities, where the alternatives presented don't meet its requirements,

---

[5] Wireless Backhaul, *Special Analyst Partner Report*, Virgo Communications, at 9 (Jan. 2012) ("While the rest of the industry historically has spent more on higher-capacity transport than wireless buyers, 2011 was the year in which both groups allocated roughly two-thirds of their spend to OCx and above circuits [including Ethernet]").

[6] *See* Credit Suisse, *Sprint, Network Sharing Deals Imminent* (rel. Apr. 5, 2011) (noting that Sprint has 45,000 base stations), available at: http://doc.research-andanalyticscsfb.com/docView?language=ENG&format=PDF&source=em&document_id=873359241&serialid=7Dhw8bPqCoevFhjAWEcScrHE9GzS9jAR0cZLXo%2fqz%2bE%3d

[7] Carol Wilson, *Sprint to Reveal Backhaul Contract Winners Friday*, Light Reading, (Oct. 5, 2011), *available at* http://www.lightreading.com/document.asp?doc_id=213050.

[8] *Id.*

[9] Thomson Street Events, Final Transcript, S-Sprint 4G Strategy/Network Update, at 8 (Event Date/Time: Oct. 07, 2011/1:30PM GMT).

including in less populated markets," "[b]ut to date . . . [has been] pleased with the way the industry has stepped up."[10]

Similarly, T-Mobile has publicly announced that it is committed to using Ethernet backhaul for all of its 3G cell sites and has largely completed this transition.[11] T-Mobile has focused on fiber-based Ethernet providers and has awarded contracts to various cable operators, alternative fiber providers, and a wholly owned subsidiary of a utility company.[12] Like Sprint, T-Mobile has said that it has substantially reduced its backhaul costs by switching to Ethernet, and it had already switched more than half of its connections for T-Mobile's 3G-capable cell sites to non-ILECs.[13] In AT&T's experience, all of the other major wireless carriers are committing to Ethernet for their future backhaul needs and they have made clear to AT&T that they are purchasing Ethernet services from a variety of competitive providers.[14]

This marketplace shift to Ethernet is now irreversible. Overall demand for Ethernet services surged in 2011 and growth is accelerating; one analyst has noted that "[t]he U.S. Ethernet port base grew 31% in 2011,"[15] and "market demand continues to exceed expectations, following robust port growth of 34% in 2010."[16] Another analyst has specifically noted the shift away from TDM services to high-capacity fiber services such as Ethernet: "In 2008, wireless buyers allocated two thirds of the spending to DS3 and below; in 2011, two-thirds of wireless spending went to OCx and above."[17] The same analyst found the same pattern with all other

---

[10] Carol Wilson, Light Reading, *Sprint to Reveal Backhaul Contract Winners Friday* (Oct. 5, 2011), available at: http://www.lightreading.com/document.asp?doc_id=213050.

[11] Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (June 10, 2011) ("AT&T-TMUS Joint Opposition"), attached Declaration of David A. Mayo, ¶¶ 6-7 ("Mayo Decl.").

[12] *Id.* ¶¶ 6-7.

[13] *Id.* ¶¶ 8-9.

[14] AT&T-TMUS Joint Opposition, attached Declaration of Parley Casto, ¶ 7-8 ("Casto Decl.").

[15] Vertical Systems, U.S. retail Business Ethernet Port Share, Year-End 2011.

[16] Vertical Systems, Retail Ethernet Port Share, First Half of 2011.

[17] Wireless Backhaul, *Special Analyst Partner Report*, Virgo Communications, at 9, 11 (Jan. 2012).

special access purchasers, noting that those buyers allocated 68 percent of their spending to DS3 and below in 2008, but only 36 percent in 2011.[18]

The Ethernet marketplace is intensely competitive and has become even more so in 2011. There are many large facilities-based Ethernet providers, and no firm has more than a 24% share. In fact, nine carriers have 4% or more share, and three carriers have more than ten percent share.[19] The largest Ethernet providers (all with share above four percent) are AT&T, Verizon, tw telecom, Cox, XO, CenturyLink/Qwest, Time Warner Cable, Level 3, and Cogent,[20] but there are many other significant providers, including those one analyst refers to as the "challenge tier": AboveNet, Charter Business, Optimum Lightpath, Reliance GlobalCom and Windstream.[21] And, there are many other significant competitors as well, including, Brighthouse, Sidera, Suddenlink, Lightower, and Zayo.[22] One independent analyst has noted that "[c]ompetition heated up in the U.S. market during the first half of [2011]," with different firms "jockeying" for position, and the "differential between the fourth and the ninth positions . . . is a mere 2.7%."[23]

CLECs are playing a leading role in the new Ethernet-led marketplace. As Level 3 told investors last year, the backhaul market is

> a *very competitive* space. We've seen, we've actually seen *the competition really, really increase* over the past 12 months, *pretty dramatically*. I think there are, the MSOs seem to have really gotten into that space in earnest, [and] CLECs are becoming really competitive.[24]

---

[18] *Id*. at 11.

[19] Vertical Systems, U.S. retail Business Ethernet Port Share, Year-End 2011.

[20] *Id.*

[21] *Id.*

[22] Wireless Backhaul, Special Analyst Partner Report, Virgo Communications, at 10 (Jan. 2012).

[23] Vertical Systems, *U.S. retail Business Ethernet Port Share*, Year-End 2011. In addition, the latest OECD (Organization for Economic Co-operation and Development) report shows that U.S. special access rates are significantly below the OECD average. *See* OECD Communications Outlook 2011, 291-92 (July 2011). Moreover, this report confirms that U.S. special access prices are significantly below those in the U.K. (*id.*), indicating that the efforts of British Telecom, a vocal proponent of Commission intervention in U.S. prices, could perhaps be better spent at home reducing its own special access prices.

[24] Amanda Tierney, Vice President-Wholesale Market Management for Level 3, available at http://www.lightreading.com/video.asp?doc_id=213138&f_src=lrdailynewsletter. *See also e.g.*,

CLECs are capturing much of the industry's recent shift to Ethernet services: tw telecom is the third largest Ethernet provider in the country and its business Ethernet installations grew 31 percent in 2011;[25] XO is growing rapidly and Ethernet is the engine of that growth, with 70 percent of its new orders related to Ethernet;[26] and Level 3 became a major supplier in 2011 to Verizon Wireless in providing Ethernet backhaul to support Verizon's deployment of its 4G LTE network.[27]

Cable companies also became much more important providers of Ethernet services in 2011. "In the last 18 months, MSOs have increased their collective Ethernet market shares within metro markets," and as cable companies increase their focus on this marketplace, their collective "share of the Ethernet market will continue growing at the expense of incumbents and other competitors."[28] As shown above, Cox and Time Warner Cable are already the fourth and seventh largest providers of Ethernet services in the U.S., respectively, and "Comcast, by far the largest cable carrier, has radically revved up its Ethernet sales in its widespread franchise regions

---

http://www.telecompetitor.com/level3-wins-verizon-4g-backhaul-deal/ (Level 3 is "supporting cell-site backhaul requirements" for Verizon Wireless); XO Press Release, March 23, 2011 (XO, another CALTEL member, has a teaming agreement to provide backhaul via microwave, and the "teaming agreement further enhances XO Communications' carrier-grade broadband wireless access service offering for the wholesale market").

[25] *See* Press Release, tw telecom Leads All Competitive Providers in Business Ethernet Services, February 14, 2012, *available at* http://newsroom.twtelecom.com/index.php?s=24615&item=121588.

[26] XO grew from the "ninth largest supplier of Ethernet ports deployed via copper or fiber at the end of 2008 . . . to become the fifth largest provider by the end of 2010"; "[t]oday, approximately 70 percent of the company's new wholesale orders are related to Ethernet services," and it "can provide Ethernet services to over 10 million U.S. businesses in the metro areas the company serves. This represents the majority of all U.S. businesses and the XO network is present in all top 25 metro markets." Carrier Ethernet News, *XO Communications Meteoric Rise Tied to Ethernet* (June 28, 2011), *available at* http://www.carrierethernetnews.com/articles/256186/xo-communications-meteoric-rise-tied-to-ethernet. "Approximately half of XO Communications' enterprise customers are served via Ethernet solutions today. Ethernet services have quickly become one of XO's largest and fastest growing network services." *Id.*

[27] TeleCom Engine, *Level 3 Helps Power Verizon Wireless 4G LTE Network Rollout* (April 26, 2011), *available at* http://www.telecomengine.com/article/level-3-helps-power-verizon-wireless-4g-lte-network-rollout.

[28] Heavy Reading Insider, *Cable Operators & Ethernet: Serious Business*, Vol. 11, No. 5, at 24 (July 2011).

from a low level as recently as a year ago, virtually ensuring that the MSO share of the U.S. market will rise substantially from close to 25 percent to approaching 30 percent (higher in-metro) in the next several years."[29] Comcast "was a late market entrant that covers nearly half of the country" and "dramatically expanded its Ethernet efforts in 2011."[30] Comcast recently reported that "[b]usiness services was the second largest contributor to cable revenue growth in 2011, with revenue increasing 41.4% to $1.8 billion,"[31] and "[d]ue to such growth, industry analysts project that the cable provider will easily blow past the $2 billion revenue mark in 2012."[32]

In short, events have already overtaken the current record, including the Commission's two voluntary data requests, and the Commission could not lawfully adopt any of the re-regulation proponents' proposals based only on the evidence it has collected thus far, which is both incomplete and out-of-date. The D.C. Circuit has reversed the Commission when it has attempted to impose new regulation based on old data when it is clear (as it is here) that subsequent marketplace developments have rendered the older data inapt.[33] The Commission's current record misses these critical facts establishing the irreversible migration to Ethernet and the stark reality that TDM services, such as DS1s and DS3s, are now essentially legacy services entering a permanent decline. In the current environment, the worst thing the Commission could do would be to mandate price reductions on those TDM services – which would artificially revive the attractiveness of those legacy services, and in so doing retard the ongoing marketplace shift to Ethernet services and reduce incentives to invest in broadband infrastructure.

---

[29] *Id.*

[30] *Id.* at 6.

[31] Comcast Reports 4th Quarter and Year End 2011 Results, Comcast Presentation Transcript (Feb. 15, 2012), *available at* http://www.cmcsk.com/earningdetails.cfm?QYear=2011&QQuarter=4.

[32] Communications Daily, *Pursuing 'Large Locals'; Cable Providers Push Into Middle Market And Enterprise Sectors* (Jan. 3, 2012); *see also id.* (Comcast stated that it "is using its twin rollouts of DOCSIS 3.0 and Metro Ethernet service to lure both more and larger commercial customers," and "small business enterprises are flocking to Comcast as cloud services drive bandwidth requirements in the last mile and the firms seek alternatives to the telcos").

[33] *Comcast Corp.* v. *FCC*, 579 F.3d 1, 6-7 (D.C. Cir. 2009) (reversing Commission order because it relied on "data from 1984-2001 and, as a result, fails to consider the impact of DBS companies' growing market share (from 18% to 33%) over the six years immediately preceding issuance of the Rule, as well as the growth of fiber optic companies").

2. Even As To Legacy TDM Services Pre-2011, The Record Generated By The Commission's Data Requests Is Inadequate. Even putting aside the dramatic marketplace changes that have occurred since the timeframe of the Commission's data requests, the Commission's two attempts to use voluntary responses to data requests from non-ILEC special access competitors have failed.

The Commission's First Voluntary Data Request sought key information needed to begin to evaluate the availability of alternatives to ILEC special access facilities. First, it sought information identifying the locations where non-ILECs currently have connections and the type of connection (*e.g.*, copper, fiver, hybrid-coaxial, fixed wireless, satellite), and thus sought to identify the locations where non-ILECs already provide alternatives to ILEC services. Second, it asked non-ILECs to provide maps of their fiber facilities and to identify the ILEC central offices where they are collocated – data that is essential to evaluate the breadth of the areas where non-ILECs' networks put them in a position to bid and compete for business. Third, the Commission asked CMRS providers to identify the location of their cell sites and the providers that serve those sites, to enable the Commission to evaluate the extent to which CMRS providers are using (or could use) alternatives to ILEC special access facilities.

AT&T, Verizon, CenturyTel and other ILECs provided detailed responses to the voluntary requests. But the non-ILECs – whose data is most important for assessing the availability of competitive alternatives to ILEC facilities and who are the ones seeking draconian new regulation of ILEC services – largely either did not respond or provided only partial responses. As the Commission itself explained in its recent opposition to mandamus in the D.C. Circuit, "the vast majority of the service provider members of [COMPTEL] did not provide *any* data in response to the Commission's first, October 2010 request,"[34] and that failure created "obstacles in [the Commission's] efforts to gather the data it needs to make an informed decision on special access."[35]

---

[34] Opposition of FCC to Petition for Writ of Mandamus, *In re COMPTEL*, No. 11-1262, at 14 (D.C. Cir., filed October 6, 2011) ("*FCC Mandamus Brief*") (emphasis added) (noting that "[a]ccording to the Commission's records, only seven [out of 90] of these member carriers – 360networks, Cbeyond, RCN, Sprint, TDS Metrocom, TelePacific Communications, and tw telecom – provided special access data in response to the agency's October 2010 request"). Many cable companies and fixed wireless providers also refused to participate. Letter from Christopher M. Heimann, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, dated March 7, 2011, at 1-3.

[35] *FCC Mandamus Brief*, at 21.

Indeed, fewer than ten of the scores of competitive providers responded to the Commission's data request, and those few that did respond provided incomplete data – for example, many failed to provide maps (or mapping data) of their fiber facilities, thus denying the Commission the ability to assess where they can or do offer competitive alternatives to ILECs. The CLECs that failed to respond are not small providers. As just a few examples, Zayo Group provided no response, yet it is a nationwide provider of private line services, with over 45,400 miles of fiber in 42 states and 70 metro markets, with connections to more than 4,100 buildings and more than 2,250 cell towers;[36] Sidera Networks provided no response, yet it has more than 2,900 on-net locations and its network is within 500 feet for over 20,000 businesses;[37] Cogent Communications also did not respond, yet, as noted above, it is the 9th largest Ethernet provider in the U.S. As for cable companies, no responses were submitted by Cox, Cablevision, or Charter, notwithstanding that they are very large suppliers of alternative special access services and, indeed, were large suppliers even in 2010 (the period covered by the data request). Cox, for example, hit the $1 billion revenue mark for business services in 2010[38] and, as noted above, is currently the fourth largest Ethernet provider in the U.S., Cablevision stated that during the relevant time period it had "more fiber in the [New York/New Jersey/Connecticut] tri-state area than any phone company" and that it provided fiber service to twice as many buildings in its metropolitan New York footprint as Verizon,[39] and Charter was at that time reporting that it could not even keep up with all of the new business it was winning.[40] In addition, large CMRS providers, including, for example, MetroPCS, Leap, U.S. Cellular, and Cellular South also chose not to respond to requests seeking information about the providers from which they obtain connections to their cell sites.

---

[36] *See*, Zayo Group Website, Our Network, http://www.zayo.com/network-statistics.

[37] *See* Sidera Website, http://www.sidera.net.

[38] Sean Buckley, *Cox Business Records $1 Billion In Annual Sales*, FierceTelecom (Dec. 7, 2010), *available at* http://www.fiercetelecom.com/story/cox-business-records-1-billion-annual-sales/2010-12-07.

[39] *Ex Parte* Letter from Glenn T. Reynolds (USTelecom) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 11 (July 16, 2009) ("USTelecom Report").

[40] Steve Donohue, *Post Chapter 11, Charter Banks on Buz. Services*, Light Reading's Cable Digital News (December 4, 2009), *available at* http://www.lightreading.com/document.asp?doc_id=185425&site=cdn ("'We do not have the staff and resources right now to handle all of the cell backhaul requests coming from all of the towers going up in our footprint,' Fred Davies, Charter's director of IP architecture and product development, said here Thursday at the event's closing session. 'So we're ramping up to accommodate that, which is a good thing.'").

The lack of responses and the incomplete responses leave gaping holes in the data the Commission has said it needs to evaluate the extent of competitive alternatives in the special access marketplace. The lack of mapping data for non-ILEC physical networks is particularly problematic.[41] The key determinant for special access competition is which providers have networks that are close enough to customer locations so that they can *bid* for the business. Special access competition does not occur only or even mainly between carriers that already have an existing connection to a building. Traditional CLECs deploy large fiber rings or other transport facilities and then make bids and offers to serve special access demand for customers in buildings located near their networks. Cable and fixed wireless providers likewise have facilities that readily can be used to provide connections to additional customers. Special access competitors typically rely on long-term contracts, which allow them to deploy (and earn a return on) direct connections only after winning the contract, rather than assuming the substantial risk of deploying ubiquitous connections first and trying to win the business later.[42] Given these characteristics of special access competition, both the D.C. Circuit and the Department of Justice have recognized that competitors will constrain ILEC special access pricing whenever they can compete for the right to extend their networks to particular customer locations.[43]

For all of these reasons, the extremely limited responses to the First Voluntary Data Request by non-ILECs do not even come close to providing the Commission with the

---

[41] *See* First Voluntary Data Request, § III.B ("For each Listed Statistical Area in which your company owns fiber or your company leases fiber from another entity under an IRU agreement, provide a map of the routes followed by fiber that constitute your network. Also provide a map of the routes followed by fiber connecting your network to end-user locations.").

[42] *See, e.g.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978, ¶ 316 (2003) (customers often "enter into long-term contracts committing to revenue streams and associated early termination charges that provide the ability for carriers to recover their substantial non-recurring 'set-up' or construction costs" of deploying facilities).

[43] *See, e.g.*, *WorldCom* v. *FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001) ("the presence of substantial sunk investment, and the resulting potential for entry into the market, can limit anticompetitive behavior by LECs", *citing Pricing Flexibility Order*, 14 FCC Rcd. 14221, ¶ 80 (1999)); *AT&T-BellSouth Merger Order*, 22 FCC Rcd. 5662, ¶¶ 41-42, 46 & nn.111-14 (2007) (describing and adopting "screens" employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building).

information it needs to reach any non-arbitrary conclusions as to the alleged lack of alternatives to ILEC special access facilities, even based on outdated 2010 and earlier data.

The Commission received an equally lackluster response from non-ILECs to its Second Voluntary Data Request, which sought pricing and related information. Again, the vast majority of CLECs and fixed wireless providers ignored the Commission's requests. Only seven non-ILEC companies appear to have responded. Further, only one cable company (RCN) responded, even though cable companies collectively represented billions of dollars in special access revenues and had already captured large portions of the Ethernet marketplace during 2010 (the time period for which the Commission sought data). As for CMRS providers, only AT&T, Verizon, and Sprint responded to these portions of the request, with no response again from the myriad other regional and local providers.[44]

In short, the previous *voluntary* data requests have not materially moved the ball forward. The Commission still lacks data from large portions of the industry, and the data it does have from those who responded are in many critical respects woefully incomplete.

3. The Commission Should Issue New Data Requests. For all of these reasons, if the Commission is determined to move forward with this rulemaking proceeding, it should promptly issue new data requests that has certain essential features:

Data from 2011 and early 2012. Given the important changes that have occurred in the marketplace since the time period covered by the Commission's last data request, the Administrative Procedure Act would require the Commission to consider and address current evidence before it could even consider adopting any new regulations.[45]

Mandatory Compliance. As the saying goes, the definition of insanity is doing the same thing over and over and expecting a different result. The Commission has twice asked for

---

[44] Moreover, the responses by some parties seeking regulation of special access services only illustrated the absurdity of their arguments. For example, BT America has spent considerable energy in this proceeding arguing that the Commission should mandate lower ILEC special access rates, but BT's response to the Second Voluntary Data Request states that BT will not submit data because it does not purchase special access services. Letter from Sheba Chacko (BT Americas Inc.) to Marlene H. Dortch (FCC) (December 5, 2011) (BT's "affiliates operating in the USA do not ordinarily purchase special access, as a service in itself, from suppliers").

[45] *Comcast*, 579 F.3d at 6-7; *see also United States Telecom Ass'n* v. *FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (unlawful for Commission to "inflict on the economy the sort of costs" associated with mandated unbundling with "naked disregard of the competitive context").

"voluntary" submissions of data, and twice most marketplace participants have thumbed their noses at the Commission's requests. Continuing to rely on voluntary compliance will ensure that only a self-selected and non-representative set of companies file whatever subset of data they believe will serve their purposes in this proceeding. Voluntary requests guarantee a record that is skewed and incomplete, and in any future data requests, the Commission must mandate *full* participation by *all* significant non-ILEC providers. The Commission also should make clear that it will give no weight to the self-serving claims of purchasers of special access services, like the so-called Ad Hoc Users Group, regarding the purported dearth of special access alternatives, if they continue to refuse to provide data necessary to evaluate their claims. These data, at a minimum, include information concerning the suppliers from which they purchase high-capacity dedicated transmission services, as well as those that have responded to any RFPs for such services, in addition to any self-supply of such capacity.

Data on Location and Mapping of Infrastructure. In any future data request, the Commission should specifically require all non-ILECs either to update or provide in the first instance the detailed information concerning the nature and location of their network facilities and the buildings and customers they serve. Even with respect to parties that provided such information in response to the First Voluntary Data Request, the Commission asked for such data only as of December 31, 2009 and it and what little data was provided is thus grossly out of date. The Commission should also require non-ILEC providers to provide copies of responses to RFPs and RFIs (or other requests for quotes for service) since 2010 as well as any unsolicited proposals it provided to prospective customers and deployment feasibility studies prepared in the past two years. And the Commission should insist that non-ILEC providers provide detailed information about the level of services and revenues they provide at each served location so that the Commission can assess the non-ILECs unsupported claims that it is virtually never feasible for them to extend their facilities to new locations.

AT&T notes that certain non-ILECs are already resisting being asked to provide the additional – and more complete – data needed to confirm the widespread availability of alternatives to ILEC special access services. For example, a recent *ex parte* by Cbeyond, Earthlink, Integra and tw telecom complains that sometimes CLECs "save information regarding the commercial buildings served by their network facilities in a database that is separate from the database(s) containing information regarding the type of services provided to a particular location," and suggests that CLECs should not be burdened with providing information that identifies both the buildings they serve and the services offered to customers in those buildings.[46] There is no reason why the information in these databases cannot be combined to provide the Commission complete information identifying the buildings served by CLECs and the services

[46] Letter from Thomas Jones to Marlene H. Dortch, WC Docket No. 05-25, RM-10593 (Mar. 21, 2012).

offered there – it seems at most to be an inconvenience. And given that these CLECs are seeking massive windfalls through mandated rate reductions and contract abrogation, their pleas that it is inconvenient to support their claims must plainly be disregarded.

Sincerely,

/s/ David L. Lawson
David L. Lawson
Attorney for AT&T

cc: Deena Shetler (Deena.Shetler@fcc.gov)
Nicholas Alexander (Nicholas.Alexander@fcc.gov)
Elizabeth McIntyre (Elizabeth.McIntyre@fcc.gov)