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EX PARTE OR LATE FILED

REDACTED – FOR PUBLIC INSPECTION

August 21, 2012

FILED/ACCEPTED

AUG 21 2012

Federal Communications Commission
Office of the Secretary

EX PARTE

VIA COURIER AND ECFS

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* letter responding to a recent Verizon filing in the above referenced proceeding. The *ex parte* letter contains information that the Wireline Bureau has deemed highly confidential under the *Second Protective Order*[1] in this proceeding. Specifically, the *ex parte* letter contains highly detailed information regarding (1) the discount plans under which tw telecom purchases special access services[2]; (2) the volumes of tw telecom's purchases

[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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of special access services from incumbent LECs and other providers[3]; and (3) the rates that tw telecom pays specified incumbent LECs for special access services.[4]

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*[5] 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.

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[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).

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones
Matthew Jones

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Enclosure

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REDACTED – FOR PUBLIC INSPECTION

August 21, 2012

VIA COURIER & ECFS ***EX PARTE***

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

Dear Ms. Dortch:

tw telecom inc. ("tw telecom") submits this letter to respond to Verizon's July 16, 2012, *ex parte* filing in the above referenced proceeding.[1] Verizon has now made clear that it has no intention of providing a meaningful response to the detailed information that tw telecom and others have submitted regarding the specific terms and conditions of Verizon's special access discount plans and their impact on the market for special access services.[2] Verizon chooses

[1] Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed July 16, 2012) ("Verizon July 16 Ex Parte").

[2] *See, e.g.*, Letter from Michael Mooney, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al., 7-11 (filed June 27, 2012) ("Level 3 June 27 Ex Parte"); Letter from Michael Mooney, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al., 2-14 (filed June 8, 2012); Letter from Thomas Jones & Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed June 5, 2012) ("tw telecom June 5 Ex Parte"); Letter from Thomas Jones & Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al., Highly Confidential Attachment at 16-20, 21-22 (filed April 11, 2012) ("tw telecom April 11, 2012 Response to Second Data Request"); Letter from Thomas Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al., PowerPoint Presentation at 2,

instead to cling to tired generalities that have no basis in economic theory and do not reflect marketplace realities. The Commission should recognize Verizon's position for what it is—a last ditch effort to retain its monopoly control over a vital sector of the information economy.

I. Verizon Has Yet to Provide a Detailed Defense of the Volume Commitment Provisions of its Special Access Discount Plans.

After at least eight filings in four months,[3] Verizon still has yet to offer a meaningful defense of the excessive volume commitment provisions in its Commitment Discount Plan ("CDP") and National Discount Plan ("NDP"). As tw telecom and others have explained, under the CDP, a customer must commit to maintaining a full 90 percent of its DS1 and DS3 purchase volumes in service for the duration of the plan's term.[4] Similarly, under the NDP, a customer must commit to maintaining either 85 percent, 90 percent, or 92 percent of its DS1 and DS3 purchase volumes (depending on which "commitment matrix" the customer selects) in service for the duration of the plan's term.[5] tw telecom and others have submitted detailed analyses of the impact of these excessive volume commitments on wholesale customers seeking to provide services to downstream retail customers.[6] Verizon's only response to these critiques is a vague claim that volume commitments provide Verizon with "greater certainty and predictability."[7] A

5-6 & Chart C (filed Feb. 27, 2012); Letter from Michael Mooney, Counsel for Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al., 8-24 (filed Feb. 22, 2012).

[3] *See* Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed July 31, 2012); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 05-25, et al. (filed July 24, 2012); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket. No. 05-25, et al. (filed July 17, 2012); Verizon July 16 Ex Parte; Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed June 6, 2012) ("Verizon June 6 Ex Parte"); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed May 2, 2012); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed April 26, 2012) ("Verizon April 26 Ex Parte"); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, et al. (filed March 27, 2012).

[4] *See, e.g.*, Verizon Tariff FCC No. 1, § 25.1.3(A)(5). The volume commitment under the CDP is measured in DS0 equivalents. *See, e.g.*, *id.* § 25.1.3(A).

[5] *See, e.g.*, *id.* § 25.3.4(C). The volume commitment under the NDP is measured by DS1 equivalents and is divided into DS1 channel terminations and DS1 channel mileage. *See, e.g.*, *id.* § 25.3.2(C)(2); § 25.3.4.

[6] *See* n.2, *supra*.

[7] *See, e.g.*, Verizon July 16 Ex Parte at 3-4.

thorough analysis of the actual provisions in Verizon's tariffs demonstrates that this claim has no merit.

First, if the purpose of Verizon's volume commitment provisions were truly to provide Verizon with needed predictability, the provisions would be based on a fixed quantity of circuits rather than on a percentage of a customer's purchase volume. Verizon claims that "When customers commit to a certain volume on top of a term Verizon can more efficiently plan the amount of network capacity and other resources it will need over a long term." But under the CDP and NDP, a customer must commit to maintaining a full 85 percent, 90 percent, or 92 percent of its purchase volume in service, regardless of the number of circuits that it purchases.[8] Verizon cannot reasonably claim that requiring a customer to commit to maintaining 90 percent of its total purchase volume of 100 circuits in service allows it to efficiently plan its network capacity needs in the same way as requiring a customer to commit to maintaining 90 percent of its total purchase volume of 100,000 circuits in service. The only real benefit that Verizon receives from requiring the customer purchasing 100 circuits to commit to maintaining 90 of those circuits in service with Verizon is the certainty that the customer will not be able to purchase those 90 circuits from another provider.

Furthermore, Verizon's predictability claim is contradicted by the terms that it offers to customers in Verizon West (legacy GTE territory). Under the Term Volume Plan ("TVP") in Verizon West,[9] a customer's volume commitment level is not linked to its total purchase volume.[10] Instead, upon subscribing to the TVP, a customer is free to determine its commitment level, which can be as low as two circuits.[11] Verizon grants TVP customers circuit portability regardless of the commitment level that the customers choose.[12] Clearly, Verizon is able to effectively plan its network in Verizon West while offering its customers circuit portability at a

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[8] In addition to these excessive volume commitments, a customer is also required to keep each circuit purchased under the CDP and NDP in service for a minimum of one year, regardless of the number of circuits that the customer purchases. *See, e.g.*, Verizon Tariff FCC No. 1, § 25.1.10; § 25.3.8.

[9] *See* Verizon Tariff FCC No. 14, § 5.6.14.

[10] *Id.* § 5.6.14(D). tw telecom's analysis focuses on the One-, Two, Three, and Five-Year DS1 TVP. The Eight- and Ten-Year DS1 TVP contains a different volume commitment, which, like the CDP and NDP, requires a customer to commit to maintaining a percentage of its purchase volume in service.

[11] *Id.*

[12] This is not to say that the TVP is in all respects reasonable. While a customer is able to determine its own commitment level under that plan, Verizon imposes shortfall penalties if a customer misses its volume commitment by more than three percent. *See id.* § 5.6.14(I). In addition, customers must pay nonrecurring installation charges under the TVP, and in a number of states, the discounts offered under the TVP are significantly less favorable than those offered under Verizon's other plans. *See id.* § 5.6.14(J); § 5.7.18(I).

variety of commitment levels. Verizon has made no attempt to explain why it is unable to offer similar terms in the remainder of its service area.

Second, even if the Commission were to accept Verizon's specious defense of volume commitment provisions based on a percentage of a customer's total purchase volume, Verizon fails to defend the actual percentage *level* that it requires customers to commit. Nowhere in its numerous recent *ex parte* filings does Verizon even mention the fact that the CDP requires a customer to commit to maintaining 90 percent of its purchase volume in service or that the NDP requires a customer to commit to maintaining 85 percent, 90 percent, or 92 percent of its purchase volume in service. Verizon claims that volume commitments "are what make it possible for Verizon to offer additional benefits such as circuit portability,"[13] but it provides zero evidence as to why 85 percent, 90 percent, and 92 percent are the commitment levels that Verizon requires in order to offer such benefits. For example, Verizon could have submitted data demonstrating the costs that it claims to incur as a result of providing circuit portability and juxtaposed those costs with data demonstrating the financial benefit that it receives by requiring customers to commit to maintaining 85 percent, 90 percent, and 92 percent of their purchase volumes in service. Verizon has made no such showing, choosing instead to rely on a foggy, theoretical defense of volume discount practices in general.

Third, Verizon's predictability claim is inconsistent with Verizon's other assertions in this proceeding. For example, Verizon states that, "When a customer's plan expires, the customer has many options, including migrating all of its circuits away from Verizon."[14] Yet Verizon claims that, somehow, it is still able to "plan the amount of network capacity and other resources it will need over the long term."[15] The Commission should reject this doublespeak. Verizon cannot legitimately claim on the one hand that its volume commitment provisions enable it to predict future volume levels while simultaneously arguing that customers are free to shift their purchase volumes to other providers at will.[16]

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[13] Verizon July 16 Ex Parte at 3.

[14] *Id.* at 4; *see also* Verizon April 26 Ex Parte at 2 (explaining maneuvers that Verizon suggests competitors may use to transition circuits away from Verizon upon the expiration of a plan's term). tw telecom explains why none of these maneuvers is viable in Section II, *infra*.

[15] Verizon July 16 Ex Parte at 4.

[16] In addition to contradicting itself, Verizon also contradicts arguments made in previous filings by other BOCs. For example, AT&T and CenturyLink have argued that their volume and term commitment provisions are reasonable because certain CLECs offer similar arrangements. *See* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary FCC, WC Docket No. 05-25, 9-13 (filed August 8, 2012); Letter from Melissa Newman, Vice President, Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, Attachment at 4, 8 (filed April 20, 2012). tw telecom has explained why this argument is meritless in light of the vast differences that exist between CLEC sales of special access and ILEC sales of special access. *See* tw telecom June 5 Ex Parte at 6 ("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

II. Verizon Continues to Ignore the Impact of its Discount Plans on Wholesale Customers.

As tw telecom has explained, 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. And even if an alternative wholesale provider were available at a given location, the minimum volume commitment provisions of the ILEC discount plans would often prevent tw telecom from purchasing services that it currently purchases from the ILEC from that alternative wholesale provider. Despite overwhelming evidence to the contrary, Verizon continues to insist that its discount plans have no such effect. To support this position, Verizon provides only *ipse dixit* responses, essentially suggesting that there is no problem because they say there is no problem. Verizon uses this tactic as its response to a number of issues.

First, tw telecom has made clear that it would be unable to serve downstream retail customers on a large scale without sufficiently robust circuit portability solutions.[17] In order to receive circuit portability, tw telecom subscribes to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** As described above, subscribing to these plans requires tw telecom to meet minimum volume commitments. If tw telecom fails to meet the minimum volume commitments, tw telecom incurs shortfall penalties, which in turn prevent tw telecom from purchasing services from alternative wholesale providers even where such providers exist. As a policy matter, this dilemma should be of great concern to the Commission. But Verizon simply resorts to its favorite attack line, accusing competitors of "seeking discounts without being willing to make the type of commitment that makes these discounts possible."[19] This assertion not only mischaracterizes tw telecom's position; it completely dodges the factors that force businesses

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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."). Verizon now agrees with tw telecom, apparently rejecting CenturyLink's view and conceding that, "Given the wide number of variables involved, there is simply no way to make apples-to-apples comparisons between Verizon's and competitors' plans." Verizon July 16 Ex Parte at 6.

[17] *See, e.g.*, tw telecom April 11, 2012 Response to Second Data Request, Highly Confidential Attachment at 3 ("Without circuit portability, tw telecom is unable to manage its large base of business customer locations without incurring prohibitively high circuit termination liabilities in areas in which those charges apply.").

[18] *See id.*, Highly Confidential Attachment at 16-20.

[19] Verizon July 16 Ex Parte at 3.

like tw telecom to purchase services under Verizon's discount plans.[20] For example, Verizon provides no evidence indicating that a provider could manage a large retail customer base in the absence of circuit portability without incurring significant early termination penalties.

Verizon insists that its tariff provisions allowing customers to *move* circuits without paying early termination penalties makes it feasible for competitors to operate without circuit portability.[21] But as tw telecom explained with regard to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted][22] **[END HIGHLY CONFIDENTIAL]** while Verizon's retail customers may benefit from such a provision, wholesale customers seeking to serve downstream retail customers are almost always unable to do so. In order to take advantage of Verizon's provisions, a customer must submit a request that the existing service be disconnected and that the new service be provisioned "at the same time."[23] Therefore, practically speaking, tw telecom can only take advantage of these provisions when a single end user requests that a circuit be moved to a new location. In the more common situation, in which an end user terminates service and tw telecom wishes to fulfill the commitment term for that circuit by providing service to a different end user at a different location, only a highly coincidental timing of end user requests would allow tw telecom to do so. It follows that the ability to move circuits pursuant to Verizon's tariff provisions is inadequate to address the need to provide genuine circuit portability.

Second, Verizon repeats its mantra that customers have "many options" when a discount plan expires, but as tw telecom has explained, none of these purported options is viable. In particular, Verizon claims that a customer may choose to renew its plan at a lower volume commitment level or enter into a different plan at a lower volume commitment level.[24] However, the volume commitments required under the CDP and the NDP are both based on a percentage of the customer's total purchase volume from Verizon at the time that the customer signs up for the plan.[25] Therefore, in order to commit a lower volume to Verizon under its new or renewed plan, the customer would have already had to begin purchasing a portion of its volume from an alternative provider. Of course, the customer could not have done so during the term of its previous plan without incurring significant early termination fees and shortfall

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[20] Moreover, as described above, Verizon has provided no evidence to support its claim that 85 percent, 90 percent, and 92 percent volume commitment provisions make circuit portability "possible."

[21] *See, e.g.*, Verizon July 16 Ex Parte at 4.

[22] *See* tw telecom April 11, 2012 Response to Second Data Request, Highly Confidential Attachment at 4-6.

[23] *See, e.g.*, Verizon Tariff FCC No. 1, § 7.4.13(C); § 7.4.17(E)(4).

[24] *See* Verizon July 16 Ex Parte at 4.

[25] *See, e.g.*, Verizon Tariff FCC No. 1, § 25.1.3(A)(5); § 25.3.4(C).

penalties. Verizon suggests two maneuvers that it claims a customer can use to avoid this issue, but neither of these maneuvers is viable.

Verizon first claims that a customer can remain on an expiring plan for a two-month "grace period" and manage its transition to an alternative wholesale provider during this brief window.[26] This is wildly unrealistic. In order for a competitor to switch from purchasing a circuit from Verizon used to serve a retail customer to purchasing the circuit from an alternative wholesale supplier, the competitor must coordinate with its retail customer to schedule a mutually agreeable time at which its service can be interrupted and the necessary network modifications can be performed. Retail customers are sensitive to service interruptions, and they often resist or delay this process. If and when a mutually agreeable time is determined, the competitor must then dispatch a service representative to the retail customer's premises to establish a new network interface and perform any additional work that may arise from this change. Often, the customer must then also coordinate with the third-party vendor of its private branch exchange in order to perform further equipment modifications. In some cases, the customer will incur fees for this third-party service work.

This process is very time-consuming and would be extremely burdensome if tw telecom were to attempt to undergo this process for a large number of customers simultaneously. For comparison, when tw telecom recently discontinued a service in Texas,[27] tw telecom coordinated with 110 of its retail customers in order to transition them to an alternative service and perform any modifications necessitated by the change. tw telecom was required to devote substantial resources to managing this process for over a year in order to perform the necessary service modifications for this relatively small number of customers.

In Verizon East (legacy NYNEX territory) alone, tw telecom commits to maintaining approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]** Due to the operational constraints discussed above, tw telecom would be not be able to transition a meaningful number of these circuits to alternative wholesale providers during a brief "grace period" at the end of a plan's term. If tw telecom were to attempt to effect such a burdensome transition, it would have to do so over an extended period during the term itself. Of course, under Verizon's current terms and conditions, attempting to do so would cause tw telecom to incur substantial early termination fees and shortfall penalties.[28]

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[26] *See* Verizon July 16 Ex Parte at 4-5.

[27] *See Comments Invited on Application of tw telecom of texas llc to Discontinue Telecommunications Services*, Public Notice, 26 FCC Rcd. 7584 (2011).

[28] Verizon asserts that during the two-month "grace period," the customer "has the ability to avoid [shortfall penalties] simply by working with Verizon to manage the circuit transition." Verizon July 16 Ex Parte at 5. In support of this claim, Verizon cites the provision of its tariff that explains that Verizon will conduct a "true-up" every six months in order to determine whether a customer owes shortfall or overage penalty. *See id.* at n.21 (citing Verizon Tariff FCC No. 1, § 25.1.7(A)(2)). It is unclear how Verizon expects this provision to allay concerns that it would impose shortfall penalties if a purchaser attempted to transition circuits away from

The other means by which Verizon claims a customer may reduce its volume commitment upon expiration of its plan is to delay renewing the plan and pay month-to-month rates while attempting to transition circuits away from Verizon to alternative providers.[29] But as tw telecom has explained, Verizon's month-to-month rates are cost prohibitive. As demonstrated by the chart attached as Appendix A, tw telecom purchases the majority of its circuits from Verizon at rates that are at least **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** lower than Verizon's month-to-month rates. For example, in New York, tw telecom currently pays Verizon approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** each month for approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** DS1 and DS3 circuits. If tw telecom were to go off-plan and pay month-to-month rates for half of these circuits in order to attempt to transition them to alternative wholesale providers, tw telecom would be required to pay Verizon **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** extra each month, an increase of approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**. tw telecom would be required to pay these exorbitant month-to-month rates for as long as it took to complete the burdensome transition process described above. Contrary to Verizon's contention, this approach is clearly not viable.

Third, Verizon misleadingly asserts that its discount plans permit customers to freely switch from DSn special access services to higher-capacity services, such as Ethernet, without incurring penalties.[30] In support this claim, Verizon cites its tariff provisions that allow customers to upgrade *existing* circuits to Ethernet and continue to count those circuits toward their volume commitment levels.[31] For a number of reasons, these provisions are inadequate to allow customers to fully embrace higher-capacity services.

As an initial matter, Verizon's upgrade provisions are subject to a number of conditions that limit their application and utility. Among other things, these provisions require that the new service be provided to the same service address as the existing service, that the commitment term for the new service term be longer than the commitment term for the existing service, and that Verizon's revenue attributable to the new service be greater than its revenue attributable to the

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Verizon during the "grace period." If Verizon is suggesting that it would not impose shortfall penalties under any circumstances during the "grace period," it should say so.

[29] *See* Verizon July 16 Ex Parte at 5. Verizon seems to suggest that, in this scenario, the customer would sign up for term-only plans for the circuits that it intends to keep with Verizon and pay month-to-month rates on all other circuits during the transition. Then, once the customer has begun purchasing the latter circuits from alternative wholesale providers, it would roll the remaining term-only plans into a term-and-volume plan with Verizon.

[30] *See id.* at 3, n.10.

[31] Verizon is notably silent as to the impact of AT&T's discount plans, which do not contain such provisions.

existing service.[32] These conditions would place tw telecom at risk of incurring shortfall penalties if it were to attempt to transition a large number of end users to service contracts that are either shorter or less costly than their existing service contracts for DSn special access services. tw telecom explained this in a previous filing,[33] but again, Verizon failed to respond.

Moreover, Verizon's reliance on these upgrade provisions is inconsistent with its claim, at least as it applies to large wholesale customers like tw telecom, that "the marketplace for high-capacity services is growing rapidly while demand for TDM-based special access declines."[34] Verizon's upgrade provisions only allow tw telecom to upgrade *existing* circuits without incurring penalties. However, over time, some tw telecom customers cease purchasing services from tw telecom and tw telecom acquires new customers that demand Ethernet. As legacy DSn-based customers are replaced with new Ethernet-based customers, tw telecom's total DSn volume will be replaced by Ethernet volume, but this category of Ethernet circuits does not count toward tw telecom's volume commitments **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]** Verizon's upgrade provisions provide no remedy for this issue. Verizon must either admit that it is exaggerating the pace at which DSn demand is being replaced by Ethernet demand, or it must acknowledge that its upgrade provisions do not provide wholesale customers with sufficient ability to embrace higher-capacity services.

III. Verizon Continues to Overstate the Level of Competition that it Faces from Non-ILEC Providers of Special Access Services.

Verizon continues to assert that competition for special access services is widespread and flourishing, but this is nothing more than empty rhetoric. The single most important fact in this proceeding remains—ILECs own the only last mile facility to the vast majority of business customer locations in the country. None of the evidence offered by Verizon calls this essential fact into question.

First, Verizon claims that "customers who participate in Verizon's discount plans and pricing flexibility contracts . . . do obtain high-capacity services from several different providers as well as through self-supply without penalty under Verizon's terms."[35] As an initial matter, Verizon does not provide any detail about the plans under which these customers purchase services, limiting the Commission's ability to assess the implications of its claim. But more importantly, in support of this point, Verizon is only able to cite wireless providers as examples.[36] Unsurprisingly, Verizon cannot identify examples of wholesale special access

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[32] *See, e.g.*, Verizon Tariff FCC No. 1, § 2.9.6.

[33] *See* tw telecom April 11, 2012 Response to Second Data Request, Highly Confidential Attachment at 21.

[34] Verizon July 16 Ex Parte at 7.

[35] *Id.* at 2.

[36] *See id.* at n.7.

customers that obtain a significant number of high-capacity services from alternative sources and use those services to serve downstream retail business customers because the terms and conditions of BOC discount plans make such a strategy unworkable. As tw telecom has explained, any competition for backhaul services that may develop at individual, high-demand cell towers has no impact on the millions of business customer locations throughout the country where the revenue opportunity is insufficient to enable a competitor to deploy its own facilities.

Second, Verizon attempts to show that cable providers are successfully serving business customers and relies on the misleading examples of Cablevision and Cox.[37] While Cablevision has found some success in serving small businesses in and around New York City, it is clear that this market is not representative of the country as a whole. Cablevision describes the service area of its business division, Optimum Lightpath, as "the most competitive business telecommunications market in the country."[38] And even in that market, "ILECs have significant advantages over Optimum Lightpath . . . including greater capital resources, an existing fully operational local network, and long-standing relationships with customers."[39] Despite Cablevision's efforts, tw telecom has only been able to purchase **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** from Cablevision and other alternative wholesale providers in LATA 132, the LATA for New York City. These circuits constitute approximately **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of tw telecom's wholesale special access purchase volume in that LATA.

In addition, Verizon touts Cox's "commercial services" revenue figures but fails to mention that Cox's commercial services include a variety of products other than special access services.[40] For example, Cox's commercial services include web hosting and business video services.[41] And even including revenues attributable to non-special-access products, Cox's nationwide commercial services revenues are dwarfed by Verizon's revenues from the sale of DS1 and DS3 services under its discount plans. While Cox recently reached $1 billion in total annual commercial services revenues nationwide, Verizon earns more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]** Yet Verizon and the other BOCs continue to insist that DSn-based services are obsolete and irrelevant.

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[37] *See id.* at 8, n.35.

[38] Cablevision 2011 10-K at 11.

[39] *Id.* at 24.

[40] *See* Verizon July 16 Ex Parte at n.35.

[41] *See* Cox Web Hosting Fact Sheet, *available at* ww2.cox.com/wcm/en/business/datasheet/ds-web-host.pdf; Cox Business Video Fact Sheet, *available at* ww2.cox.com/wcm/en/business/datasheet/ds-video-basic.pdf.

[42] *See* Highly Confidential Version of Verizon June 6 Ex Parte at 2.

Moreover, as the Commission has observed, even when a cable company is able to serve some business customers in a given market, this does not necessarily indicate that the market is sufficiently competitive. In the *Phoenix Forbearance Order* that was recently affirmed by the Tenth Circuit Court of Appeals, the Commission held that business services provided by Cox in Phoenix, an area subject to an unusually significant level of competitive entry in the business market by cable companies, were insufficient to subject Qwest to effective competition.[43] The Commission found that, while Cox was able to serve certain business customers in the Phoenix market, Cox still faced significant barriers to constructing its own facilities to business customer locations.[44] And even to the extent that Cox was able to construct facilities, the Commission explained that this did not indicate that other providers would be able to do so as well.[45]

Third, Verizon suggests that tw telecom can easily self supply, claiming that tw telecom operates "vast competitive facilities."[46] This assertion is inaccurate and contrary to prior Commission holdings. tw telecom has constructed facilities to approximately 16,000 of the 3-5 million commercial buildings in the United States. tw telecom is able to build facilities to approximately 1,500 additional buildings each year. Despite its aggressive investment in last-mile facilities, tw telecom still must purchase last-mile facilities to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted]. **[END HIGHLY CONFIDENTIAL]** Verizon, on the other hand, owns facilities to virtually every commercial building in its service area. Moreover, as the Commission has recognized, competitive LECs face significant barriers to self-deployment of facilities to business customer locations.[47] Verizon refuses to recognize this limitation.

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[43] *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622, ¶¶ 87-91 (2010) ("*Phoenix Forbearance Order*"), *aff'd by Qwest Corp. v. FCC*, Case No. 10-9543 (10th Cir. Aug. 6, 2012).

[44] *Id.* ¶ 89, n.268 ("To reach potential customers with its own facilities, Cox, like any other competitive LEC, would need to overcome the relevant entry barriers.").

[45] *Id.* ¶ 36 ("We see no persuasive economic reason to predict that, just because a cable company might find it profitable to make incremental investments in a preexisting network, subsequent entrants also would find it profitable to incur the costs of building an entire new network from scratch.").

[46] Verizon July 16 Ex Parte at 8.

[47] *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, ¶ 150 (2005) ("Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities"); *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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 85-91 (2003) (subsequent history omitted) (discussing the relevant economic barriers to entry).

Finally, Verizon claims that there is no basis for concluding that ILECs have market power in the market for special access services.[48] But as Verizon is well aware, price-cap ILECs have long been classified as dominant in the provision of DS1 and DS3 special access services.[49] Even in the instances in which Verizon has petitioned for forbearance in markets that it presumably selected because they were the most competitive in its service area, the Commission has held that Verizon faces insufficient competition to relieve it of dominant carrier regulation.[50] In so holding, the Commission explained that "the record does not demonstrate that Verizon no longer possesses exclusionary market power, and thus . . . we must assume that Verizon still possesses such market power."[51] Verizon's insistence that the Commission must go above and beyond the level of analysis that it has conducted in the past is simply another attempt to prolong this proceeding so that Verizon may continue to exercise its market power.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Matthew Jones

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[48] *See* Verizon July 16 Ex Parte at 7.

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

[50] *See generally In re Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach MSAs*, Memorandum Opinion and Order, 22 FCC Rcd. 21293 (2007) ("6-MSA Order"). The Commission reached a similar holding with respect to markets chosen by Qwest in its service area. *See generally In re Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle MSAs*, Memorandum Opinion and Order, 23 FCC Rcd. 11729 (2008) ("4-MSA Order").

[51] 6-MSA Order ¶ 45; *see also* 4-MSA Order ¶ 44.

APPENDIX A

[REDACTED IN FULL]