

REDACTED – FOR PUBLIC INSPECTION

June 18, 2012

VIA COURIER & ECFS

EX PARTE

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* notice. The attachments to the notice contain information that the Wireline Bureau has deemed highly confidential under the *Second Protective Order*¹ in this proceeding.

Specifically, Appendix A contains highly detailed information regarding (1) the number of tw telecom’s on-net locations in specific geographic markets² and (2) the volumes of tw

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 Second Protective Order*, ¶ 6 (deeming information regarding “[t]he locations that companies serve with last-mile facilities” and “[t]he extent to which companies rely on

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telecom's purchases of special access services from incumbent LECs and other providers.³ In addition, Appendix B contains highly detailed information regarding the rates that tw telecom pays specified incumbent LECs for special access channel terminations.⁴

tw telecom keeps the information for which it seeks highly confidential treatment 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 from incumbent LECs. In addition, with knowledge of the rates at which tw telecom purchases special access services, competitors would be able to determine the specific ILEC discount plans to which tw telecom subscribes and the terms and conditions to which tw telecom is subject when purchasing services pursuant to these plans. 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* notice will be filed electronically via ECFS. Additionally, pursuant to the *Modified Protective Order*⁵ and *Second Protective Order*, one original of the highly confidential version of the notice is being filed with the Secretary's Office under separate cover, and two copies of the highly confidential version of the notice will be delivered to Marvin Sacks of the Pricing Policy Division of the Wireline Competition Bureau.

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).

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 See *Letter to Paul Margie* at 2, category A (deeming information regarding "[t]he rates or charges associated with channel terminations or transport facilities, and information from which, whether alone or in combination with other confidential or non-confidential information, such rates or charges could be inferred" to be eligible for highly confidential treatment); see also *Letter to Donna Epps* at 4, category F (deeming information regarding "[p]ricing, to the extent such information is not publicly available, for DS1s and DS3s sold as unbundled network elements (UNEs) and as non-UNEs, as well as all PSDS," including "information concerning vendors," to be eligible for highly confidential treatment).

⁵ *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168 (2010).

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Please do not hesitate to contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones _____

Thomas Jones

Counsel for tw telecom inc.

cc: Michael Steffen
Angie Kronenberg
Priscilla Argeris
Paul Murray
Christine Kurth
Nicholas Degani

Enclosures

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Re: *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*

On June 14, 2012, Don Shephard of tw telecom inc. (“tw telecom”) and the undersigned met separately with (1) Angie Kronenberg, Legal Advisor to Commissioner Mignon Clyburn; (2) Priscilla Argeris and Paul Murray, Legal Advisors to Commissioner Jessica Rosenworcel; (3) Christine Kurth, Legal Advisor to Commissioner Robert McDowell; and (4) Nicholas Degani, Legal Advisor to Commissioner Ajit Pai. Also on June 14th, the undersigned held a telephone conversation with Michael Steffen, Legal Advisor to Chairman Julius Genachowski.

During these discussions, we made the points summarized in the document attached hereto as Appendix A. Based on the points made in Appendix A, we explained that the Commission should suspend operation of the special access pricing flexibility triggers, deny pending petitions for pricing flexibility, and establish price cap regulation for DS1 and DS3 special access services offered by incumbent LECs in areas in which the incumbent LECs have received Phase II pricing flexibility (“Phase II areas”). In applying price caps to Phase II areas, the price cap index for the special access basket should remain unchanged, thereby yielding prices in Phase II areas similar to prices currently charged in non-Phase II areas. At the very least, the price cap index for the special access basket should incorporate the prices currently charged by incumbent LECs in Phase II areas, thereby increasing the price cap indices for the special access basket but largely protecting against further incumbent LEC special access price increases in Phase II areas in the future.

Finally, in response to a request from Ms. Kronenberg for information regarding instances in which incumbent LECs have increased, or attempted to increase, special access prices in Phase II areas and regarding illustrative examples of differentials in prices that tw telecom pays in Phase II versus

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non-Phase II areas, on June 15th, the undersigned sent the email to Ms. Kronenberg attached hereto as Appendix B.

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Counsel for tw telecom inc.

cc: Michael Steffen
Angie Kronenberg
Priscilla Argeris
Paul Murray
Christine Kurth
Nicholas Degani

Enclosures

APPENDIX A

**tw telecom Presentation Regarding Special Access Pricing Flexibility Triggers
WC Docket No. 05-25, RM-10593
June 14, 2012**

The Commission's pricing flexibility triggers do not accurately measure competition in the market for DS1 and DS3 special access services.

- The failure of the pricing flexibility triggers to accurately measure competition is evidenced by the inconsistent and unpredictable results that they produce.
 - The Commission has granted Phase II pricing flexibility for end user channel terminations sold by the predominant incumbent LEC in only *one of the top 10 MSAs* nationwide. The Commission has not granted this form of pricing flexibility in major markets such as in New York, Chicago, Philadelphia, Boston, or Washington DC. In contrast, the Commission has granted this form of pricing flexibility in *approximately half of MSAs #50-100*, including the Flint, MI, Columbia, SC, and Shreveport, LA MSAs.
 - An analysis of AT&T's pending petitions illustrates the failure of the pricing flexibility triggers to measure the level of facilities-based competition in a given geographic market. According to AT&T, there are a sufficient number of collocators in its wire centers in the San Francisco/Oakland and San Antonio MSAs to satisfy the Phase II pricing flexibility trigger for end user channel terminations. *See AT&T Petitions for Pricing Flexibility in the San Francisco/Oakland and San Antonio MSAs* (filed Jan. 20, 2012). However, while tw telecom is one of AT&T's major competitors in these markets, tw telecom's network reaches [BEGIN HIGHLY CONFIDENTIAL]  [END HIGHLY CONFIDENTIAL]
- The pricing flexibility triggers yield results that are inconsistent with the Commission's other measures of competition and statements of policy.
 - While AT&T asserts that it qualifies for Phase II pricing flexibility in the San Francisco/Oakland and San Antonio MSAs, AT&T remains required to provide DS1 channel terminations as UNEs in the vast majority of the wire centers in these markets. The California PUC has found sufficient competition to relieve AT&T of its duty to provide competitors with access to such UNEs in only *three of the 74 wire centers* in the San Francisco/Oakland MSA. *See AT&T Handbook for California and Nevada, Non-Impaired DS1 and DS3 Wire Centers, West Region DS1 Loop Table*, <https://clec.att.com/clec/hb/shell.cfm?section=2418&hb=778&redirectsection=2422>. The Texas PUC has not made such a finding for *any of the 31 wire centers* in the San Antonio MSA. *See AT&T Handbook for Arkansas, Kansas, Missouri, Oklahoma,*

HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO
SECOND PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593,
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Texas, Non-Impaired DS1 and DS3 Wire Centers, SW Region DS1 Loop Table,
<https://clec.att.com/clec/hb/shell.cfm?section=2418&hb=1151&redirectsection=2419>.

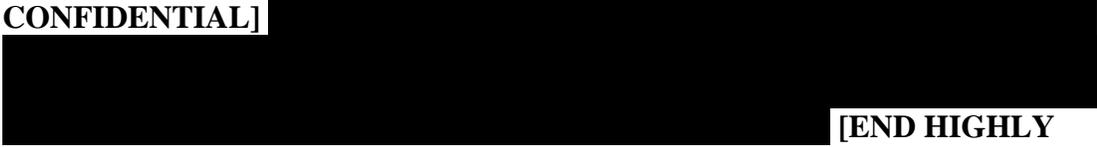
- In 2002, the Commission found that Qwest had satisfied the Phase II pricing flexibility triggers for end user channel terminations in the Phoenix, AZ MSA and accordingly granted Qwest this relief. See *Qwest Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, MO&O, 17 FCC Rcd. 7363 (2002). But eight years later, the Commission found that the level of competition in that market was insufficient to relieve Qwest of its duty to provide competitors access to these same facilities as UNEs. See *Phoenix MSA Forbearance Order* ¶ 71 (finding “no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA either individually or in the aggregate”); see also *id.* ¶ 72 (finding that “the existence of significant barriers to entry, both in general and specifically in the Phoenix MSA[] indicates that potential competition poses no significant competitive constraint in [the wholesale loop market] in this MSA”).
- The Commission’s pricing flexibility rules only require that a single competitor has connected its transport facilities to the collocations counted under the triggers. At most, this test shows that there could be a duopoly in certain parts of the market. Yet the Commission has held that a duopoly is generally unlikely to result in a competitive outcome and is likely to harm consumer welfare. See *Phoenix MSA Forbearance Order* ¶ 29 (“Economists, courts, and the Commission have long recognized that duopolies may present significant risks of collusion and supracompetitive pricing, which can lead to significant decreases in consumer welfare.”); *id.* ¶ 30 (“[E]conomic theory holds that firms operating in a market with two or a few firms (i.e., an oligopoly) are likely to recognize their mutual interdependence and, . . . in many cases may engage in strategic behavior, resulting in prices above supracompetitive levels.”); *id.* ¶ 31 (“Empirical studies of [the telecommunications industry and] other industries similarly have found that prices are likely to be higher in markets with greater concentration.”).

DS1 and DS3 special access services purchased from incumbent LECs remain vital for both wholesale and retail customers.

- The Commission has acknowledged that DS1 and DS3 special access services purchased from incumbent LECs play a significant role as inputs for carriers seeking to compete in downstream retail markets.
 - In the 2010 *Phoenix MSA Forbearance Order*, the Commission found that regulation of DS1 and DS3 loops and transport remain necessary even in a market that legacy Qwest hand-picked as the most competitive in its region (due to competition from the incumbent cable operator, Cox). The Commission rejected legacy Qwest’s request for forbearance from loop and transport unbundling obligations because, among other things, there were “no ‘significant alternative sources of wholesale inputs’ in the Phoenix MSA” and “there [wa]s insufficient actual and potential competition to

HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO
SECOND PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593,
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

constrain effectively the price of Qwest’s [retail] enterprise services.” *Phoenix MSA Forbearance Order* ¶¶ 70, 91.

- In the *Broadband Forbearance Orders*, the Commission justified its grants of forbearance from dominant carrier regulation of non-TDM-based special access services in part on the continued availability of regulated DSn special access services. *See, e.g., AT&T Broadband Forbearance Order* ¶ 25 (“We further find that competitors can readily respond should AT&T seek to impose unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions for its [non-TDM-based special access] services. Even in situations where competitors do not have the option of self-deploying their own facilities or purchasing inputs from carriers other than the incumbent LEC, potential providers may rely on special access services purchased from the incumbent LEC at rates subject to price regulation. In this regard, we note that the relief we grant in this Order excludes TDM-based, DS-1 and DS-3 special access services.”); *see also id.*, Statement of Commissioner Robert M. McDowell (“While the Order grants relief to AT&T, it does not forbear from existing regulation of DS-0, DS-1 or DS-3 type special access services most heavily relied upon by many enterprise users, wireless carriers and competitive local exchange carriers.”).
- Data submitted in the special access proceeding confirms that competitive LECs, wireless carriers, and retail customers continue to rely on DS1 and DS3 special access services purchased from incumbent LECs.
 - The RBOCs’ attempts to downplay the continued significance of DS1 and DS3 special access services lack merit. While tw telecom would like to purchase Ethernet special access circuits from incumbent LECs wherever possible, **[BEGIN HIGHLY CONFIDENTIAL]**  **[END HIGHLY CONFIDENTIAL END]** Similarly, Sprint has stated that, despite upgrades to certain parts of its network, “DS1 and DS3 level services will continue to be critical to [its] wireline and wireless operations.” *See* Letter from Sprint to Marlene H. Dortch, WC Dkt. No. 05-25, et al. (filed Jun. 12, 2012). Retail customers continue to demand DS1 and DS3 special access services as well. As of February 2010, the members of the Ad Hoc Telecommunications Users Committee, a coalition of large corporate telecommunications customers, used approximately 75,000 DS1 circuits and 3,000 DS3 circuits, yielding an annual billing of more than \$250 million. *See Reply Comments of Ad Hoc Telecommunications Users Committee*, WC Dkt. No. 05-25, et al., at 3 (filed Feb. 24, 2010).
 - Data filed in this proceeding likewise supports the conclusion that incumbent LECs dominate the market for DS1 and DS3 special access services. **[BEGIN HIGHLY CONFIDENTIAL]** 

HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO
SECOND PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593,
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

[END HIGHLY CONFIDENTIAL]

Other competitive LECs, such as Level 3, report that they purchase the vast majority of their special access services from incumbent LECs as well. *See* Letter from Level 3 to Marlene H. Dortch, WC Dkt. No. 05-25, et al. (filed Jun. 8, 2012). Demand from wireless carriers is no different—Sprint reports purchasing approximately 90% of its DS1 circuits from incumbent LECs. *See* Letter from Sprint to Marlene H. Dortch, WT Dkt. No. 12-4 (filed Apr. 24, 2012).

The Commission has developed a robust record in this proceeding that demonstrates a lack of competition in the market for DS1 and DS3 special access services.

- There is no question that the record developed to date in this proceeding far exceeds the record that the Commission has relied upon in the past when adopting significant orders that have been affirmed on appeal. For example, in the Triennial Review Remand proceeding, the Commission collected one round of comments and reply comments, *see Unbundled Access to Network Elements*, Interim Order and NPRM, 19 FCC Rcd. 16783 (2004), and did not issue any formal, industry-wide data requests. The *Triennial Review Remand Order* properly relied on the record developed in that proceeding and was affirmed on appeal. *See Covad v. FCC*, 450 F.3d 528 (2006). Over the long course of the special access proceeding, the Commission has collected three rounds of comments and reply comments and has issued two formal, industry-wide data requests. *See Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, FCC 07-123 (Jul. 9, 2007); *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, DA 09-2388 (rel. Nov. 5, 2009); *Data Requested in Special Access NPRM*, DA 10-2073 (rel. Oct. 28, 2010); *Competition Data Requested in Special Access NPRM*, DA 11-1576 (rel. Sept. 19, 2011). The record compiled to date is more than sufficient to support Commission action to address the lack of competition in the market for DS1 and DS3 special access services.
- In their recent *ex parte* submissions, the incumbent LECs recite the Commission's statement in a brief filed in the mandamus proceeding that competitive LECs' failure to respond to the Commission's 2010 voluntary data request has somehow impeded the special access rulemaking. But the facts belie this claim. As COMPTTEL et al. explained to the D.C. Circuit, that voluntary data request sought information on the extent to which carriers have deployed their own loop facilities. Many COMPTTEL members (such as tw telecom and TelePacific) responded to the request, as did numerous other CLECs that are not COMPTTEL members (such as XO and Cox). *See* Reply of Petitioners in Support of Petition for Writ of Mandamus, No. 11-1262, nn.6-7 (D.C. Cir. Oct. 19, 2011). But many other COMPTTEL members have no (or few) self-deployed loop facilities and are even more dependent upon the incumbent LECs' special access facilities to reach their customers. These COMPTTEL members thus have little (if any) of the data requested by the Commission. This should come as no surprise to the Commission or to the incumbent LECs. Since at least 2003, the Commission has repeatedly found *de minimis* competitive deployment by competitive LECs

HIGHLY CONFIDENTIAL INFORMATION – SUBJECT TO
SECOND PROTECTIVE ORDER IN WC DOCKET NO. 05-25, RM-10593,
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

due to the extremely high barriers to such deployment. The claim that competitive LECs are the source of the rulemaking delay is therefore inaccurate and belied by the Commission's acknowledgment in its Opposition to the Mandamus Petition, dated October 2011, that the FCC "ha[d] already collected a significant body of evidence regarding the operation of [the special access] market." *See* Opposition of FCC to Petition for Writ of Mandamus, No. 11-1262, at 26 (D.C. Cir. Oct. 6, 2011).

APPENDIX B

Jones, Matthew

From: Jones, Thomas
Sent: Friday, June 15, 2012 10:03 AM
To: 'Angela Kronenberg'
Cc: Jones, Matthew; Patel, Nirali
Subject: Response to Information Request
Attachments: DOC.PDF

Dear Angie,

Please find below the information you requested regarding incumbent LEC special access prices in Phase II areas versus non-Phase II areas. Please also find attached the blog post response to the Anna Maria Kovacs paper that I mentioned during our discussion. We will file copies of this email and the attached blog post in the docket of the special access rulemaking in accordance with the Protective Order in that proceeding.

Thomas Jones

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All three of the BOCs have taken advantage of Phase II pricing flexibility to impose substantial unilateral increases in the monthly rates for special access services in areas subject to Phase II pricing flexibility. Moreover, the BOCs have maintained the price levels once increased in Phase II areas even though the incumbent LECs have experienced increases in the volume of special access services sold as well as increases in economies of scale and scope and even though the Commission's rules have mandated reductions in special access rates to ensure that they are just and reasonable.

- On November 1, 2002, Qwest increased its rates for essentially all DS1 transport and channel termination rate elements in Phase II markets by 15 percent. *See* Letter from Bill Johnston, Executive Director, Qwest Corp. to Secretary, FCC, Transmittal No. 145 (filed Oct. 31, 2002). Then, on February 18, 2004, Qwest increased many of its DS3 transport rate elements in Phase II markets by varying amounts. *See* Letter from Mark Brinton, Manager, Qwest Corp., to Secretary, FCC, Transmittal No. 186 (filed Feb. 13, 2004). On September 1, 2004, Qwest again increased many of its DS1 and DS3 rate elements in Phase II markets, including many of the same rate elements that had been impacted by the previous two increases, by varying amounts. *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 sell its DS1 and DS3 special access services at reduced rates in Phase II markets until July 1, 2010, it preemptively announced rate increases that would take effect upon expiration of the merger condition. *See* Letter from Patrick Doherty, Director – Access Regulatory Affairs, AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, Transmittal No. 1062 (filed Mar. 29, 2007); Letter from Patrick Doherty, Director – Access Regulatory Affairs, AT&T, to Ms. Marlene H. Dortch, Secretary, FCC, Transmittal

WHY CONFUSE US WITH FACTS?

TBC Editor

Anna-Maria Kovacs has provided us with a short descriptive literary sketch : an economic policy *vignette* reminding us how important the facts are in determining how millions of US customers and carriers will access broadband technology. Unfortunately, while lecturing us on the need for current data she offers up findings that are not supported by data, are simply wrong on the facts and instead rely on unsupported claims made by companies like AT&T and Verizon.

Many of Ms. Kovacs' assertions are inaccurate. For example, she criticizes the FCC for limiting its review of the special access market to DSn services. In fact, the Notice of Proposed Rulemaking that commenced the special access proceedings *specifically* includes packetized services such as Ethernet. She also asserts that competitive carriers have argued that ILECs have priced retail DSn services too low to enable competition, but that too is incorrect. Competitive carriers have argued that all ILEC DSn prices are too high and that high standard prices force competitors to sign up for volume/term discounts that lock up the market and harms consumers.

The report is also plagued by unsupported, and implausible, assumptions. For example, Ms. Kovacs assumes that the DSn services providing access to broadband technologies to the vast majority of US business customers today will somehow disappear from the marketplace in the near term. She doesn't offer a single fact to support this assumption. She includes a few slides from carriers that describe Ethernet services and their investment in broadband infrastructure – but nothing in these slides supports the unlikely notion that the DS1 and DS3 services AT&T, Verizon and CenturyLink sell today will suddenly be transformed into “Ethernet services over fiber networks.” The slides offer no support for the assertion that “DS1 and Ds3 circuits are obsolete or being rapidly abandoned” (pg 7). Ms. Kovacs could have attempted to quantify the number of DS1/DS3 special access services sold by the ILECs compared to the number of Ethernet special access services sold by the ILECs. Had she made this obvious comparison she would have known that the overwhelming majority of special access services currently sold by the 3 large incumbents are DS1 and DS3 services. To be clear, no one disputes that packet-based technology is the next generation broadband solution, but the transition from one technology to another does not happen with the simple swipe of a pen. There

is no basis in reality, and Ms. Kovacs certainly provides none, for believing that DS1s or DS3s will be abandoned in the next few years – these services will continue to provide broadband access to the vast majority of business locations for many years to come.

In addition, Kovacs criticizes economic studies of the special access market conducted by the GAO and NRRI but her own analysis of the market appears to be based on *no relevant data or economic analysis at all*. For example, Kovacs asserts that the Ethernet market is competitive based on national market share data collected by Vertical Systems – in so doing, she fails to address fundamental issues of market analysis such as product and geographic market definitions and whether competitors to AT&T and Verizon actually rely on AT&T's and Verizon's own underlying facilities to provide services to their customers.

No one is saying that the networks aren't transitioning to packet-based technologies. Ethernet special access services deserve the FCC's attention -- that we can all agree on. But to pretend that the current US marketplace is being served by obsolete facilities is irresponsible and down-right misleading. This FCC docket has more data and more market-based information than any in recent history. Even Ms Kovacs concedes that the FCC's data requests have been comprehensive. But she quickly falls back on the old mantra that somehow there is not enough data because some carriers did not respond to the data requests. Any one familiar with the marketplace knows that the carriers that have relevant data are participating in the FCCs data requests. There is no stealth carrier out there buying from or selling to the incumbents, wireless carriers, competitive carriers or enterprise customers at levels that will impact the findings of data collected by the FCC.

Unfortunately, Ms. Kovacs' paper is not an economic analysis at all. It is a simple advocacy piece that provides no data to support its conclusions. Odd for a piece intending to tell us about the importance of current data.