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EX PARTE OR LATE FILED

ORIGINAL

June 5, 2012

VIA COURIER AND ECFS

FILED/ACCEPTED
EX PARTE

JUN - 5 2012

Federal Communications Commission
Office of the Secretary

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

Re: *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593*

Dear Ms. Dortch:

On behalf of tw telecom inc. (“tw telecom”), please find enclosed two copies of the redacted version of an *ex parte* filing responding to recent BOC assertions regarding the market for special access services. The *ex parte* filing contains information that the Wireline Bureau has deemed highly confidential under the *Second Protective Order*¹ in this proceeding. Specifically, the filing contains highly detailed information regarding (1) the discount plans under which tw telecom purchases special access services²; and (2) the volumes of tw telecom’s purchases of

¹ *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Second Protective Order, 25 FCC Rcd. 17725 (2010) (“*Second Protective Order*”); see also *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Paul Margie, Wiltshire & Grannis LLP, 26 FCC Rcd. 6571 (2011) (“*Letter to Paul Margie*”) (supplementing the *Second Protective Order*); *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, 27 FCC Rcd. 1545 (2012) (“*Letter to Donna Epps*”) (further supplementing the *Second Protective Order*).

² See *Letter to Donna Epps* at 5, category M (deeming information that, alone or in combination with other information, “would reveal the identity of a customer” that purchases service under a particular tariff to be eligible for highly confidential treatment); see also *id.* at 4, category G (deeming information regarding “the discount plans under which [a customer’s] circuits were purchased” to be eligible for highly confidential treatment).

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special access services from incumbent LECs and other providers.³

tw telecom keeps the information for which it seeks highly confidential classification in the strictest confidence, and it is not available from public sources. Any of this information, if released to competitors, would allow those competitors to gain a significant advantage in the marketplace. For example, competitors would be able to determine tw telecom's costs, both in the aggregate and on a circuit-by-circuit basis, of obtaining wholesale inputs. Competitors would also be able to determine the terms and conditions, as defined by specific discount plans, to which tw telecom is subject when seeking to serve customers via incumbent LEC facilities. Competitors would be able to exploit access to this information to design competitive strategies that unfairly disadvantage tw telecom. Accordingly, the maximum level of protection afforded highly confidential information under the *Second Protective Order* should apply to the information described herein.

One machine-readable copy of the redacted version of the *ex parte* filing will be filed electronically via ECFS. Additionally, pursuant to the *Modified Protective Order*⁴ and *Second Protective Order*, one original of the highly confidential version of the *ex parte* filing is being filed with the Secretary's Office under separate cover, and two copies of the highly confidential version of the *ex parte* filing will be delivered to Marvin Sacks of the Pricing Policy Division of the Wireline Competition Bureau. Please do not hesitate to contact Thomas Jones at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Matthew Jones

Counsel for tw telecom inc.

cc (via email): Nick Alexander
Elizabeth McIntyre
Andrew Multz
Eric Ralph
Deena Shetler
Daniel Shiman

Enclosure

³ See *Letter to Donna Epps* at 4, category H (deeming information regarding the "dollar volumes of purchases of intrastate and interstate DS1 and DS3 services, and expenditures under certain rate structures and discount plans" to be eligible for highly confidential treatment); see also *Second Protective Order*, ¶ 6 (deeming information regarding "[t]he extent to which companies rely on incumbent local exchange carrier ('ILEC') . . . last-mile facilities and local transport facilities to provide special access-like services" to be eligible for highly confidential treatment).

⁴ *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168 (2010).

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Re: *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593*

Dear Ms. Dortch:

tw telecom inc. (“tw telecom”) submits this letter to respond to recent assertions by AT&T,¹ Verizon,² and CenturyLink³ regarding the market for special access services.

¹ See Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; WCB/Pricing Files Nos. 12-04, 12-05 (filed May 22, 2012) (“AT&T May 22, 2012 *Ex Parte* Letter”); Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed March 28, 2012) (addressing the dynamics of the special access marketplace and the record generated by the Commission’s data requests) (“AT&T March 28, 2012 *Ex Parte* Letter”); Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed March 28, 2012) (responding to Level 3, tw telecom, and CALTEL) (“AT&T March 28, 2012 *Ex Parte* Response to Level 3 et al.”).

² See Letter from Donna Epps, Attorney for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; RM 10593 (filed May 3, 2012) (“Verizon May 3, 2012 *Ex Parte* Letter”); Letter from Donna Epps, Attorney for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; RM 10593 (filed May 2, 2012) (“Verizon May 2, 2012 *Ex Parte* Letter”); Letter from Donna Epps, Attorney for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25;

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As tw telecom has explained, in order to compete in the downstream retail business services market, tw telecom has no choice but to purchase special access services under ILEC Special Access Plans and commercial agreements.⁴ As tw telecom has also explained, the terms of those ILEC Special Access Plans and [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] harm consumer welfare by (1) severely limiting tw telecom’s ability to obtain special access services from non-ILEC sources (either from non-ILEC wholesalers or self-provisioning), thereby hobbling the development of facilities-based competition over time; (2) limiting tw telecom’s ability to upgrade legacy DSn special access facilities to more efficient Ethernet special access facilities, thereby denying business customers the benefits of the efficiencies tw telecom gains when it can rely on Ethernet; and (3) [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

Notwithstanding the overwhelming evidence to the contrary, the BOCs argue in their recent *ex parte* filings that the onerous and exclusionary terms of the ILEC Special Access Plans are entirely reasonable. Apparently recognizing the weakness of this assertion, the BOCs next fall back on the assertion that TDM-based special access services should not be the subject of regulatory concern and that the fast-changing special access market renders the existing record stale and defies fact-based analysis. None of these last-ditch arguments has any basis in fact or law.

It is critical that the Commission reject the BOCs’ continued attempts to delay the adoption of meaningful regulation of ILEC special access services. Every week that passes

RM 10593 (filed April 26, 2012) (“Verizon April 26, 2012 *Ex Parte* Letter”); Letter from Donna Epps, Attorney for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; RM 10593 (filed March 27, 2012) (“Verizon March 27, 2012 *Ex Parte* Letter”).

³ See Letter from Melissa Newman, Attorney for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed April 20, 2012) (“CenturyLink April 20, 2012 *Ex Parte* Letter”).

⁴ See generally Letter from Thomas Jones and Matthew Jones, Attorneys for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25; RM 10593 (filed April 11, 2012) (“tw telecom April 11, 2012 Response to Second Data Request”). tw telecom purchases DS1 and DS3 special access services subject to ILEC Term Discounts, Tariff Discount Plans, Tariff Benefit Plans, and Prior Purchase-Based Discounts, as those terms are defined in the definitions section of the Commission’s second data request. See *Data Request Public Notice. See Competition Data Requested in Special Access NPRM*, Public Notice, DA 11-1576, at 3-4 (rel. Sept. 19, 2011). For ease of reference, tw telecom herein refers to these arrangements collectively “ILEC Special Access Plans.”

⁵ See generally tw telecom April 11, 2012 Response to Second Data Request.

without the adoption of such regulation is another week in which American businesses must make do without the benefits of a truly competitive business broadband market. It is for this reason that, just last week, the Office of Advocacy of the U.S. Small Business Administration, an entity established by Congress for the purpose of representing the views of small businesses, emphasized to the Commission that “Broadband remains an indispensable input for growing businesses” and that “preserving and promoting competition in the business broadband market is essential in order to provide small businesses with affordable access and choice regarding the services they need to grow and create jobs.”⁶ As the Office of Advocacy explained, in order to address “barriers to entry in the business broadband market,” the “FCC’s special access docket requires particularly urgent attention.”⁷ This is because the Office of Advocacy “remains concerned that the current special access rules may be resulting in higher costs and lower quality service for business broadband consumers who could be using those extra resources to grow their businesses and hire more employees.”⁸ Thus, the ILECs’ attempts to maintain high special access rates and lock-up contracts are not just bad for competition. They are bad for the U.S. economy.

I. The ILEC Special Access Plans Harm Consumer Welfare.

The BOCs offer numerous purported justifications for the terms of the ILEC Special Access Plans. None of these assertions has merit.

BOC Assertion: ILEC Special Access Plans are simply private contracts that large customers agree to voluntarily.⁹

The implication of this assertion is that large purchasers of special access service could readily obtain local transmission facilities by some means other than ILEC Special Access Plans. But as tw telecom has explained, there are no realistic alternatives to ILEC Special Access Plans

⁶ Comments of the Office of Advocacy, U.S. Small Business Administration, WT Docket No. 12-69; WC Docket Nos. 10-188, 05-25; GN Docket No. 09-51; RM 11358, at 5 (filed May 24, 2012).

⁷ *Id.* at 6.

⁸ *Id.*

⁹ See AT&T May 22, 2012 *Ex Parte* Letter, Attachment at 2 (“Special Access volume and term discounts are pro-competitive and voluntary”); AT&T March 28, 2012 *Ex Parte* Response to Level 3 et al., at 3 (“AT&T (and other incumbents) provide and negotiate many different types of offers, and no customer is required to accept volume and term discount plans.”); Verizon March 27, 2012 Letter, at 3 (“Verizon’s special access discount plans are individually negotiated contract tariffs, which are entirely voluntary [and] were developed to provide customers greater choice to meet their needs . . .”).

for competitors that rely on special access services purchased at wholesale to provide services to retail customers in downstream markets.¹⁰ This is so for a number of reasons.

First, and most importantly, tw telecom is unable to purchase special access services from alternative providers because ILECs control the only last mile facilities serving the vast majority of business customer locations for which tw telecom must purchase services from a wholesale provider. AT&T and Verizon attempt to divert attention away from this fact by focusing on competition that has supposedly developed in the provision of backhaul service to certain cell towers, but, as explained more fully in Section II below, any competition that may develop at individual, high demand cell towers for backhaul service has no impact on the millions of business customer locations throughout the country where the revenue opportunity is too small to enable a competitor to deploy its own transmission facilities. Thus, tw telecom must rely almost entirely on DS1 and DS3 special access services purchased at wholesale from ILECs.¹¹

Second, the ILECs, and the BOCs in particular, have set their undiscounted month-to-month rates for special access services at prohibitively high levels, steering customers into the exclusionary terms and conditions of their special access plans. As former FCC Chief Economist Joseph Farrell has explained, “[t]he claim that voluntary discounts cannot harm consumers assumes that basic month-to-month rates are not affected, but in fact, once an ILEC has contracted with some of its customers for a percentage discount off the month-to-month tariff, it has an incentive to raise the latter above the level that it would have chosen otherwise.”¹² In recent years, the ILECs have made clear that they intend to execute this strategy to the extent the Commission will allow them to do so. During the time that this proceeding has been pending at the Commission, all three of the BOCs have imposed substantial unilateral increases in the monthly rates for special access services.¹³ These increases to rates that were already

¹⁰ See generally tw telecom April 11, 2012 Response to Second Data Request; see also Section II, *infra*.

¹¹ tw telecom’s DS1 and DS3 purchase volumes from ILECs and non-ILECs are described in detail below.

¹² Reply Declaration of Joseph Farrell on Behalf of CompTel, attached to Reply Comments of CompTel, Global Crossing North America, Inc., and NuVox Communications, WC Dkt. No. 05-25; RM-10593 (filed July 29, 2005) (citing Borenstein & Severin, “Settling for Coupons: Discount Contracts as Compensation and Punishment in Antitrust Lawsuits,” *Journal of Law & Economics*, University of Chicago Press, vol. 39(2), at 379-404 (1996)).

¹³ In 2004, Qwest increased its special access rates in areas subject to Phase II Pricing Flexibility. See Letter from Mark Brinton, Manager, Qwest Corp., to Secretary, FCC, Transmittal No. 206 (filed Aug. 16, 2004). While AT&T agreed, as a condition of Commission approval of its merger with BellSouth, to maintain special access rates at discounted levels until July 1, 2010, it filed a tariff on June 2, 2007, in which it announced special access rate increases that would take effect upon expiration of the merger condition. See Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, Appendix 2, Declaration of Susan

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unreasonably high have left special access rates far above the comparable UNE rates (a suitable benchmark for reasonable rates) in many geographic markets.¹⁴ By increasing their undiscounted month-to-month rates to cost-prohibitive levels, the ILECs leave their special access customers no choice but to agree to unreasonably long commitment terms and unreasonably high volume commitments.

Third, without a sufficiently robust circuit portability solution, it is virtually impossible for a competitor to compete on a meaningful level in downstream retail markets. Yet circuit portability is often only available from an ILEC if tw telecom agrees to purchase a large volume of special access under an ILEC Special Access Plan. In these circumstances, tw telecom again has no choice but to enter into such a plan.¹⁵

M. Gately, Exhibit 3 (filed Aug. 8, 2007). The planned rate increase took effect as scheduled on July 1, 2010. In 2011, Verizon increased its rates for essentially all channel mileage and multiplexing rate elements throughout its incumbent LEC territory. *See* Letter from Frederick Moacdieh, Executive Director- Federal Regulatory Affairs, Verizon Tel. Cos., to Marlene H. Dortch, Secretary, FCC, Transmittal No. 1152 (filed July 1, 2011). On April 30, 2012, Verizon proposed a *second* six percent increase for these rate elements. *See* Letter from Frederick Moacdieh, Executive Director – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 1187, at 2 (filed Apr. 30, 2012). Verizon only abandoned this plan after numerous parties filed petitions to suspend and investigate Verizon’s tariff filing that would have effected the increase. *See* Letter from Frederick Moacdieh, Executive Director- Federal Regulatory Affairs, Verizon Tel. Cos., to Marlene H. Dortch, Secretary, FCC, Application No. 204 (filed May 11, 2012); *see also* Petition of tw telecom inc. and Windstream Communications, Inc. to Suspend and Investigate, Verizon Transmittal No. 1187 (filed May 7, 2012); Petition of XO Communications, LLC to Suspend and Investigate, Verizon Transmittal No. 1187 (filed May 7, 2012); Petition of MetroPCS to Reject or Suspend and Investigate Proposed Tariff Revisions, Verizon Transmittal No. 1187 (filed May 7, 2012); Petition of TelePacific Communications to Reject or Suspend and Investigate Proposed Tariff Revisions, Verizon Transmittal No. 1187 (filed May 7, 2012).

¹⁴ *See* Letter from Thomas Jones and Nirali Patel, Attorneys for tw telecom, to Marlene H. Dortch, Secretary, FCC, Verizon Transmittal No. 1187, Attachment A (filed May 8, 2012) (comparing current and proposed Verizon special access rates with the comparable UNE rates).

¹⁵ **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] *See* tw telecom April 11, 2012 Response to Second Data Request at 13-14.

BOC Assertion: Volume and term commitments like those in ILEC Special Access Plans are common across many industries, and non-ILEC wholesalers also require such commitments in exchange for discounts.¹⁶

The obvious differences between the special access market and other industries are that the special access market (1) is dominated by a single firm, the ILEC, in each geographic area, (2) the entry barriers to competing with the ILEC have proven to be extraordinarily high, thereby largely insulating the ILECs from competition at most locations, and (3) special access services are a vital input for millions of businesses across the economy. Indeed, it is for these reasons that price-cap ILECs have long been classified as dominant in the provision of DS1 and DS3 special access services.¹⁷ As discussed above, this dominance allows the ILECs to set their undiscounted rates above the competitive level, thereby giving customers the incentive to agree to terms and conditions that they would otherwise decline if competitive alternatives were available. This clearly distinguishes the terms and volume commitments in ILEC Special Access Plans from term and volume commitments that companies offer in other product markets.

Nor does the use of volume and term commitments by non-ILEC wholesale providers in any way justify the ILECs' use of those commitments. If a non-ILEC insists that a customer continue to purchase the same volume of services it purchased in the past in order to obtain a discount from the non-ILEC, the resulting volume commitment is likely to be extremely small, since non-ILECs' facilities do not reach most business locations. Moreover, if a customer does not want to commit to the volume demanded by the non-ILEC, the customer can always purchase services from the ILEC instead. In contrast, in the many locations at which the ILEC owns the only transmission facility, the customer, including tw telecom, has no choice but to agree to the ILEC's volume commitment demand. It is therefore obvious that non-ILECs' use of volume and term commitments should have no bearing on whether and to what extent ILECs should be able to use those mechanisms.

BOC Assertion: Discounts offered in return for volume commitments and prior purchase commitments are commercially reasonable arrangements that enable ILECs to recover the cost of providing special access.

Verizon argues that discounts offered in return for volume commitments are reasonable because purchasing large volumes yields efficiencies for the seller.¹⁸ While large volume

¹⁶ See Verizon March 27, 2012 *Ex Parte* Letter at 1-2; CenturyLink April 20, 2012 *Ex Parte* Letter at 8 (describing the terms of unnamed CLECs' contracts with their customers); AT&T March 28 *Ex Parte* Response to Level 3 et al. at 2-3 (citing XO's response to the first data request).

¹⁷ See generally *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990).

¹⁸ See Verizon March 27, 2012 *Ex Parte* Letter at 7. Verizon also argues that discounts offered in exchange for term-only commitments are reasonable because term commitments give the ILEC greater revenue certainty and therefore allow the ILEC to recover its costs. *Id.* at 7-8.

purchases may in some cases yield lower costs for a seller, the key issue is whether volume discounts combined with exorbitant, supra-competitive monthly rates lock purchasers into purchasing service from Verizon that could otherwise be obtained from a non-ILEC source (either a non-ILEC wholesaler or self provisioning). Where this is true, large discounts offered in exchange for volume commitments exclude competitors from the market and harm consumer welfare. That is exactly what is happening in the special access market.

Moreover, many of the ILEC Special Access Plans that include Prior Purchase-Based Discounts such as the Verizon CDP (the CenturyLink RCP and the AT&T TPPs are similar) grant discounts to customers in return for a commitment to purchase a percentage of the customer's historic demand. The same discount is offered to a customer with 100 circuits that meets the prior purchase percentage (e.g., 90 percent) by committing to purchase 90 circuits as is offered to a customer with 100,000 circuits that meets the prior purchase percentage by committing to purchase 90,000 circuits. There is simply no way in which the discounts offered pursuant to such Prior Purchase-Based Discount arrangements have any rational basis in economics. They serve only to lock up customer demand and prevent the development of competition.

BOC Assertion: ILEC Special Access Plans only require that purchasers commit to a percentage of purchases from the ILEC; customers' purchases from non-ILECs and their UNE purchases generally do not affect volume commitments.

Both Verizon and CenturyLink make the meritless argument that their lock-up plans should be of no concern because the volume commitments in those plans do not encompass services purchased in the past from non-ILECs or those purchased as UNEs.¹⁹ As explained, tw telecom has had no choice but to purchase almost all of its off-net last mile facilities from incumbent LECs because competitive LECs' networks simply do not reach most of the locations where tw telecom needs to lease a circuit. Again, in order to obtain those circuits from ILECs on minimally viable terms and conditions, including discounts and circuit portability, tw telecom has had no choice but to agree to large volume commitments, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

Verizon makes no attempt to support these assertions and, given that it has already recovered the vast majority of the costs of providing DS1 and DS3 special access, it is extremely doubtful that Verizon needs a customer to commit to a long term agreement in order to earn a reasonable return on the service. In any event, term-only commitments generally do not provide the customer with circuit portability. As explained, tw telecom cannot purchase special access services without circuit portability, a feature that requires a volume commitment by the purchaser under the ILEC Special Access Plans. Thus, the absence of circuit portability in term-only plans effectively requires large customers to make large volume commitments, and such commitments are exclusionary as explained herein.

¹⁹ See Verizon March 27, 2012 *Ex Parte* Letter at 2-3; CenturyLink April 20, 2012 *Ex Parte* Letter at 6-7.

[END HIGHLY CONFIDENTIAL]

BOC Assertion: Customers are free to lower their commitment levels during the life of an ILEC Special Access Plan or after the expiration of the plan.²⁰

The BOCs try mightily to show that customers are free to set and adjust their volume commitments under ILEC Special Access Plans at any time. This is simply not true as a practical matter.

First, special access customers cannot realistically reduce their volume commitments under ILEC Special Access Plans during the terms of the plans. For example, CenturyLink broadly claims that it “imposes *no logistical constraints* on a customer’s ability to transition DS1 or DS3 services to . . . access services offered by a competitor.”²¹ But [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

²⁰ See Verizon March 27, 2012 *Ex Parte* Letter at 4-6; Verizon April 25, 2012 *Ex Parte* Letter at 2; see generally Verizon May 3, 2012 *Ex Parte* Letter.

²¹ CenturyLink April 20, 2012 *Ex Parte* Letter at 3.

²² [BEGIN HIGHLY CONFIDENTIAL]
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²³ [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL]

²⁴ [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

As tw telecom has explained at length, AT&T's ILEC Special Access Plans [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] also impose stiff penalties for failing to meet the minimum volume commitments set forth therein.²⁵ The same is true of the [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL] to a non-ILEC source, even in the unlikely event that such a non-ILEC source exists.

Second, tw telecom cannot realistically reduce its committed volumes upon expiration of its ILEC Special Access Plans. To begin with, there is no non-ILEC wholesaler from which tw telecom could lease a large volume of off-net circuits at the locations where tw telecom needs them.

But the terms of the ILEC Special Access Plans exacerbate the problem. Verizon gamely offers a laundry list of options available to large special access customers that supposedly enable the customers to reduce their volume commitments upon expiration of a [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

²⁵ See tw telecom April 11, 2012 Response to Second Data Request at 6-14.

²⁶ *Id.* at 16-20.

²⁷ See Verizon May 3, 2012 *Ex Parte* Letter at 1 (“[A] customer that originally enrolled in a term-and-volume plan may, at the end of that plan, enroll in one or more term-only plans that contain no volume commitments.”).

²⁸ See tw telecom April 11, 2012 Response to Second Data Request at 5-6 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

Verizon also suggests that a special access customer could simply disconnect a portion of its special access circuits with Verizon [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[END HIGHLY CONFIDENTIAL]

Verizon further suggests that, if a customer needs more time to migrate its circuits to a new provider, it could simply purchase the circuits it plans to convert to a non-ILEC at month-to-month rates until the time of conversion, while including the other circuits in a term-only plan.³⁰ This alternative is also not viable because, as tw telecom has shown, Verizon's month-to-month charges are exorbitant, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

²⁹ See Verizon May 3, 2012 *Ex Parte* Letter at 2.

³⁰ *Id.* at 2.

³¹ *Id.*

³² See tw telecom April 11, 2012 Response to Second Data Request at 17 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

BOC Assertion: Shortfall penalties under ILEC Special Access Plans are small and do not prevent customers from switching special access purchases from the ILEC to non-ILEC sources.³³

This again, is untrue. As tw telecom has explained at length, the penalties in ILEC Special Access Plans for failure to meet special access volume commitments are substantial, and they constitute a major barrier to switching special access purchases from an ILEC to a non-ILEC source.³⁴

BOC Assertion: The absence of overage penalties makes an ILEC Special Access Plan reasonable.

CenturyLink asserts that the [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

BOC Assertion: Customers can terminate ILEC Special Access Plans at any time.³⁷

This glib assertion is patently wrong as a practical matter, given that, as explained, tw telecom has no choice but to purchase special access from ILECs under ILEC Special Access

³³ See Verizon March 27, 2012 *Ex Parte* Letter at 6.

³⁴ See tw telecom April 11, 2012 Response to Second Data Request at 7 [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

³⁵ See CenturyLink April 20, 2012 *Ex Parte* Letter at 5.

³⁶ See tw telecom April 11, 2012 Response to Second Data Request at 14-16.

³⁷ See Verizon March 27, 2012 *Ex Parte* Letter at 8.

Plans which contain onerous penalties for early termination.³⁸

BOC Assertion: ILEC Special Access Plans do not result in tying arrangements.³⁹

This too is patently false. For example, as tw telecom has explained, the ILEC Special Access Plans under which it purchases special access services require that tw telecom commit most of its special access service demand to an ILEC in any particular region. This is so, even though it might be theoretically possible for tw telecom to obtain special access from a non-ILEC supplier in at least some of the locations at which tw telecom must purchase special access from the ILEC in order to meet its volume commitments under the ILEC Special Access Plans.⁴⁰

Moreover, [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

II. The Commission Should Reject the ILECs' Claim That Changes In the Special Access Market Obviate the Need to Regulate DSn Services And Render the Current Record Stale.

In a transparent attempt to avoid Commission review of the ILECs' unreasonable prices for DS1 and DS3 special access services, the BOCs assert that DS1 and DS3 services are no longer relevant, and therefore need not be the subject of FCC review. The BOCs assert further that, in all events, the speed of change in the market (e.g., the transition from DSn to Ethernet) renders the existing factual record unreliable. Neither of these assertions has any merit.⁴²

³⁸ See tw telecom April 11, 2012 Response to Second Data Request at 7-8 [BEGIN HIGHLY CONFIDENTIAL]

[END

HIGHLY CONFIDENTIAL]

³⁹ Verizon March 27, 2012 *Ex Parte* Letter at 11.

⁴⁰ See tw telecom April 11, 2012 Response to Second Data Request at [BEGIN HIGHLY CONFIDENTIAL]

[END HIGHLY CONFIDENTIAL]

⁴¹ *Id.* at 14.

⁴² In a further attempted diversion, AT&T states that “certain non-ILECs are already resisting being asked to provide additional” data in the special access proceeding. See AT&T March 28, 2012 *Ex Parte* Letter at 12 citing Letter from Thomas Jones to Marlene H. Dortch, WC Docket No. 05-25, RM-10593 (Mar. 21, 2012). There is of course no basis for AT&T's irresponsible and incorrect speculation. In fact, the discussion described in the *ex parte* letter cited by AT&T occurred in response to a request for assistance from the Wireline Competition Bureau staff, and

To begin with, there is little doubt that DS1 and DS3 services continue to be used by a wide range of business customers across the economy. Moreover, **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL] In addition, the absence of sufficiently flexible technology migration provisions in the ILEC Special Access Plans limit tw telecom’s ability to upgrade DSn services to Ethernet services.⁴⁴ Thus, while the BOCs argue that the FCC should ignore DSn special access because it is going away, they are constraining competitors’ ability to transition away from DSn special access services.

Furthermore, the BOCs overstate the pace of change in the special access market. Virtually all of the information upon which the BOCs rely in discussing emerging competition and changing demand patterns pertains to deployment of Ethernet service to wireless cell towers. For example, AT&T asserts that the wireless backhaul services market reached an “irreversible turning point” in April 2011, at which time Ethernet purchases began to outpace DSn purchases.⁴⁵ But other wireless providers tell a different story. For example, as recently as December 2011, Sprint stated that **[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

In any event, the deployment of fiber facilities by non-ILECs to serve individual cell towers has no implication for the millions of special access customers throughout the country that can only be served by ILEC transmission facilities. As the information submitted by Verizon shows, wireless companies have seen a large increase in data traffic due to the adoption of smartphones and tablets. This increased data usage has caused wireless companies to demand higher capacity, higher priced backhaul transmission services at particular locations.⁴⁷ It is

the information provided was intended to ensure that the Commission’s future data gathering process is efficient and successful. The Commission would benefit if AT&T were similarly cooperative.

⁴³**[BEGIN HIGHLY CONFIDENTIAL]**

[END HIGHLY CONFIDENTIAL]

⁴⁴ See tw telecom April 11, 2012 Response to Second Data Request at 20-22.

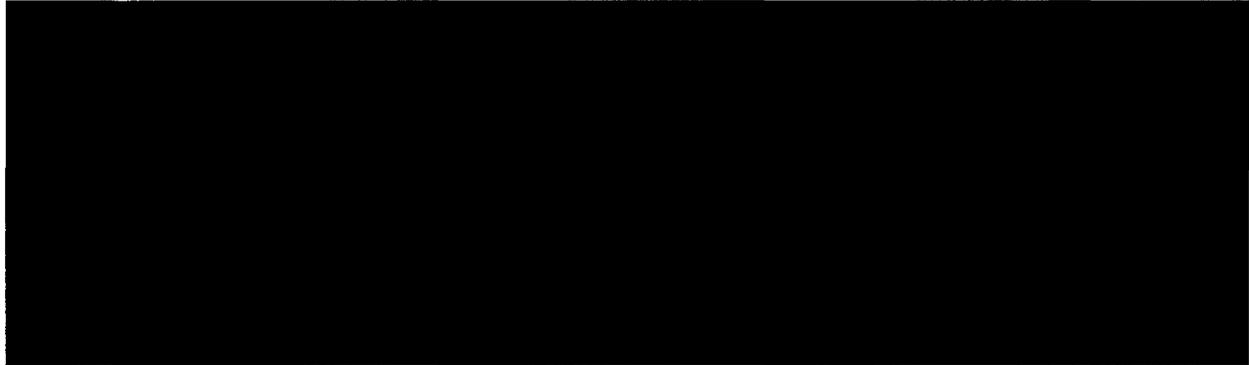
⁴⁵ AT&T March 28, 2012 *Ex Parte* Letter at 2.

⁴⁶ Letter from Paul Margie, Attorney for Sprint Nextel Corporation, to Marlene Dortch, Secretary, FCC, Attachment at 1 (filed Dec. 19, 2011) (Sprint response to second data request).

⁴⁷ See Verizon May 2, 2012 *Ex Parte* Letter, Attachment 3.

unsurprising that competitors would be able to deploy fiber facilities to provide these services where the revenues associated with the services exceed even the steep costs of fiber deployment. In this regard, high-demand wireless tower locations are no different than especially large downtown office buildings to which competitors have been able to deploy high capacity transmission facilities (e.g., OCn) for years. But while competitors can deploy facilities to these locations, they still cannot deploy facilities to the vast majority of business locations in the U.S. at which the demand for transmission services is insufficient to justify deployment of competitive fiber. These are the locations at which the ILECs continue to have market power, and nothing in the ILEC filings or anywhere else in the record in this proceeding demonstrates otherwise.

Thus, notwithstanding the BOCs' repeated attempts to divert the Commission's attention, the defining fact of the special access market, whether it be DS1, DS3 or Ethernet circuits, is that the ILECs control the only facility serving the vast majority of commercial locations in the United States. The proof is in the numbers. tw telecom has every incentive to lease local transmission facilities from non-ILECs. In fact, **[BEGIN HIGHLY CONFIDENTIAL]**



[END HIGHLY CONFIDENTIAL] Changes in technology simply have not changed the effect of the ILECs' dominance in the special access market. Moreover, as Ethernet is more widely deployed, the ILECs will almost certainly exploit their control over transmission facilities to dominate the Ethernet market just as they have the DS_n market.

Nor is there any merit in AT&T's assertion that tw telecom's third-highest market share among providers of Ethernet, measured in Ethernet ports, proves that the special access market is competitive and that there is therefore no need for the FCC to regulate ILEC special access services.⁴⁸ This assertion is extremely misleading.

First, market share measured in ports includes Ethernet ports that tw telecom provides via ILEC last mile facilities as well as ports that tw telecom provides via its own facilities (those facilities connect to approximately 15,500 commercial buildings nationwide). Given the ILECs' ability to raise rivals' costs in the provision of underlying special access facilities, the FCC's

⁴⁸ See AT&T March 28, 2012 Ex Parte at 8; see also AT&T May 22, 2012 Ex Parte Letter, Attachment at 1-2.

assessment of market share should only account for ports served via a service provider's own facilities.⁴⁹ If this measure is used, tw telecom's market share would be considerably lower.

Second, tw telecom's share of ports provided among all types of Ethernet says nothing about the ILECs' market power in relevant Ethernet product markets. Customers do not view all Ethernet services as substitutes. For example, a 10 Mbps Ethernet service is not a substitute for a one Gbps Ethernet service. Moreover, there are significant differences on the supply side that make it likely that the level of competition varies greatly at different bandwidths. Most obviously, it will come as no surprise to the Commission that tw telecom and other competitors are more likely to be able to deploy their own facilities to provide Ethernet services of higher bandwidth rather than lower bandwidths. Thus, competitors' reliance on the BOCs' last mile facilities, and therefore the BOCs' market power, varies greatly from higher to lower capacity Ethernet services. For these reasons, it is critical to define relevant product markets for purposes of market power analysis. AT&T's reliance on a measure of total Ethernet ports in all relevant Ethernet product markets says nothing about AT&T's market power in any particular relevant Ethernet product market.

Third, tw telecom's share of ports among providers of Ethernet across the country says nothing about ILECs' market power in relevant geographic markets. The differences in the level of competition from one area to another are dramatic, thereby foreclosing reliance on a national market share for Ethernet. It is also worth emphasizing that an ILEC is likely to have (either now or in the near future) disproportionate market power within its ILEC territory. Thus, it would probably be sensible to rely on geographic areas as small as ILEC wire centers for purposes of the market power analysis for Ethernet. In any event, the national market share data upon which AT&T relies provides nothing close to the level of geographic granularity needed for the analysis.

Fourth, as AT&T and the other BOCs are fond of asserting, market share data must be considered in light of other factors in the market. tw telecom and some of the other non-ILECs have been far more aggressive in marketing Ethernet than has generally been the case with the BOCs. This is likely due to a range of different factors, including the BOCs' historic desire to avoid cannibalizing their legacy services such as ATM, frame relay, and DSn services.⁵⁰ In any event, the total number of commercial buildings served with Ethernet today is likely tiny compared to the addressable market. But as the BOCs roll out their Ethernet services, they will

⁴⁹ Indeed, by locking tw telecom into older, more costly DSn technology in the provision of Ethernet services, AT&T and the other BOCs are engaging in text book raising rivals' costs conduct.

⁵⁰ See Letter from Thomas Jones and Jonathan Lechter, Attorneys for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125 (filed Oct. 9, 2007) (citing Fred Ellefson, *Assuring Ethernet SLAs*, Telephony Online, Sept. 18, 2006, available at http://telephonyonline.com/ethernet/technology/infocus_next_ethernet_091806/index2.html ("According to Vertical Systems Group, 86 percent of end users who purchase an Ethernet service are switching from a legacy service such as Frame Relay, ATM or Private Line.")).

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undoubtedly exploit their huge advantage in the total number of buildings served on their networks to take a commanding control over Ethernet services of moderate and low capacity in many or all relevant geographic areas, just as they have with DS1 and DS3 services. Market share data must account for this fact.

Finally, AT&T incorrectly claims that, because of recent marketplace trends, the Commission could not lawfully adopt a new regulatory framework for special access based on the data it has collected.⁵¹ AT&T relies on *Comcast Corp. v. FCC*, in which the D.C. Circuit overturned the Commission’s horizontal ownership cap for cable providers. In that case, the D.C. Circuit found that the Commission had not heeded specific instructions that the court had previously given the Commission regarding the proper analytical approach in that proceeding.⁵² In addition, the Commission had not considered data from “the six years immediately preceding issuance of the Rule.”⁵³ In this proceeding, by contrast, the Commission has collected data twice in the last two-and-a-half years. This data supplements the numerous rounds of comments and *ex parte* letters that have been filed over the long course of this proceeding. There is no question that the record developed to date far exceeds the record that the Commission has relied upon in the past when adopting significant orders that have been affirmed on appeal.⁵⁴

Respectfully submitted,

/s/ Thomas Jones

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⁵¹AT&T March 28, 2012 *Ex Parte* Letter at 2 (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 6-7 (D.C. Cir. 2009)).

⁵² *Comcast*, 579 F.3d at 6-7 (“[I]n *Time Warner II* we said in no uncertain terms that ‘in revisiting the horizontal rules the Commission will have to take account of the impact of DBS on [cable operators’] market power.’”)

⁵³ *Id.* at 7.

⁵⁴ See, e.g., *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005), *aff’d* at 450 F.3d 528 (D.C. Cir. 2006).