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November 2, 2012

VIA COURIER AND ECFS

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

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:

On behalf of Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer & Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation, and tw telecom inc., please find enclosed two copies of the redacted version of a petition to reverse forbearance from dominant carrier regulation of incumbent LECs' non-TDM-based special access services (the "*Petition*"). The *Petition* contains information that the Wireline Competition Bureau has deemed highly confidential under the *Second Protective Order*¹ in the above-referenced proceeding.

Specifically, the *Petition* and Attachment 2 thereto contain statistics derived from the data that parties submitted in response to the Commission's first special access data request.² This data includes

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

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the number of locations to which incumbent LECs and non-incumbent LECs own connections in each of the markets for which the Commission requested data.³ In addition, the *Petition* contains highly detailed information regarding a commercial agreement under which one petitioner purchases specified special access services from an incumbent LEC and the number of Ethernet circuits that this petitioner purchases from non-incumbent LECs.⁴ The petitioner keeps this information in the strictest confidence, and it is not available from public sources. If released to the petitioner's competitors, this information would allow those competitors to gain a significant advantage in the marketplace. Accordingly, this information is eligible for highly confidential treatment under the *Second Protective Order*.

Pursuant to the procedures outlined in the *Modified Protective Order*,⁵ as modified by the instructions in the first data request in this proceeding,⁶ one original of the highly confidential version of the *Petition* is being filed with the Secretary's Office under separate cover, and two copies of the highly confidential version of the *Petition* will be delivered to Andrew Multz of the Pricing Policy Division of the Wireline Competition Bureau. In addition, pursuant to a request from Wireline Competition Bureau staff, one copy of the highly confidential version of the *Petition* will be delivered to Derian Jones of the Pricing Policy Division of the Wireline Competition Bureau. Finally, one machine-readable copy of the redacted version of the *Petition* will be filed electronically via ECFS.

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

*Counsel for BT Americas Inc., Cbeyond, Inc.,
EarthLink, Inc., MegaPath Corporation,
and tw telecom inc.*

Enclosures

³ See *Second Protective Order*, ¶ 6 (deeming responses to Questions III.B and III.E of the *First Special Access Data Request* to be eligible for highly confidential treatment).

⁴ See *id.* (deeming “[t]he extent to which companies rely on [incumbent LEC] and [non-incumbent LEC] last-mile facilities and local transport facilities to provide special access-like services and the nature of those inputs (e.g., the names of suppliers and whether the inputs are conditioned copper loops, DS1 loops, DS3 loops, Ethernet loops)” to be eligible for highly confidential treatment).

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

⁶ See *First Special Access Data Request* at 21.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**PETITION OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE,
BT AMERICAS, CBeyond, COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION, EARTHLINK, MEGAPATH, SPRINT NEXTEL, AND TW TELECOM
TO REVERSE FORBEARANCE FROM DOMINANT CARRIER REGULATION OF
INCUMBENT LECS' NON-TDM-BASED SPECIAL ACCESS SERVICES**

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**PETITION OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE,
BT AMERICAS, CBeyond, COMPUTER & COMMUNICATIONS INDUSTRY
ASSOCIATION, EARTHLINK, MEGAPATH, SPRINT NEXTEL, AND TW TELECOM
TO REVERSE FORBEARANCE FROM DOMINANT CARRIER REGULATION OF
INCUMBENT LECS’ NON-TDM-BASED SPECIAL ACCESS SERVICES**

Pursuant to Section 1.41 of the Commission’s rules¹ and Sections 4(i) and 10 of the Communications Act,² Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer & Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation, and tw telecom inc. (collectively, the “Petitioners”) hereby submit this petition to reverse the forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to the Verizon Telephone Companies (“Verizon”), AT&T Inc. (“AT&T”), the legacy Embarq Local Operating Companies (“legacy Embarq”), the Frontier and Citizens ILECs (“Frontier”), and legacy Qwest Corporation (“legacy Qwest”) in their provision of non-TDM-based special access services.

¹ 47 C.F.R. § 1.41.

² 47 U.S.C. § 154(i); *id.* § 160. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (“Communications Act” or “Act”), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

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I. INTRODUCTION AND SUMMARY.

Through the so-called “deemed grant” of a forbearance petition filed by Verizon in 2006 and in subsequent partial grants of forbearance petitions filed by AT&T, legacy Embarq, Frontier, and legacy Qwest, the FCC has eliminated all dominant carrier regulation of the largest incumbent LECs’ packet-switched and optical special access services (“non-TDM-based special access services”). In the orders addressing the AT&T, legacy Embarq, Frontier and legacy Qwest forbearance petitions (the “*Forbearance Orders*”), the Commission declined to examine the incumbent LECs’ market power in the relevant product and geographic markets. It instead granted forbearance from dominant carrier regulation based primarily on predictions that competition would develop in the future, on the continued availability of DS1 and DS3 special access services, and on the continued application of certain statutory provisions (*e.g.*, the complaint provisions of Section 208 of the Act). In what may have been an implicit acknowledgement of the weaknesses of its analysis, the Commission noted that it could apply appropriate regulations to incumbent LEC non-TDM-based special access services in the future.

Today, as a result of the Commission’s decisions in the *Forbearance Orders*, the incumbent LECs are essentially free to offer non-TDM-based special access services at any price and on any terms and conditions they choose. The dangers associated with the Commission’s deregulation of non-TDM-based special access services without properly analyzing the market for those services have grown significantly over time. Traditional DS1 and DS3 special access services comprise the vast majority of the special access services used to serve business customers across the United States, and will continue to be critical and widely-used for the

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foreseeable future,³ but non-TDM-based special access services, such as Ethernet, are replacing DS_n services. Ethernet and other non-TDM-based special access services will eventually be the central means by which businesses in this country transmit information. When and where that is the case, unreasonably high prices and anticompetitive conduct by dominant incumbent LECs will harm American businesses by increasing their costs and reducing the extent to which they benefit from innovation yielded by competitive markets.

The Commission has an obligation under Sections 201(b) and 202(a) of the Act to ensure that incumbent LECs provide non-TDM-based special access services at rates, and on terms and conditions, that are just and reasonable and not unjustly or unreasonably discriminatory. In order to meet these obligations, the Commission must undertake a thorough market power analysis of incumbent LEC non-TDM-based special access services. This is especially so because the Commission concluded in the 2010 *Phoenix Order* that a traditional market power analysis is the appropriate means of determining whether forbearance from regulation of incumbent LEC local transmission facilities is appropriate. In light of this conclusion, the Commission's decisions to forbear from regulating incumbent LEC non-TDM-based special access services and the "deemed grant" to Verizon must be reexamined.

Accordingly, the Commission should conduct a market power analysis of the incumbent LECs' non-TDM-based special access service offerings in which it follows the methodology utilized in the *Phoenix Order* and in which it considers the information submitted in the Commission's special access rulemaking docket. That analysis will almost certainly yield the conclusion that the incumbent LECs' enduring control over the only last-mile connection serving

³ While traditional DS1 and DS3 special access services are not the focus of this Petition, the Petitioners believe that reform of regulations governing DS1 and DS3 special access services also must be adopted.

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the vast majority of business customers in the country gives incumbent LECs market power in the provision of non-TDM-based special access services. In conducting the analysis, the Commission should consider the following.

First, the Commission should define the relevant product markets. In so doing, the Commission should follow the test set forth in the *DOJ-FTC Horizontal Merger Guidelines*, under which a relevant product market consists of a product or group of products such “that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products (‘hypothetical monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price.” If the Commission lacks the information necessary to conduct this analysis, it can instead rely on evidence such as the extent to which there are differences between services in terms of prices and technical characteristics, and the extent to which customers switch between the services. In addition, the Commission should follow its past practices of (1) treating services provided solely over a service provider’s own facilities as belonging to different product markets than services provided over other service providers’ facilities (and, as discussed below, the Commission should focus its analysis exclusively on services provided via facilities owned by the service provider); (2) treating wholesale and retail services as belonging to different product markets; and (3) relying on capacity levels as a basis for defining relevant product markets.

Second, the Commission should define the relevant geographic markets. While each individual customer location is technically a separate geographic market for last-mile services, for administrative purposes, it will be necessary for the Commission to aggregate customer locations subject to similar levels of competition. In so doing, the Commission should identify low capacity non-TDM-based special access services (*e.g.*, at or below 10 Mbps) that do not, by

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themselves, yield sufficient revenue to justify competitive deployment of last-mile facilities in any geographic area. The Commission could deem such services to be subject to incumbent LEC market power on a nationwide basis. For higher capacity non-TDM-based special access services, the Commission could aggregate individual customer locations into larger categories, such as wire centers. Wire centers subject to similar levels of competition could in turn be aggregated into broader categories. Once the Commission has established such aggregated categories, it could undertake a granular market power analysis in a representative subset from each aggregated category. The results of the analysis in representative wire centers would apply to all wire centers in the category.

Third, in conducting a granular market power analysis for relevant product markets in representative wire centers, the Commission should identify the market participants. Consistent with the *Phoenix Order*, the Commission should count only those service providers that deliver special access services via facilities that they own. Moreover, the Commission should only count entities to the extent that their facilities actually support provision of viable substitutes for incumbent LEC non-TDM-based special access services. For example, cable companies should only be considered competitors in locations served by their fiber facilities (as opposed to locations served by their coaxial cable facilities) because the cable companies appear to provide substitutes for incumbent LEC non-TDM-based special access services only via such fiber facilities.

Fourth, after identifying the market participants, the Commission should assess the extent to which incumbent LECs face actual competition from market participants in the wire centers at issue. To make this assessment, the Commission should determine the extent to which market participants have actually deployed facilities to customer locations that can be used to provide

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non-TDM-based special access services. Every past examination of the market for local transmission services, including those conducted by the GAO, the DOJ, and the Commission itself, has yielded the conclusion that incumbent LECs own the only facilities serving the vast majority of business customers in the United States. The data submitted in the Commission’s special access rulemaking docket confirm that this remains the case. Thus, there is little doubt that the Commission will conclude that incumbent LECs face little or no actual competition in most or all of the relevant markets for non-TDM-based special access services.

Fifth, the Commission should assess the extent to which incumbent LECs face potential competition. Specifically, the Commission should assess whether potential entry into the relevant product and geographic markets is likely to occur in a timely and sufficient manner to counteract the exercise of market power by an incumbent LEC. It is highly unlikely that potential entrants meet this test in the relevant special access market(s). This is because, as the Commission has repeatedly held, the barriers to deploying local transmission facilities are extremely high. Competitive carriers will deploy local transmission facilities only to locations where the revenue opportunities are sufficiently large to overcome the extremely high sunk costs of deployment. Such locations constitute a small minority of commercial buildings in the U.S. This is true even in markets that incumbent LECs have identified as subject to the highest level of facilities-based competition. For example, the Commission recently concluded that even in Phoenix, which legacy Qwest apparently viewed as the most competitive urban area in its territory, the high barriers to facilities deployment rendered both construction of new facilities by existing competitors and entry by an entirely new competitor “unlikely” for the provision of DS1 and DS3 services. That conclusion almost certainly applies to most or all non-TDM-based special access services throughout the country too.

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Sixth, the Commission should assess the extent to which customers are willing and able to switch from the incumbent LECs' non-TDM-based special access services to a non-incumbent LEC's non-TDM-based special access services (*i.e.*, elasticity of demand). The paucity of facilities-based competitors to the incumbent LECs obviously limits customers' ability to switch to alternative facilities-based competitors. But even where non-incumbent LEC providers have deployed their own facilities, customers are often unwilling to switch to the non-incumbent LEC. This is because the special access tariffs and commercial agreements under which wholesale and retail customers purchase special access from incumbent LECs often include provisions that limit customers' ability to switch from an incumbent LEC to another provider.

Seventh, the Commission should assess the extent to which incumbent LECs' advantages in cost structure, size and resources as compared to their competitors are strong enough to preclude effective competition. Here again, the analysis weighs heavily in favor of concluding that incumbent LECs have market power in the provision of non-TDM-based special access services. Incumbent LECs benefit from significant first-mover advantages such as preexisting and preferential access to commercial buildings and rights-of-way and the receipt of billions of dollars in universal service funds over several decades. Incumbent LECs also benefit from far greater economies of scale and scope than their competitors—a result of, among other things, their ubiquitous networks and, in the case of AT&T and Verizon, their ownership of the two largest mobile wireless carriers. At the same time, competitors' reliance on incumbents' last-mile facilities enables incumbent LECs to raise their rivals' costs, thereby increasing the cost differential between incumbents and non-incumbents even further.

Applying these factors in the market power analysis yields the conclusion that incumbent LECs must be treated as dominant in the provision of non-TDM-based special access services.

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Again, that dominance results primarily from the incumbent LECs' control over the only last-mile facilities that serve a large number of business customers in the U.S. Moreover, the incumbent LECs have already begun to exploit this market power in harmful ways, such as by (1) setting prices for non-TDM-based special access services well above the available measures of costs; (2) maintaining wholesale prices that are high relative to retail prices so as to squeeze non-incumbent LECs' margins and limit the size of their addressable markets; and (3) utilizing restrictive provisions in special access volume and term plans to limit the extent to which competitors are able to upgrade existing purchases of DS1 and DS3 special access circuits to more efficient Ethernet special access circuits.

Therefore, the Commission should establish regulations that limit the incumbent LECs' ability to act on their incentives to harm consumers and competition in the provision of non-TDM-based special access services. In particular, the Commission should reverse the "deemed grant" to Verizon and the *Forbearance Orders* to the extent necessary to classify incumbent LECs as dominant in the provision of non-TDM-based special access services. The Commission should then establish pricing regulations (to be implemented via tariffs) and service quality regulations for incumbent LEC non-TDM-based special access services.

These regulations will ensure that incumbent LECs offer non-TDM-based special access services at rates, and on terms and conditions that are just and reasonable and not unjustly or unreasonably discriminatory in accordance with Sections 201(b) and 202(a) of the Act. These regulations will also advance the goals of Section 706 of the 1996 Act by enabling competitors to expand the size of their addressable markets to include locations that they cannot serve today due to high incumbent LEC wholesale prices for non-TDM-based special access services. This, in turn, will allow non-incumbent LECs to serve more multi-location customers and to deploy fiber

to such customers' multiple locations, including their high-demand locations. The ultimate beneficiaries will of course be businesses, anchor institutions, and the U.S. economy as a whole.

II. BACKGROUND.

A. The “Deemed Grant” Of Forbearance From Dominant Carrier Regulation Of Verizon’s Non-TDM-Based Special Access Services.

Section 10 of the Act⁴ directs the Commission to “forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” if the following three-part test is met:

- (1) enforcement of the identified provision(s) or regulation(s) is not necessary to ensure that the telecommunications carrier’s charges, practices, classifications or regulations are just, reasonable, and not unjustly or unreasonably discriminatory;
- (2) enforcement of the identified provision(s) or regulation(s) is not necessary to protect consumers; and
- (3) non-enforcement of the identified provision(s) or regulation(s) is consistent with the public interest.⁵

Under Section 10(b), when determining whether forbearance is in the public interest under Section 10(a)(3), “the Commission shall consider whether forbearance . . . will promote competitive market conditions.”⁶

On December 20, 2004, Verizon filed a petition for forbearance⁷ pursuant to Section 10. Verizon requested forbearance from application of “Title II common carriage requirements”⁸—

⁴ 47 U.S.C. § 160.

⁵ *See id.* §§ 160(a)(1)-(3).

⁶ *Id.* § 160(b).

⁷ *See generally* Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services, WC Dkt. No. 04-440 (filed Dec. 20, 2004) (“Verizon Petition”).

⁸ *Id.* at 2.

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including dominant carrier “tariff filing, cost support, and pricing requirements”⁹—and “*Computer Inquiry* rules”¹⁰ to “any broadband services offered by Verizon”¹¹ at the time or in the future.¹² Verizon offered virtually no factual support for its petition. On December 19, 2005, pursuant to Section 10(c) of the Act, the Commission extended the deadline for acting on Verizon’s petition by 90 days, to March 19, 2006.¹³ On February 7, 2006, in response to a request for clarification by Commission staff, Verizon submitted an *ex parte* letter stating that it sought forbearance for two categories of “broadband transmission services” that it offers “both to enterprise customers on a retail basis, and to other carriers on a wholesale basis.”¹⁴ These categories were (1) non-TDM-based “packet-switched services capable of 200 kbps in each direction” (including “Frame Relay services, ATM services, IP-VPN services, and Ethernet services”)¹⁵ and (2) “non-TDM based optical networking, optical hubbing, and optical

⁹ *Id.* at 8.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 1.

¹² Verizon requested the same relief as that requested in BellSouth’s October 2004 forbearance petition to the extent that it was not covered by Verizon’s previously filed requests for regulatory relief. *See id.* at 2. BellSouth, in turn, had requested forbearance from traditional common carriage requirements for “all broadband services that [it] does or may offer.” *Id.*

¹³ *See generally* *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Order, 20 FCC Rcd. 20037 (2005).

¹⁴ *See* Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 2-3 (filed Feb. 7, 2006) (“*February 7, 2006 Letter*”).

¹⁵ *See id.* at 2.

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transmission services.”¹⁶ In the *February 7, 2006 Letter*, Verizon reiterated that it was “seeking forbearance from the mandatory application of Title II common-carriage regulation”¹⁷—which includes dominant carrier regulation—but it did not discuss how its request satisfied the Section 10 criteria.¹⁸

The Commission failed to issue a written decision addressing the merits of Verizon’s petition by the March 19, 2006 statutory deadline. As the Commission later explained, “[b]y their recorded vote, two Commissioners voted for and two Commissioners voted against a Memorandum Opinion and Order granting Verizon’s petition in part.”¹⁹ Under Section 10(c) of the Act, a forbearance petition “shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance” set forth in Section 10(a) before the statutory deadline.²⁰ Accordingly, on March 20, 2006, the Commission issued a news release

¹⁶ *See id.* at 3. At the same time, Verizon submitted a “List of Broadband Services for Which Verizon Is Seeking Forbearance” that contained 10 Verizon services that fell within these two categories. *See id.*, Attachment 1.

¹⁷ *Id.* at 3.

¹⁸ *See, e.g.*, Letter from Jason Oxman, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 3 (filed Feb. 17, 2006) (“Verizon does not explain, as to a single specific provision of Title II, how its forbearance petition meets the section 10 test.”); Letter from Russell M. Blau, Counsel for McLeod USA, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, at 4 (filed Mar. 14, 2006) (“In order for the Commission to evaluate this request[,] Verizon must submit a showing as to why each of the provisions for which it seeks forbearance is unnecessary under the statutory forbearance standards with respect to each service.”).

¹⁹ *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 11 (2007) (“*AT&T Forbearance Order*”).

²⁰ 47 U.S.C. § 160(c).

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“inform[ing] the public that, pursuant to section 10(c), the relief requested in Verizon’s petition was deemed granted by operation of law, effective March 19, 2006.”²¹

B. The Grant Of Forbearance From Dominant Carrier Regulation Of AT&T, Legacy Embarq, Frontier, And Legacy Qwest’s Non-TDM-Based Special Access Services.

Following the deemed grant of Verizon’s petition, AT&T, legacy Embarq, Frontier, and legacy Qwest each filed petitions seeking “relief comparable to the relief granted [to] Verizon through that deemed grant.”²² Like Verizon, these incumbent LECs offered virtually no factual support for their forbearance requests. Nevertheless, the Commission granted forbearance from dominant carrier regulation of each petitioner’s existing “non-TDM-based, packet-switched services capable of transmitting 200 kbps or greater in each direction” and “non-TDM-based,

²¹ See FCC News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006). The Commission also released statements from individual commissioners. In a joint statement, Chairman Martin and Commissioner Tate expressed support for granting Verizon’s petition as amended by the *February 7, 2006 Letter*, and in separate statements, Commissioners Copps and Adelstein expressed their opposition to Verizon’s petition even as amended by the *February 7, 2006 Letter*. See Joint Statement of Chairman Kevin J. Martin and Commissioner Deborah Taylor Tate, WC Dkt. No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Michael J. Copps in Response to Commission Inaction on Verizon’s Forbearance Petition, WC Dkt. No. 04-440 (rel. Mar. 20, 2006); Statement of Commissioner Jonathan S. Adelstein in Response to Commission Inaction on Verizon’s Forbearance Petition, WC Dkt. No. 04-440 (rel. Mar. 20, 2006). On appeal, the D.C. Circuit Court of Appeals held that the deemed grant was not an appealable agency action because “Congress, not the Commission, ‘granted’ Verizon’s forbearance petition.” *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

²² See *AT&T Forbearance Order* ¶ 1; *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478, ¶ 1 (2007) (“*Embarq & Frontier Forbearance Order*”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260, ¶ 1 (2008) (“*Qwest Forbearance Order*”) (collectively, the “*Forbearance Orders*”).

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optical transmission services.”²³ In particular, the Commission granted forbearance from the tariff filing, cost support, and pricing requirements for dominant carriers contained in Sections 61.31 to 61.59 of its rules, as well as other requirements applicable to dominant carriers.²⁴ The Commission also granted forbearance from certain *Computer Inquiry* rules.²⁵ The relief granted

²³ *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; see also *Qwest Forbearance Order* ¶ 13. Each grant of partial forbearance was limited to the services that the petitioner offered at the time and listed in its petition. See *AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *Qwest Forbearance Order* ¶ 13. By contrast, although Verizon listed 10 services in its “List of Broadband Services for Which Verizon Is Seeking Forbearance,” it has taken the position that it sought and obtained forbearance for “all services that fit within the[] [two] categories [of non-TDM-based packetized and non-TDM-based optical transmission services] that Verizon *does or may offer*.” Letter from William H. Johnson, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 04-440, n.22 (filed Nov. 7, 2007) (emphasis added). For this reason, the Commission should eliminate any doubt as to the scope of the deemed grant by reapplying dominant carrier regulation to *all of Verizon’s existing and future* non-TDM-based broadband transmission services. In addition, there is some confusion regarding whether the deemed grant affected Verizon’s interstate interexchange broadband transmission services. The grant of partial forbearance to AT&T excluded its broadband transmission services provided on an interstate interexchange basis (see *AT&T Forbearance Order* ¶ 15; see also *id.* n.168) and the forbearance relief granted to legacy Embarq, Frontier, and legacy Qwest was “consistent with” the relief granted in the *AT&T Forbearance Order*. See *Embarq & Frontier Forbearance Order* ¶ 1; *Qwest Forbearance Order* ¶ 1. This raises the question of whether the deemed grant of Verizon’s petition included forbearance for Verizon’s interstate interexchange broadband transmission services. To eliminate any doubt, the Commission should also clarify that the deemed grant did not affect regulation of such services. For ease of reference, the non-TDM-based packet-switched broadband services and the non-TDM-based optical transmission services for which Verizon as well as AT&T, legacy Embarq, Frontier, and legacy Qwest were granted forbearance from dominant carrier regulation are referred to herein as “non-TDM-based special access services.”

²⁴ More specifically, the Commission granted forbearance from “the requirements contained in section 203 of the Act, 47 U.S.C. § 203, section 214 of the Act, 47 U.S.C. § 214 (as it relates to dominant carriers), and the following sections of the Commission’s rules: 47 C.F.R. §§ 61.31-59 (general rules for dominant carriers), 47 C.F.R. § 63.71 (to the extent it provides discontinuance rules for domestic dominant carriers), [and] 47 C.F.R. Part 69 (access charge and pricing flexibility rules).” *AT&T Forbearance Order* n.5; *Embarq & Frontier Forbearance Order* n.6; *Qwest Forbearance Order* n.6.

²⁵ The Commission granted AT&T and legacy Qwest forbearance from *Computer Inquiry* requirements applicable to Bell Operating Companies (“BOCs”) (*i.e.*, the so-called *Computer II*

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expressly excluded all TDM-based DS1 and DS3 special access services.²⁶

In the *Forbearance Orders*, the Commission acknowledged that its “analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis.”²⁷ Despite this statement, however, the Commission did not perform a traditional market power analysis in the *Forbearance Orders*. Historically, under its traditional market power framework, the Commission determined whether there is sufficient competition in a market to constrain a carrier from exercising market power (*i.e.*, the power to control price),²⁸ and thus relieve the carrier of dominant carrier regulation.²⁹ In particular, “after defining the

structural separation requirements and *Computer III* comparably efficient interconnection and open network architecture requirements) to the extent that AT&T and Qwest offer information services in conjunction with their existing non-TDM-based special access services. *See AT&T Forbearance Order* ¶¶ 53-57; *Qwest Forbearance Order* ¶¶ 54-58. The Commission granted legacy Embarq and Frontier forbearance from “the *Computer Inquiry* tariffing requirement” applicable to incumbent LECs (*i.e.*, the requirement to offer the basic transmission services underlying their information services as telecommunications services pursuant to tariff) to the extent that Embarq and Frontier provide information services in conjunction with their existing non-TDM-based special access services. *See Embarq & Frontier Forbearance Order* ¶¶ 51-54; *see also id.* n.180.

²⁶ *See AT&T Forbearance Order* ¶ 12; *Embarq & Frontier Forbearance Order* ¶ 12; *Qwest Forbearance Order* ¶ 13.

²⁷ *AT&T Forbearance Order* n.80; *Embarq & Frontier Forbearance Order* n.72; *Qwest Forbearance Order* n.86.

²⁸ *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, ¶¶ 54, 56 (1980) (“*Competitive Carrier First Report and Order*”).

²⁹ *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 37 (2010), *aff’d*, *Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. Aug. 6, 2012) (“*Phoenix Order*”) (explaining the purpose of the traditional market power analysis); *see also Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271 (1995) (“*AT&T Nondominance Order*”) (undertaking a market power analysis to determine whether AT&T remained a dominant carrier requiring continued regulation in the interstate interexchange market).

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relevant [geographic and product] markets and identifying participating firms, [the Commission] would then evaluate available evidence regarding market shares . . . and other factors, including supply substitutability, elasticity of demand, [and] the cost structure, size, and resources of the carrier.”³⁰ In deciding the *Forbearance Orders*, the Commission departed from this traditional market power framework in several critical respects.

First, the Commission did not assess competition in the relevant geographic market. Instead, the Commission found it “appropriate . . . to look more broadly at competitive trends without regard to specific geographic markets.”³¹ *Second*, the Commission did not assess competition in the relevant product markets. The Commission examined competition in the downstream retail market for all non-TDM-based broadband services—not just non-TDM-based broadband special access services³²—and it did not examine the level of competition for wholesale non-TDM-based special access services. *Third*, in evaluating the level of actual competition in the retail market, the Commission did not rely on “detailed market share information”³³ and took into account competition from providers—such as “systems integrators, equipment vendors, and value-added resellers”—that do not rely on their own facilities to

³⁰ See *Phoenix Order* n.144 (citing *AT&T Nondominance Order* ¶¶ 38, 139).

³¹ *AT&T Forbearance Order* ¶ 20; *Embarq & Frontier Forbearance Order* ¶ 19; *Qwest Forbearance Order* ¶ 23.

³² See, e.g., Brief of Private Petitioners, *Ad Hoc Telecomms. Users Comm. v. FCC*, No. 07-1426, at 6 (D.C. Cir. July 15, 2008) (explaining that the record contained data “purporting to show the existence of competition for downstream, interexchange, packetized services,” not the special access services at issue); *id.* at 12 (explaining that the “FCC granted forbearance with respect to special access products that are necessarily provided in local geographic markets, yet the FCC considered only competitive data relating to the national market for end-to-end products”).

³³ *AT&T Forbearance Order* ¶ 23; *Embarq & Frontier Forbearance Order* ¶ 22; *Qwest Forbearance Order* ¶ 26.

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provide non-TDM-based special access services.³⁴ *Fourth*, the Commission found that there is “the potential for competitors to deploy their own facilities for the provision of the relevant [non-TDM-based special access services],”³⁵ but it did not cite to any record evidence of supply substitutability or any other evidence to support this finding of potential competition. *Fifth*, the Commission failed to examine elasticity of demand or the cost structure, size, and resources of the carriers seeking forbearance.

Rather than consider these time-tested components of the market power framework, the Commission considered factors that have little or no bearing on the level of competition for non-TDM-based special access services. For example, the Commission observed that enterprise customers are “sophisticat[ed]” enough “to make informed choices based on expert advice about service offerings and prices” and “also are likely to be aware of the choices available to them.”³⁶ In addition, the Commission held that “market forces” as well as “the Section 201 and 202 standards and the formal complaint process in Section 208 of the Act” and the Commission’s implementing rules would “safeguard the rights of consumers.”³⁷ Furthermore, the Commission predicted that forbearance from dominant carrier tariff filing, cost support, and pricing regulation

³⁴ *AT&T Forbearance Order* ¶ 22; *Embarq & Frontier Forbearance Order* ¶ 21; *Qwest Forbearance Order* ¶ 25.

³⁵ *AT&T Forbearance Order* n.86; *Embarq & Frontier Forbearance Order* n.78; *Qwest Forbearance Order* n.92.

³⁶ *AT&T Forbearance Order* ¶ 24; *Embarq & Frontier Forbearance Order* ¶ 23; *Qwest Forbearance Order* ¶ 27.

³⁷ *AT&T Forbearance Order* ¶¶ 35-36; *Embarq & Frontier Forbearance Order* ¶¶ 34-35; *Qwest Forbearance Order* ¶¶ 38-39.

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“would make [each petitioner] a more effective competitor” for the services at issue³⁸ by “enabl[ing] [each petitioner] to respond quickly and creatively to competing service offers.”³⁹ The Commission “anticipat[ed]” that this in turn would “increase even further the amount of competition in the marketplace” for non-TDM-based special access services.⁴⁰ The Commission also noted that “[it] has the option of revisiting this forbearance ruling should circumstances warrant.”⁴¹

In the appeal of the *AT&T Forbearance Order* (as well as the *Embarq & Frontier Forbearance Order*), the D.C. Circuit Court of Appeals—applying a “particularly deferential” standard of review—upheld the Commission’s decision to forbear from dominant carrier regulation.⁴² The court deferred to the Commission’s judgment that dominant carrier regulation was unnecessary because (1) the Commission retained other common carrier regulation, including Sections 201, 202, and 208 of the Act; (2) the Commission “determined that competitive broadband service providers could use heavily regulated TDM-based services to compete”; (3) the Commission “recognized the fact and feasibility of competitive self-deployment of special access lines”; and (4) “the FCC is continuing to study the overall market

³⁸ *AT&T Forbearance Order* ¶ 35; *Qwest Forbearance Order* ¶ 38; see also *Embarq & Frontier Forbearance Order* ¶ 34.

³⁹ *AT&T Forbearance Order* ¶ 33; *Embarq & Frontier Forbearance Order* ¶ 32; *Qwest Forbearance Order* ¶ 36.

⁴⁰ *AT&T Forbearance Order* ¶ 35; *Embarq & Frontier Forbearance Order* ¶ 34; *Qwest Forbearance Order* ¶ 38.

⁴¹ *AT&T Forbearance Order* n.120; *Embarq & Frontier Forbearance Order* n.113; see also *Qwest Forbearance Order* n.69 (“[A]s the Commission has held, it has the option of revisiting a forbearance ruling in light of new facts.”).

⁴² *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

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developments in special access on an industry-wide basis.”⁴³ The court stated, however, that “the FCC’s forbearance decision in this particular matter (or in the related Verizon and Qwest special access matters) is not chiseled in marble,” and that “the FCC will be able to reassess as they reasonably see fit based on changes in market conditions, technical capabilities, or policy approaches to regulation in this area.”⁴⁴

C. The Use Of The Traditional Market Power Standard In The *Phoenix Order*.

In 2009, Qwest filed a petition for forbearance from dominant carrier regulation applicable to its switched access services and Section 251 unbundling requirements⁴⁵ in the Phoenix, Arizona Metropolitan Statistical Area (“MSA”).⁴⁶ In the order addressing Qwest’s petition, “the Commission comprehensively reviewed its approach to forbearance and explained in detail its decision to return to the more rigorous market power framework that underpinned its earliest forbearance decisions.”⁴⁷ The Commission explained that “[t]he traditional market power framework enables [it] to respond to a petition for forbearance by evaluating the record evidence of actual and potential competition, and considering whether there is evidence of sufficient competition to conclude that forbearance is warranted.”⁴⁸ The Commission further

⁴³ *Id.* at 911; *see also id.* (“Finally, in reaching its decision, the FCC emphasized that its ongoing Special Access Rulemaking proceeding will address, on an industry-wide basis, general concerns about discriminatory practices by ILECs with respect to their special access lines.”).

⁴⁴ *Id.*

⁴⁵ *See* 47 U.S.C. § 251(c)(3).

⁴⁶ *See generally* Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Dkt. No. 09-135 (filed Mar. 24, 2009).

⁴⁷ Brief for Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 16-17 (10th Cir. Jan. 10, 2011) (“FCC *Phoenix Order* Appeal Brief”).

⁴⁸ *Phoenix Order* ¶ 42.

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explained that the traditional market power analysis requires it to, among other things, (1) define the relevant product and geographic markets; (2) identify the market participants and evaluate the level of actual competition in the relevant markets (*e.g.*, by examining evidence regarding market shares and market concentration); and (3) “evaluate whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power by [the petitioner] or by [the petitioner] in concert with a few competitors.”⁴⁹

In the *Phoenix Order*, the Commission defined the relevant product markets—including separate retail and wholesale markets⁵⁰—by using the “economically sound standards” of the *DOJ-FTC Horizontal Merger Guidelines*.⁵¹ The Commission also relied on the *Merger Guidelines* and Commission precedent to “properly[]” define the relevant geographic market.⁵² In assessing the level of actual competition in the relevant markets, the Commission limited its analysis to competition from service providers that use their own facilities (*e.g.*, loop and transport facilities) to deliver service to their customers.⁵³ And in evaluating the level of potential competition in the relevant markets, the Commission examined both “the potential for

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *See id.* n.169; *see also* U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, § 4.1.1 (rel. Aug. 19, 2010) (“*DOJ-FTC Horizontal Merger Guidelines*” or “*Merger Guidelines*”) (defining a product market as the smallest group of products for which a hypothetical monopoly provider” would be able to profitably impose a “small but significant and non-transitory” increase in price).

⁵² *See Phoenix Order* ¶¶ 64-65.

⁵³ *See, e.g., id.* ¶ 71 (counting as competitors in the wholesale loop market only those service providers that “have constructed their own last-mile connections to enterprise customers, and . . . offer these services to competitors as wholesale inputs”).

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entry via supply-side substitution”⁵⁴ and “the possibility of *de novo* entry” and took into account the relevant barriers to entry.⁵⁵

Applying the traditional market power framework to the record evidence, the Commission found “insufficient actual and potential competition” in the relevant markets⁵⁶ to warrant forbearance from dominant carrier regulation or unbundling obligations in the Phoenix MSA. In particular, the Commission found “no ‘significant alternative sources of wholesale inputs’ in the Phoenix MSA.”⁵⁷ The Commission also found that “potential competition from either supply-side substitution or from *de novo* entry to be unlikely [in the wholesale loop market] in the Phoenix MSA.”⁵⁸ And, based on “insufficient evidence of competition [in the retail enterprise and mass markets] to ensure that Qwest’s switched access rates are just, reasonable, and not unjustly or unreasonably discriminatory,” the Commission “conclude[d] that the dominant carrier pricing and tariffing regulations remain necessary” under the Section 10 forbearance standard.⁵⁹

⁵⁴ See *id.* ¶ 83; see also *id.* ¶¶ 72-73, 89.

⁵⁵ See *id.* ¶ 84 & n.252 (citing *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) (“*TRO*”) (subsequent history omitted)) (discussing types of barriers to entry, including scale economies, sunk costs, and first-mover advantages); *Phoenix Order* ¶ 89 & n.268; see also *Phoenix Order* ¶ 38 (explaining that “barriers to entry . . . are key components of a traditional market power analysis”).

⁵⁶ See *Phoenix Order* ¶ 91 (retail enterprise market); see also *id.* ¶¶ 70-73 (wholesale loop market).

⁵⁷ *Id.* ¶ 70.

⁵⁸ *Id.* ¶ 73.

⁵⁹ *Id.* ¶ 114.

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On appeal, the Tenth Circuit Court of Appeals rejected Qwest’s argument that “the Commission’s assessment of competitive conditions in the Phoenix market was unreasonable.”⁶⁰ The court found that Qwest was on notice that the Commission was considering moving to the traditional market power framework to analyze Qwest’s petition and that such a framework “necessitated the production of qualitatively different evidence to warrant regulatory forbearance.”⁶¹ The court further found that “the Commission offered an extensive discussion of its reasons for . . . adopting the market-power approach—an approach with some basis in the Commission’s precedent and, in the Commission’s view, better in keeping with the underlying purposes of section 10.”⁶²

III. DISCUSSION.

A. The Commission Has The Authority To Reverse The Grants Of Forbearance From Dominant Carrier Regulation Of AT&T, Legacy Embarq, Frontier, Legacy Qwest, and Verizon’s Non-TDM-Based Special Access Services.

As a threshold matter, the Commission has the authority to reverse its decisions granting AT&T, legacy Embarq, Frontier, and legacy Qwest forbearance from dominant carrier regulation of their non-TDM-based special access services. It is well established that an agency has the authority to revisit its own orders and change its policies so long as it provides a reasoned explanation for the change.⁶³ In general, an agency “need not demonstrate . . . that the reasons

⁶⁰ *Qwest Corp. v. FCC*, No. 10-9543, slip op. at 28 (10th Cir. Aug. 6, 2012).

⁶¹ *Id.* at 35.

⁶² *Id.* at 36.

⁶³ *See, e.g., NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (“[T]he Commission is free within the limits of reasoned interpretation to change course if it adequately justifies the change.”); *see also id.* at 981-82 (“An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider . . . the wisdom of its policy on a continuing basis. . . . That is no doubt why in *Chevron* itself, this Court deferred to an agency

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for a new policy are better than the reasons for the old one.”⁶⁴ Rather, under the “arbitrary and capricious” standard of review, the Commission need only (1) display awareness that it is changing its position; (2) ensure that its new policy is permissible under the statute; and (3) show that there are good reasons for the new policy.⁶⁵ Moreover, even if the existing policy “engendered serious reliance interests” and the Commission was therefore required to “provide a more detailed justification” for its change in policy,⁶⁶ the information provided in this Petition and in the record of the special access rulemaking docket would allow the Commission to do just that.

As the Petitioners have demonstrated elsewhere, the Commission also has the authority to reverse the forbearance relief that was granted to Verizon by operation of law.⁶⁷ In fact, the Commission may be subject to an even less stringent standard in reversing the deemed grant to Verizon.⁶⁸

interpretation that was a recent reversal of agency policy.”) (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, at 863-64 (1984)); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) (holding that an agency must provide a reasoned explanation for a departure from its previous policy).

⁶⁴ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasis omitted).

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM-Based Broadband Transmission Services, WC Dkt. No. 11-188, at 21-23 (filed Oct. 4, 2011) (“tw telecom et al. October 4, 2011 Petition”).

⁶⁸ *See id.* at 23 (explaining that Congress, not the Commission, granted Verizon’s petition, and therefore, even if reliance interests are at stake, the Commission need not provide an explanation of why reimposing the regulation at issue on Verizon’s non-TDM-based special access services is a better policy than the *status quo*).

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Furthermore, both the Commission and the D.C. Circuit have expressly confirmed the Commission’s authority to reverse the *Forbearance Orders* and the deemed grant to Verizon. In the *Forbearance Orders*, the Commission noted that it retained “the option of revisiting th[ese] forbearance ruling[s]”⁶⁹ and it promised to do so in the case of Verizon’s deemed grant.⁷⁰ And, as discussed above, the D.C. Circuit explicitly stated that the *Forbearance Orders* and the deemed grant to Verizon were not “chiseled in marble” and could be reversed in the “ongoing Special Access Rulemaking proceeding.”⁷¹ These statements plainly put incumbent LECs on notice that the Commission could reverse the grants of forbearance from dominant carrier regulation of non-TDM-based special access services.

In sum, it is clear that the Commission has the authority to reverse the *Forbearance Orders* as well as the deemed grant to Verizon. In fact, the Commission has an *obligation* to do so in accordance with its ongoing duty to practice reasoned decision-making,⁷² to ensure that the statutory requirement that rates for the services at issue be just and reasonable is met, and to

⁶⁹ *AT&T Forbearance Order* n.120; *Embarq & Frontier Forbearance Order* n.113; *Qwest Forbearance Order* n.127.

⁷⁰ See *AT&T Forbearance Order* ¶ 50 (promising to revisit the forbearance relief that Verizon had been granted by operation of law within 30 days).

⁷¹ *Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 911.

⁷² See, e.g., *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (“[S]hould the Commission’s predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decisionmaking.”); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (holding that the Commission’s “latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether . . . they actually produce the benefits the Commission originally predicted they would”).

ensure that its rules and policies are consistent with the pro-competitive goals of the 1996 Act.⁷³

The Commission should do so by acting on this Petition, which is being filed in the special access rulemaking docket.⁷⁴

B. In Revisiting Its Decisions To Grant Forbearance From Dominant Carrier Regulation Of Incumbent LEC Non-TDM-Based Special Access Services, The Commission Should Apply The Traditional Market Power Standard Used In The *Phoenix Order*.

The Commission must reverse forbearance if it finds that one or more of the Section 10(a) criteria is not met.⁷⁵ Accordingly, if the Commission determines that dominant carrier

⁷³ For example, Section 706 of the 1996 Act requires the Commission to encourage broadband deployment “by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a). *See also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999) (noting that the 1996 Act includes a number of provisions “intended to facilitate market entry”); *Connect America Fund; A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, ¶ 499 (2011) (explaining that, “[w]ith the 1996 Act, Congress sought to promote and facilitate competition in telecommunications markets”).

⁷⁴ In the *Special Access NPRM*, the Commission explicitly sought comment on the proper regulatory treatment of non-TDM-based special access services. *See 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*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶ 51 (2005) (“*Special Access NPRM*”) (seeking comment on the treatment of “high capacity services above the DS-3 level (e.g., OCn [services]”); *id.* ¶ 52 (seeking comment on the “proper regulatory treatment” of “packet-switched services” such as Ethernet services); *see also Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd. 14000, at 3, 5, 12-13 (2011) (seeking information on rates for and terms and conditions associated with “Packet-Switched Dedicated Services (PSDS),” including Ethernet services); *Special Access NPRM* ¶¶ 1, 7 (“commenc[ing] a broad examination of the regulatory framework to apply to price cap [LECs’] interstate special access services,” which the Commission defined broadly as services that use dedicated facilities to connect two locations).

⁷⁵ *See Framework for Broadband Internet Service*, Notice of Inquiry, 25 FCC Rcd. 7866, ¶ 98 (2010) (“Section 10 . . . requires the Commission to forbear if the statutory criteria are met.

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regulation of incumbent LEC non-TDM-based special access services is (1) necessary to ensure just, reasonable, and not unjustly or unreasonably discriminatory rates, terms, and conditions for such services; (2) necessary to protect consumers of such services; or (3) consistent with the public interest, the Commission must reverse the forbearance relief it granted in the *Forbearance Orders* as well as the forbearance relief that Verizon was granted by operation of law. In addition to reversing forbearance, the Commission would need to adopt new dominant carrier regulations designed to prevent incumbent LECs from improperly exploiting their market power over non-TDM-based special access services.⁷⁶

In assessing the risk to consumers and competition under Section 10, the Commission should apply the traditional market power framework used in the *Phoenix Order*. That approach provides the best framework for analyzing whether forbearance from dominant carrier regulation is justified pursuant to Section 10.⁷⁷ Such an approach is “not only data-driven, economically sound and predictable, but also reflects a forward-looking approach to competition.”⁷⁸

Moreover, it is clear that the traditional market power analysis employed in the *Phoenix Order* is

Thus, to reverse a forbearance decision, the Commission must find that at least one of the criteria is no longer met with regard to a particular statutory provision.”).

⁷⁶ See *infra* Part III.D.

⁷⁷ See, e.g., *Phoenix Order* ¶ 37 (“[T]he Commission’s market power analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner. This market power analysis is the precise inquiry specified in section 10(a)(1), and informs our assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates.”); see also *Wireline Competition Bureau Seeks Comment on Applying the Qwest Phoenix Forbearance Order Analytic Framework in Similar Proceedings*, Public Notice, 25 FCC Rcd. 8013, at 1 (2010) (“*Analytic Framework Public Notice*”) (explaining that the traditional market power analysis is “well-designed to protect consumers, promote competition and stimulate innovation”).

⁷⁸ *Phoenix Order* ¶ 3.

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far more precise, accurate, and reliable than the “abbreviated analysis”⁷⁹ used in the *Forbearance Orders*. In that abbreviated analysis, the Commission, among other things,

- Ignored the wholesale market for non-TDM-based special access services⁸⁰ and improperly analyzed the retail market for all non-TDM-based broadband services rather than the specific subset of services for which the incumbent LECs sought forbearance: non-TDM-based broadband special access services;⁸¹
- Considered broad national “competitive trends without regard to specific geographic markets”;⁸²
- Relied on vague and unsupported predictive judgments about the development of competition in the provision of retail non-TDM-based special access services in the future⁸³—including the possibility that competitors would deploy their own broadband

⁷⁹ See *id.* ¶ 41 (explaining that the Commission utilized an “abbreviated analysis” in its 2005 order addressing Qwest’s petition for forbearance from dominant carrier and unbundling regulations in the Omaha MSA and in subsequent decisions).

⁸⁰ See, e.g., *AT&T Forbearance Order* n.90 (stating that the services for which AT&T sought forbearance were “purchased predominantly by enterprise customers, not by [incumbent LECs’] competitors as wholesale inputs”); cf. *Phoenix Order* ¶ 28 (discussing the importance of assessing the competitiveness of both the retail and wholesale markets).

⁸¹ See *supra* note 32.

⁸² See *AT&T Forbearance Order* ¶ 20; see also *id.* ¶ 19 (finding “insufficient information to precisely define the market boundaries” for the services for which AT&T sought forbearance); cf. *Phoenix Order* ¶ 42 (explaining that the Commission’s “market power analysis begins by defining the relevant product and geographic markets”).

⁸³ See *AT&T Forbearance Order* ¶¶ 47-49 (predicting that forbearance would further the deployment of advanced services and “promote competitive market conditions”); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d at 909 (noting that the Commission “predicted that eliminating dominant carrier regulation will increase competition”); cf. *Phoenix Order* ¶¶ 26, 33-34 (finding that the Commission’s previous predictive judgments regarding potential competition in the so-called *Omaha Order* “have not been borne out”); see also *AT&T Forbearance Order*, Joint Statement of Commissioner Michael J. Copps and Commissioner Jonathan S. Adelstein, Dissenting (“*Copps-Adelstein Dissenting Statement*”) (“Also troublesome is the fact that the Order finds that ‘potential’ competition is sufficient to protect consumers. In places where substantial competition does not demonstrably exist, it seems that forbearance actually can make the problem worse as ‘potential’ competitors will have even less ability to successfully compete to provide a check on any anti-competitive behavior.”).

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facilities⁸⁴—even though the Commission had repeatedly found that the barriers to the deployment of last-mile facilities are impossible to overcome in most situations;⁸⁵

- Depended on the sophistication of enterprise customers to counteract the incumbent LECs’ exercise of market power,⁸⁶ despite the fact that, in the absence of a viable alternative, there is nothing that even the most sophisticated customer can do to offset the incumbent LECs’ market power; and
- Relied on the fact that incumbent LECs would remain subject to Sections 201 and 202 of the Act and the Section 208 complaint process,⁸⁷ even though the Commission has never deemed these requirements to be sufficient, standing alone, to protect consumers and competition against the exercise of incumbent LEC market power and there was no record evidence to support such a finding.⁸⁸

⁸⁴ See *AT&T Forbearance Order* n.86; *Embarq & Frontier Forbearance Order* n.78; *Qwest Forbearance Order* n.92.

⁸⁵ See *infra* Part III.C.5.

⁸⁶ See *AT&T Forbearance Order* ¶ 24; *Embarq & Frontier Forbearance Order* ¶ 23; *Qwest Forbearance Order* ¶ 27.

⁸⁷ See *AT&T Forbearance Order* ¶¶ 35-36; *Embarq & Frontier Forbearance Order* ¶¶ 34-35; *Qwest Forbearance Order* ¶¶ 38-39.

⁸⁸ See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 62 (2005) (“*TRRO*”) (holding that “the Act’s general provisions designed to guard against anticompetitive behavior are [not] sufficient to protect competitive carriers from potential abuses of special access pricing on a timely basis”). In fact, it is nearly impossible to succeed in a Section 208 complaint proceeding alleging violations of Section 201(b), for example, in the absence of orders or regulations establishing what constitutes just and reasonable rates. See, e.g., Reply of Petitioners in Support of Mandamus, *In re COMPTTEL, et al.*, No. 11-1262, at 13-15 (D.C. Cir. Oct. 19, 2011) (discussing the impediments to challenging special access rates, terms, and conditions via a Section 208 complaint, including that, in the case of untariffed special access services (such as Ethernet services), “the complainant lacks any information about the rates and terms offered to other special access purchasers”); Letter from John J. Heitmann, Counsel for XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3-4 (filed Oct. 11, 2007) (explaining why the Section 208 complaint process does not provide an effective means for resolving special access rate disputes).

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By contrast, under the traditional market power framework used in the *Phoenix Order*, the Commission relied on “well-accepted principles” of economics that have been developed in antitrust law to assess the competitiveness of the relevant markets.⁸⁹

Consistent with the *Phoenix Order*, the Commission should define the relevant product and geographic markets, examine available evidence regarding market shares,⁹⁰ and consider potential competition from facilities-based competitors.⁹¹ The Commission should also consider elasticity of demand and the cost structure, size, and resources of incumbent LECs.⁹² The Commission should engage in a fact-based analysis and not rely on misplaced predictions of future competition, or the supposed “sophistication” of customers—much less the availability of inferior regulatory alternatives—as a means of blunting the exercise of market power.⁹³ In sum,

⁸⁹ *AT&T Nondominance Order* ¶ 38; see also FCC *Phoenix Order* Appeal Brief at 19 (“As the Commission pointed out, the United States Department of Justice, Federal Trade Commission, and telecom regulators employ similar approaches for evaluating market power.”).

⁹⁰ By its own admission, the Commission failed to collect the necessary market share data in the *Forbearance* proceedings. See *AT&T Forbearance Order* ¶ 23 (conceding that the record in that proceeding “does not include detailed market share information”); see also *id.*, *Copps-Adelstein Dissenting Statement* (decrying the lack of data available to the Commission and explaining that the Commission should not have granted “forbearance for rules covering special access services without a rigorous analysis of competition for these services – an analysis wanting in today’s decision”); *id.*, Statement of Commissioner Robert McDowell (explaining that the Commission had “inadequate information” to determine whether competition exists for the special access services at issue in the *AT&T Forbearance Order*).

⁹¹ See *supra* Part II.B.-C.

⁹² See *AT&T Nondominance Order* ¶ 38.

⁹³ In addition, the Commission should consider the potential for not only unilateral but also coordinated market power. See *Phoenix Order* ¶ 30. Where competition exists in the provision of non-TDM-based special access services, it is likely to be so limited as to create the risk of coordinated exercise of market power and other anticompetitive strategic behavior. See, e.g., *id.* (“[W]hen there are only a few firms in a market, they are more likely to engage in coordinated interaction that harms consumers than when there are a greater number of firms. Such coordination . . . can result in supracompetitive pricing.”); see also *Application of EchoStar*

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the Commission should reverse forbearance unless it finds that the relevant wholesale and retail markets are effectively competitive.⁹⁴

Finally, while the FCC speculated in the *Phoenix Order* that “a different analysis [from the traditional market power analysis] *may* apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities,”⁹⁵ that statement has no relevance here. The Commission’s primary concern with employing that framework in the context of advanced services appears to be that market shares in an industry characterized by innovation and changing technology may not be ““meaningful predictors of future competitive conditions.””⁹⁶ But, as discussed below, the same facilities that can be used to provide the legacy TDM-based unbundled network elements at issue in the *Phoenix Order* are used to provide the non-TDM-based special access services at issue in the *Forbearance Orders* and Verizon’s deemed grant.⁹⁷ Thus, an examination of actual facilities-based competition and the potential for facilities-based competitive entry similar to that conducted in the *Phoenix Order* would yield reliable results here. Moreover, while the Commission must “take into consideration the direction of [S]ection 706” of the 1996 Act⁹⁸ when evaluating the

Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation and EchoStar Communications Corporation, Hearing Designation Order, 17 FCC Rcd. 20559, ¶ 170 (2002) (holding that “firms in concentrated, oligopoly markets take their rivals’ actions into account in deciding the actions they will take”).

⁹⁴ See *Phoenix Order* ¶ 43.

⁹⁵ *Id.* ¶ 39 (emphasis added).

⁹⁶ See *id.* n.132 (quoting Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 14-15 (2007)).

⁹⁷ See *infra* Part III.C.4-5 & -7.

⁹⁸ *Phoenix Order* ¶ 39.

competitiveness of advanced services, reversal of forbearance from dominant carrier regulation of incumbent LEC non-TDM-based special access services will actually further broadband deployment and thereby fulfill the mandate of Section 706.⁹⁹

The Commission should thus conduct a rigorous analysis of the current marketplace for non-TDM-based special access services using its traditional framework for evaluating the existence of market power. If that analysis demonstrates that incumbent LECs are dominant in the provision of the relevant services, the Commission must, in order to conform to the mandates in Section 10, reverse its previous grants of forbearance with respect to non-TDM-based special access services and implement regulatory safeguards that will protect customers and competition in accordance with the goals of the Communications Act.

C. Application Of The Traditional Market Power Standard Yields The Conclusion That Incumbent LECs Are Dominant In The Provision Of Non-TDM-Based Special Access Services.

1. Product Markets.

As the Commission explained in the *Phoenix Order*, “the fundamental question in a traditional product market definition” is whether the “prospect of buyer substitution” of one service for a second service “constrains the price” of the second service.¹⁰⁰ Thus, where a sufficient number of customers would switch to service B in response to an increase in the price of service A such that the price increase would be rendered unprofitable, service B belongs in the same product market as service A.¹⁰¹

⁹⁹ See *infra* Part III.D.

¹⁰⁰ *Phoenix Order* ¶ 56.

¹⁰¹ See, e.g., *id.*; *Merger Guidelines* § 4 (“Market definition focuses solely on demand substitution factors, *i.e.*, on customers’ ability and willingness to substitute away from one

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The most precise means of defining the relevant product market is to apply the test set forth in the *Merger Guidelines*. Under that test, a product market consists of a product or group of products such “that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products (‘hypothetical monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price” (“SSNIP”).¹⁰² The *Merger Guidelines* suggest that a five percent increase in price can be considered “significant” in most cases.¹⁰³

To apply the SSNIP test, the Commission would need to collect data measuring the extent to which purchasers of non-TDM-based special access services respond to changes in the price of those services by switching to other services. For example, if the data show that a nontransitory increase of five percent or more in the price of a non-TDM-based special access service by a hypothetical monopolist would not cause enough customers to switch to another transmission service so as to render the price increase unprofitable, then the non-TDM-based special access service at issue would be deemed a separate product market. However, if the data show that a nontransitory increase of five percent or more in the price of the non-TDM-based special access service by a hypothetical monopolist would cause enough customers to switch to another transmission service that the price increase would be unprofitable,¹⁰⁴ then the non-TDM-

product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”).

¹⁰² See *Merger Guidelines* § 4.1.1.

¹⁰³ See *id.* § 4.1.2.

¹⁰⁴ The inflection point between profit and loss is reached at the “critical sales loss.” See PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 562(d) (Supp. 2009) (citing *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007)) (“There is a profit detriment to the price increase equal to the product of the per unit gross margin and the number of units lost. But there is also an economic gain from the increased gross margin earned from the higher price on each remaining unit sold. The

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based special access service would not constitute a separate product market. In that case, the Commission would need to expand the products in the relevant market to include the closest substitute to the non-TDM-based special access service at issue. Once all of the services that would enable a hypothetical monopolist to profit from a SSNIP have been identified, that group of products would be deemed the relevant product market.

While application of the SSNIP test yields sound product market definitions, the Commission often lacks the data needed to apply the test. If that is the case with regard to non-TDM-based special access services, the Commission can analyze other information that indicates the extent to which customers of a non-TDM-based special access service view other services as reasonable substitutes for the non-TDM-based special access service. For example, in defining categories of products for purposes of its competition analysis, the Commission has previously relied on the following types of information:

- Comparisons of prices charged for different services (significant price differences indicate that two services are not substitutes);¹⁰⁵
- Comparisons of the technical characteristics of services (*e.g.*, evidence that one service is offered with service level guarantees regarding levels of latency and jitter and a second service is offered subject solely to “best effort” commitments indicates that the two services are not substitutes);¹⁰⁶ and

‘critical loss’ is the amount of lost sales equal to the economic gain. It is a ‘critical’ loss because any greater loss will result in the economic detriment exceeding the economic gain, thereby rendering the price increase unprofitable.”).

¹⁰⁵ See *TRRO* ¶ 193 (“Commenters also note that businesses that do require DS1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable.”).

¹⁰⁶ See *id.* (“Competitive LEC commenters explain that bandwidth, security, and other technical limitations on cable modem service render it an imperfect substitute for service provided over DS1 loops.”).

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- The extent to which there is customer churn between two services (the more customers switch between two services, the more likely it is that they perceive the services to be substitutes).¹⁰⁷

By relying on this kind of information, the Commission can define sufficiently reliable product markets for purposes of reviewing the level of competition in the provision of non-TDM-based special access services.

In addition, the Commission can rely on precedent regarding product markets for services similar to non-TDM-based special access services. For example, both the Commission and the DOJ have used services provided solely via transmission facilities (*i.e.*, facilities such as the fiber optic and copper wires used to transmit special access services) owned by the service provider as a relevant product market when examining the competitiveness of special access services.¹⁰⁸

¹⁰⁷ In the *TRRO*, the Commission concluded that cable modem and DSn-based services did not belong in the same product market based in part on customer churn data provided by competitors. *See id.* (“Finally, at least two competitors maintain that, based on their internal data, they rarely lose enterprise customers to cable providers.”); *id.* n.514 (“Nuvox, for example, states that only a tiny fraction of its customer losses between January and October 2004 were to cable companies, and even those may have been to wireline competitive LEC affiliates. Cbeyond similarly asserts that very few telephone numbers have been ported from Cbeyond to a cable company and vice versa. None of the BOCs provide comparable numbers indicating how many enterprise customers they have lost to cable providers.”) (internal citations omitted).

¹⁰⁸ *See, e.g., AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662, ¶ 29 (2007) (“*AT&T-BellSouth Merger Order*”) (defining “‘Type I’ special access services, which are offered wholly over a carrier’s own facilities,” as a separate relevant product market from “‘Type II’ special access services, which are offered using a combination of the carrier’s own facilities . . . and the special access services of another carrier”); *id.* ¶¶ 40-49 (finding potential anticompetitive harm in the provision of Type I special access services in buildings where AT&T has the only direct connection (besides BellSouth) and competitive entry is unlikely); *United States v. SBC Communications, Inc.*, Complaint, No. 1:05-cv-02102, ¶ 19 (D.D.C. Oct. 27, 2005) (“*DOJ Complaint Against SBC-AT&T*”) (defining “‘Local Private Lines’ as a separate relevant product market from “‘voice and data telecommunications services that rely on Local Private Lines’”); *id.* ¶ 25 (finding that “SBC and AT&T are the only two carriers that own or control a Local Private Line connection to many buildings in each region”); *see also Phoenix Order* ¶¶ 71, 99 (examining network coverage by facilities-based competitors); *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence*

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Given that the primary source of incumbent LEC market power in the special access market is ownership of local transmission facilities,¹⁰⁹ and in particular end-user connections, it makes sense for the Commission to limit the relevant product markets to services provided via a carrier's own transmission facilities.

The Commission has also often treated wholesale and retail services as separate product markets when analyzing services similar to non-TDM-based special access services.¹¹⁰ The Commission should adopt the same approach here because the characteristics of services demanded by wholesale customers of non-TDM-based special access services are materially different from those demanded by retail customers of non-TDM-based special access services. For example, tw telecom's Wholesale Switched Native LAN service is a point-to-multipoint service designed to enable carrier customers to reach end-user customers that are located on or near tw telecom's network in areas that are outside the reach of the carriers' networks.¹¹¹ By contrast, tw telecom's retail Enterprise Switched Native LAN service is designed to provide end-user business customers with "any-to-any" connectivity (*i.e.*, the service connects multiple end-

and Virginia Beach Metropolitan Statistical Areas, Memorandum Opinion and Order, 22 FCC Rcd. 21293, ¶¶ 37, 41 (2007) ("*6-MSA Order*") (same).

¹⁰⁹ See *infra* Part III.C.3-5 & -7.

¹¹⁰ See, e.g., *Phoenix Order* ¶ 46; *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, ¶¶ 24-80 (2005) ("*SBC-AT&T Merger Order*") (analyzing competitive effects of the proposed merger on wholesale special access services separately from the downstream retail services for which such wholesale services are inputs); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18433, ¶¶ 24-81 (2005) ("*Verizon-MCI Merger Order*") (same); *AT&T-BellSouth Merger Order* ¶¶ 27-87 (same).

¹¹¹ See Declaration of Michael Buso on Behalf of tw telecom inc. ¶¶ 4-5 (*attached hereto as "Attachment 1"*).

user customer locations in such a way that any end-user customer’s location can interconnect with any other location of that particular end-user customer).¹¹² In light of this and other differences, it is unlikely that a wholesale purchaser of non-TDM-based special access service such as Ethernet would switch to a retail Ethernet offering in the event of a small but significant and nontransitory increase in the price of the wholesale service.¹¹³ It is therefore necessary to define separate wholesale and retail product markets for non-TDM-based special access services.

Finally, the Commission has in the past utilized capacity levels of services as a basis for identifying separate product categories for purposes of its competition analysis.¹¹⁴ This approach makes sense because it is unlikely that customers view lower bandwidth services as substitutes for higher bandwidth services. Accordingly, in defining product markets for non-TDM-based special access services, the Commission should identify the relevant bandwidths of the services at issue that are appropriate for product market definition.

2. Geographic Markets.

As the Commission has recognized, each point-to-point connection of a transmission service constitutes a separate geographic market.¹¹⁵ In the case of TDM channel terminations, the point-to-point connection can be understood to mean the individual building in which the

¹¹² See *id.* ¶¶ 4, 6.

¹¹³ See *id.* ¶ 9.

¹¹⁴ See, e.g., *TRRO* ¶¶ 166 (conducting a “capacity-specific analysis” of competitive deployment of high-capacity loops); *id.* ¶¶ 170-71 (analyzing competitive deployment of DS3 loops separately from competitive deployment of DS1 loops).

¹¹⁵ See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, Second Report and Order in CC Docket No. 06-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd. 15756, ¶ 5 (1997) (“*LEC Classification Order*”).

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customer is located.¹¹⁶ If, as in the experience of tw telecom, Sprint, and others, non-TDM-based special access channel terminations and channel mileage are always offered together at a single price, the relevant geographic market for non-TDM-based special access services is also each customer location. For administrative convenience, however, the Commission could aggregate customer locations subject to similar levels of competition.¹¹⁷ In so doing, the Commission should consider the following approaches proposed in the special access rulemaking proceeding.

First, the Commission should identify the low-capacity, non-TDM-based special access services that do not, by themselves, yield sufficient revenue to justify competitive deployment of loop facilities in any geographic area.¹¹⁸ For example, it seems unlikely that widespread facilities-based competition is possible for the provision of Ethernet special access service at or

¹¹⁶ See, e.g., *Phoenix Order* ¶ 64 (“[E]ach customer location constitutes a separate relevant geographic market, given that a customer is unlikely to move in response to a small, but significant and nontransitory increase in the price of the service.”); *AT&T-BellSouth Merger Order* ¶ 28.

¹¹⁷ See, e.g., *Phoenix Order* ¶ 64; *AT&T-BellSouth Merger Order* ¶ 31; *LEC Classification Order* ¶ 5.

¹¹⁸ The Commission adopted this approach for unbundled network element copper loops. See *TRO* ¶ 249 (holding that competitors are impaired on a nationwide basis without access to unbundled copper loops, including two- and four-wire analog voice grade loops, DS0 loops, ISDN loops, and loops conditioned to provide xDSL service). In the case of non-TDM-based special access services, the Commission could request data from competitive carriers as to the lowest level of service capacity for which loop construction is normally justified. If all, or the vast majority, of competitive carriers surveyed state that they would only build loop facilities to a customer that demands at least a certain level of capacity (*i.e.*, the “minimum capacity to build”), then this evidence supports the conclusion (assuming that competitors have not already widely deployed loops to customer locations in a relevant geographic area) that competition is not possible for services of capacity equal to or lower than the minimum capacity to build. See Comments of BT Americas Inc. on Behalf of Itself and other BT Entities, WC Dkt. No. 05-25, at 25-26 (filed Jan. 19, 2010) (“BT January 2010 Comments”); Comments of tw telecom, WC Dkt. No. 05-25, at 25-26 (filed Jan. 19, 2010) (“tw telecom January 2010 Comments”).

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below 10 Mbps in any geographic area. If that is true, the Commission can aggregate all locations served by such relatively low-capacity services (though probably not other, higher-capacity services, as discussed below) into a single national geographic market because they are not subject to effective competition in any part of the country.

Second, for higher-capacity, non-TDM-based special access services that are not uniformly subject to incumbent LEC market power on a nationwide basis, the Commission could identify the geographic areas in which those services *might* be subject to effective competition. For administrative ease, the Commission could aggregate individual customer locations into larger categories, such as wire centers, for purposes of this analysis.¹¹⁹ The Commission could further aggregate wire centers with similar characteristics, and in which customers face similar competitive alternatives, into broader categories.¹²⁰

There are several ways in which the Commission could define these broader categories of similarly-situated wire centers. For example, Sprint has suggested that the Commission assess the extent to which it would be appropriate to use the wire center categories adopted in the *TRRO* for loop and transport unbundling requirements to classify wire centers for the purpose of assessing incumbent LEC market power in the provision of TDM-based special access services.¹²¹ This approach may also work for non-TDM-based special access services. Alternatively, the Commission could deem incumbent LECs to have market power in the provision of non-TDM-based special access services in any wire centers in which there are fewer

¹¹⁹ See Declaration of Bridger M. Mitchell ¶ 38 (“Mitchell January 2010 Declaration”), attached as Attachment A to Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25 (filed Jan. 19, 2010) (“Sprint January 2010 Comments”).

¹²⁰ See *id.* ¶ 45.

¹²¹ See *id.* ¶¶ 38-49.

than two non-incumbent LEC competitors that provide service via their own last-mile facilities.¹²² Wire centers in which there are two or more competitors that provide service via their own last-mile facilities would then be aggregated into broader categories defined by the average number of competitive fiber transport networks in close proximity to the buildings in each wire center.¹²³

Once the Commission has established categories of similarly situated wire centers, it could undertake a granular market power analysis of a representative subset of each category. The results of that analysis would apply to all wire centers in the category.

3. Market Participants.

Consistent with the *Phoenix Order*, the Commission should take into account in its market power analysis only those service providers that deliver special access services over their own facilities (*i.e.*, “facilities-based” providers).¹²⁴ The market participants would thus consist

¹²² See tw telecom January 2010 Comments at 26-29 (discussing possible approaches to designing such a screen); see also BT January 2010 Comments at 26-29 (same).

¹²³ See Reply Comments of tw telecom, WC Dkt. No. 05-25, at 18 (filed Feb. 24, 2010).

¹²⁴ See *Phoenix Order* ¶¶ 87, 100 (finding insufficient facilities-based competition in the wholesale and retail markets for switched access services in the Phoenix MSA); see also *id.* ¶ 82 (holding that “evidence of *facilities-based* competition is highly relevant to determining whether competition is sufficient to satisfy the Section 10 criteria” and that “*facilities-based* coverage should be a leading factor in the Commission’s analysis of whether . . . forbearance is warranted”) (emphasis added). Focusing on the competitive availability of “facilities” is appropriate because these facilities provide the platform upon which all local telecommunications services are delivered, including the non-TDM-based special access services that are the subject of this Petition. See, e.g., Declaration of Joseph Gillan on behalf of CALTEL ¶¶ 9, 11, 17, attached to Additional Comments and Analysis of the California Association of Competitive Telecommunications Companies Regarding Backhaul and Merger Conditions, *Order Instituting Investigation on the Commission’s Own Motion Into the Planned Purchase and Acquisition by AT&T Inc. of T-Mobile USA, Inc., and its Effect on California Ratepayers and the California Economy*, California PUC Investigation 11-06-009 (filed Aug. 22, 2011) (“Gillan Declaration”) (explaining that the same transmission facilities can be used to provide either TDM-based services or non-TDM-based services, such as Ethernet).

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primarily of the incumbent LEC as well as those competitive LECs that provide non-TDM-based special access services via their own fiber connections to end users.

In identifying facilities-based competitors, the Commission should count only those entities that own facilities that support the provision of viable substitutes to the incumbent LECs' non-TDM-based special access services. For example, while cable operators do, in limited circumstances, provide services that are substitutes for incumbent LECs' non-TDM-based special access services, this is only true of the services that cable operators provide over their own fiber end-user connections. Services provided via traditional cable company hybrid fiber-coaxial ("HFC") facilities are not substitutes for dedicated, symmetric non-TDM-based connections provided by incumbent LECs and competitive LECs.¹²⁵ As other parties have explained in the special access rulemaking proceeding, "[t]he available evidence in the record indicates that most customers of special access service [(e.g., business customers)] do not view HFC-based services as substitutes for special access services because HFC networks are not capable of providing the features demanded by special access customers[,] such as guaranteed bandwidth and service level agreements."¹²⁶ Not surprisingly, the available evidence also

¹²⁵ See, e.g., Reply Comments of Cbeyond, Integra, One Communications and tw telecom, WC Dkt. Nos. 06-172 & 07-97, at 11 (filed Oct. 21, 2009) ("HFC networks, like fixed and mobile wireless and residential FTTH networks, all utilize shared configurations. In these architectures, traffic is aggregated at a local point close to the customer which often has limited capacity. As the Joint Commenters have explained, and as panelists at the recent Broadband Workshops reiterated, it is difficult if not impossible to deliver the guaranteed service levels demanded by business customers over shared networks, including HFC-based networks."); see also Letter from Joshua M. Bobeck, Counsel for PAETEC Holding Corp., and Thomas Cohen, Counsel for XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 24-25 & n.87 (filed May 28, 2010) ("PAETEC and XO May 28, 2010 Letter").

¹²⁶ PAETEC and XO May 28, 2010 Letter at 24-25; see also Declaration of Ajay Govil on behalf of XO Communications, LLC ¶ 24, attached to Comments of XO Communications, LLC, Covad Communications Group, Inc. and NuVox Communications, WC Dkt. No. 05-25 (filed Aug. 8,

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indicates that the percentage of business services revenues that cable companies generate from services that serve as substitutes for special access services is likely to be very small.¹²⁷

In the vast majority of circumstances, fixed wireless providers also do not offer a viable substitute for incumbent LECs' non-TDM-based special access services.¹²⁸ As Sprint has explained, "fixed wireless service is not a viable substitute for wireline special access services in many cases due to a variety of factors, including: propagation issues that limit the distance a fixed wireless connection can cover; line of sight requirements which render fixed wireless services ineffective in certain locations; sensitivity to weather, which can affect reliability; costs that are too high to justify use for relatively low-capacity connections; limited access to rooftops and other building access issues; and fixed wireless providers' focus on the retail market."¹²⁹ It is therefore unsurprising that, in the backhaul marketplace, fixed wireless services do not pose a significant threat to the incumbents' wireline special access services. For example, after nearly eight years in business, FiberTower, a fixed wireless backhaul provider, had a market share of only approximately 1.5 percent,¹³⁰ and FiberTower recently decided to "limit investment in its

2007) ("Govil Declaration") ("Our assessment is that cable systems normally could not provide the service availability guarantees required by our business customers.").

¹²⁷ See Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 15-16 (filed June 14, 2010) ("tw telecom June 14, 2010 Letter").

¹²⁸ See, e.g., *id.* at 17; PAETEC and XO May 28, 2010 Letter at 28-29.

¹²⁹ Sprint January 2010 Comments at 19-20; see also Declaration of Michael Lasky ¶ 4, attached as Appendix B to Initial Comments of Broadview Networks, Inc., NuVox, and XO Communications, LLC, WC Dkt. No. 09-135 (filed Sept. 21, 2009) ("Broadview et al. September 21, 2009 Comments") (explaining that fixed wireless service provided by Nextlink, an affiliate of XO, "can only be used to reach commercial buildings that meet a set of highly limiting engineering criteria").

¹³⁰ See FiberTower Presentation, Raymond James Investor Conference, at 7 (Mar. 5, 2008), available at <http://www.fibertower.com/corp/downloads/investors/RaymondJamesConf0308.ppt>.

legacy network” due to financial problems.¹³¹ And, as explained in the record of this proceeding, incumbents such as Verizon are relying primarily on their own fiber networks, not those of intermodal competitors, to provide backhaul to themselves.¹³²

4. Actual Competition.

In determining whether a carrier possesses market power, the Commission has focused on whether the carrier has “control of bottleneck facilities.”¹³³ Thus, a key question in assessing the amount of actual competition in the market(s) for non-TDM-based special access services is the extent to which competitors have deployed their own fiber facilities to end-user locations (*e.g.*, commercial buildings).¹³⁴ Under the standard set forth in the *Phoenix Order*,

¹³¹ See “FiberTower toppling?” LightWave Online, Nov. 21, 2011, *available at* <http://www.lightwaveronline.com/articles/2011/11/fibertower-toppling-134239453.html>.

¹³² See tw telecom June 14, 2010 Letter at 17 & n.63; PAETEC and XO May 28, 2010 Letter at 28-29 (discussing Verizon and Qwest’s fiber backhaul development plans).

¹³³ See *Phoenix Order* ¶ 5 (quoting *Competitive Carrier First Report and Order* ¶ 58); see also *Petition of Qwest Communications International Inc. for Forbearance from Enforcement of the Commission’s Dominant Carrier Rules As They Apply After Section 272 Sunsets*, Memorandum Opinion and Order, 22 FCC Rcd. 5207, ¶ 47 (2007) (“*Qwest Section 272 Sunset Forbearance Order*”) (finding that “Qwest continues to possess exclusionary market power within its region by reason of its control over these bottleneck access facilities”).

¹³⁴ See *supra* note 124. For this reason—and notwithstanding incumbent LECs’ suggestions to the contrary—the fact that tw telecom has been recognized by Vertical Systems Group as the third largest provider of business Ethernet ports in the U.S. is irrelevant to the Commission’s market power analysis. See *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Dkt. No. 12-60, at 25 (filed Feb. 23, 2012), as amended Mar. 21, 2012 (citing Vertical Systems Group: *2011 U.S. Business Ethernet Leaderboard, Ethernet Port Base Rises 31% in 2011 on Solid Market Demand and More Competitive Service Pricing* (Feb. 13, 2012), *available at* http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_pnews.html); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 6 & n.25 (filed Mar. 28, 2012) (“AT&T March 28, 2012 Letter”). The Vertical Systems Group market share analysis did not differentiate between Ethernet ports associated with services tw telecom provided over its own last-mile facilities and Ethernet ports associated with services tw telecom provided over

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forbearance is only warranted where multiple competitors have deployed their own network facilities to a sufficiently large number of end-user locations such that the incumbent LEC is subject to competitive discipline.¹³⁵

Every available source indicates that competitors have deployed fiber to only a small percentage of commercial buildings across the country. For example, in 2006, the Government Accountability Office (“GAO”) examined competitive deployment of loop facilities to commercial buildings in 16 MSAs and found that competitors had deployed loop facilities to only (1) approximately 6 percent of buildings with a demand of DS1 or greater; (2) approximately 15 percent of buildings with a DS3-level of demand; and (3) approximately 25 percent of buildings with a demand of 2 DS3s or greater.¹³⁶ Stated differently, the GAO found

incumbent LECs’ last-mile facilities. Moreover, as discussed above, in a market power analysis, the Commission must analyze competition in the relevant geographic market. Measuring market share in an overly broad geographic market yields misleading results. For example, the fact that Vodafone (excluding its share of Verizon Wireless) is the second-largest provider of mobile wireless services in the world (*see* “The top 20 global operators in Q3,” *FierceWireless: Europe* (Mar. 13, 2012) *available at* <http://www.fiercewireless.com/europe/special-reports/top-20-global-operators-q3>) says little or nothing about its market power in the U.S. mobile wireless market. Likewise, the fact that tw telecom is recognized as the third largest provider of business Ethernet ports in the U.S. says nothing about the level of competition in the provision of Ethernet services in particular wire centers within the AT&T, Verizon, and CenturyLink incumbent LEC regions.

¹³⁵ *See, e.g., Phoenix Order* ¶ 71 (finding insufficient competition in the wholesale loop market because “other than Qwest, there are no significant suppliers of relevant wholesale loops with coverage throughout the Phoenix MSA, either individually or in the aggregate”); *id.* ¶ 80 (finding insufficient competition in the retail mass market in large part because “Cox is Qwest’s only competitor that now provides or is soon likely to provide retail service to mass market customers over its own last-mile network to any significant extent in the Phoenix MSA”); *id.* ¶ 87 (finding insufficient competition in the retail enterprise market because “competitors offering retail enterprise services in the Phoenix MSA primarily rely upon Qwest’s wholesale services”).

¹³⁶ *See* Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-08, at 20 (Nov. 2006) (“*GAO Special Access Report*”).

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that incumbent LECs controlled the only viable local transmission facility to (1) approximately 94 percent of end-user locations with a demand of DS1 or greater; (2) approximately 85 percent of end-user locations with a DS3-level of demand; and (3) approximately 75 percent of end-user locations with a demand of 2 DS3s or greater in 16 markets nationwide. Of course, outside of these urban markets,¹³⁷ the incumbent LECs' control over these bottleneck facilities is likely even greater.

As the GAO noted, its findings were consistent with those of the DOJ.¹³⁸ Specifically, during its review of the proposed SBC-AT&T and Verizon-MCI mergers in 2005, the DOJ found that “[f]or the vast majority of commercial buildings in its territory, [SBC or Verizon] is the only carrier that owns a last-mile connection to the building.”¹³⁹

Subsequent Commission orders confirm that nothing has changed since the GAO made its findings. In orders issued between 2007 and 2010, the Commission found no significant providers of loop (or transport) facilities in 10 urban markets in which the incumbent LECs themselves asserted competition was the greatest.¹⁴⁰ For instance, in the *6-MSA Order*, the Commission found that “the percentage of all commercial buildings that competitors light is

¹³⁷ The GAO examined competitive deployment in the following markets: Atlanta, Los Angeles, Miami, Norfolk, Phoenix, Pittsburgh, Portland, San Jose, Chicago, Detroit, Greenville, Minneapolis, New Orleans, New York, Seattle, and Washington, DC. *See id.* at 20.

¹³⁸ *See id.* at 47-48.

¹³⁹ DOJ Complaint Against SBC-AT&T ¶ 15; *United States v. Verizon Communications Inc. and MCI, Inc.*, Complaint, No. 1:05-cv-02103, ¶ 15 (D.D.C. Oct. 27, 2005) (“DOJ Complaint Against Verizon-MCI”).

¹⁴⁰ *See 6-MSA Order* ¶ 38; *Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle Metropolitan Statistical Areas*, Memorandum Opinion and Order, 23 FCC Rcd. 11729, ¶ 37 & n.137 (2008) (“*4-MSA Order*”); *Phoenix Order* ¶¶ 71, 77.

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extremely small on a relative basis – only 0.25 percent in the 6 MSAs.”¹⁴¹ Similarly, in the *4-MSA Order*, the Commission found that “the percentage of all commercial buildings that competitors serve with their own fiber facilities [in the 4 MSAs at issue] is extremely small on a relative basis – 0.17 percent to 0.26 percent.”¹⁴² In these orders as well as the 2010 *Phoenix Order*, the Commission determined that there was insufficient competition from cable operators in the retail enterprise and wholesale markets to justify forbearance.¹⁴³ In addition, in the *4-MSA* and *Phoenix Orders*, the Commission found that fixed wireless providers were not a significant alternative source of wholesale loops in the relevant MSAs.¹⁴⁴

Data provided by the incumbent LECs themselves are consistent with the conclusions regarding competitive deployment reached by the GAO, the DOJ, and the Commission. For example in 2005, Verizon asserted that competitors had deployed loop facilities to less than 32,000 commercial buildings nationwide.¹⁴⁵ At the same time, Verizon asserted that in 1996, there were only 24,000 buildings “served directly by CLEC fiber.”¹⁴⁶ In other words, in almost

¹⁴¹ *6-MSA Order* ¶ 41.

¹⁴² *4-MSA Order* ¶ 40.

¹⁴³ See, e.g., *6-MSA Order* n.116 (finding insufficient competition from cable operators in the retail enterprise market in the six MSAs at issue); *4-MSA Order* ¶¶ 33, 36-37 (finding insufficient competition, including from cable operators, in the retail enterprise and wholesale markets in the 4 MSAs at issue); *Phoenix Order* ¶ 69 (“Cox’s non-cable plant facilities are not widely deployed . . . and it apparently provides little, if any, wholesale service over its cable plant, which is deployed primarily in residential areas.”).

¹⁴⁴ *4-MSA Order* n.137; *Phoenix Order* nn.210, 212.

¹⁴⁵ See Declaration of Quintin Lew, Appendix B, attached as Attachment D to Comments of Verizon, WC Dkt. No. 05-25 (filed June 13, 2005) (“Verizon June 2005 Comments”).

¹⁴⁶ See Declaration of William E. Taylor, Table 10, attached as Attachment C to Verizon June 2005 Comments.

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10 years, competitors deployed loops to less than 8,000 buildings. There is every reason to believe that competitive fiber deployment to business customer locations continues at this snail's pace.¹⁴⁷

Similarly, in the Commission's AT&T-BellSouth merger review proceeding, the Applicants argued that there were 219,000 commercial buildings demanding enterprise-class services in BellSouth's territory.¹⁴⁸ And less than two years earlier, in the *TRRO* proceeding, BellSouth stated that competitors had deployed loops to only approximately 2,200 buildings in its region,¹⁴⁹ or 1 percent of the market.

Finally, the data provided in response to the Commission's *First Special Access Data*

¹⁴⁷ While AT&T and Verizon argue that competition in the provision of Ethernet backhaul services has increased as a result of the explosion in mobile wireless carriers' demand for backhaul capacity (*see* AT&T March 28, 2012 Letter at 2-4; Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment 1, at 6-7 (filed May 2, 2012) ("Verizon May 2, 2012 Letter")), this is hardly surprising. There may be some multi-carrier macro-cell towers where such "explosive" demand exists (*see* Verizon May 2, 2012 Letter, Attachment 1, at 6) and where the revenue opportunities might well be sufficient for alternative backhaul providers to deploy fiber facilities. *See infra* Part III.C.5. However, as the available evidence demonstrates, that is not the case for the vast majority of business end-user customer locations. Indeed, tw telecom has found that it has few if any viable alternatives to the incumbent LEC for the wholesale Ethernet services needed to reach tw telecom's off-net business end-user customer locations. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]**

¹⁴⁸ *See* Declaration of Dennis W. Carlton & Hal S. Sider ¶ 112, *attached to* Description of Transaction, Public Interest Showing & Related Demonstration, WC Dkt. No. 06-74 (filed Mar. 31, 2006).

¹⁴⁹ *See* Letter from Glenn T. Reynolds, Vice President, Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-338, Attachment, at 4 (filed Aug. 18, 2004). In fact, prior to the AT&T-BellSouth merger, AT&T indicated that it had direct connections to only 317 buildings in BellSouth's region. *See AT&T-BellSouth Merger Order* ¶ 44.

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“competitive carriers face extensive economic barriers to the construction of [those] facilities.”¹⁵⁵

In particular, the Commission has consistently found that competitive carriers face large sunk costs,¹⁵⁶ and that economic deployment of fiber loop and transport facilities requires substantial economies of scale and scope.¹⁵⁷ Importantly, the Commission has recognized that these barriers to entry constrain all potential competitors—including existing cable providers—that do not have facilities in place to serve all of the locations designated by an end user.¹⁵⁸

The Commission has also repeatedly recognized that competitors will only deploy their own loop facilities if there is sufficient demand (*i.e.*, revenue) to justify the cost of construction to a particular building.¹⁵⁹ For example, in the *Phoenix Order*, the Commission relied on record evidence provided by XO Communications (“XO”) that “adding buildings [to its network] is

¹⁵⁵ *Phoenix Order* ¶ 90 (citing *TRO* ¶¶ 85-91); *see also TRRO* ¶¶ 149-154.

¹⁵⁶ *See, e.g., TRRO* ¶ 72 (finding that “[t]he deployment of transport facilities involves substantial fixed and sunk costs”); *id.* ¶ 150 (“Competitive LECs face large fixed and sunk costs in deploying competitive fiber, as well as substantial operational barriers in constructing their own facilities.”); *TRO* ¶ 86 (finding that “construction of wireline transmission facilities is literally ‘sunk’ – once invested in, it cannot be moved, even if customer demand patterns change”).

¹⁵⁷ *See, e.g., TRO* ¶ 86 (finding that “producing telecommunications services requires very substantial economies of scale and scope”); *but cf. TRRO* ¶ 154 (“While the fixed and sunk costs for constructing loops are quite high, economies of scale in deployment can accrue when carriers construct loops to locations that are geographically close to the transport network, assuming other barriers do not preclude construction.”); *id.* ¶ 129 (finding that “scale economies sometimes are sufficient to recover the fixed and sunk costs of deploying transport facilities”).

¹⁵⁸ *See Phoenix Order* n.268 (“To reach potential customers with its own facilities, Cox, like any other competitive LEC, would need to overcome the relevant entry barriers.”).

¹⁵⁹ *See, e.g., TRRO* ¶ 150 (“The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location.”); *see also id.* ¶ 152 (finding that “a carrier’s ability to recover the cost of [a] loop is generally wholly tied to the carrier’s ability to maintain service to a specific customer”).

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costly and XO will only undertake such investment if there is a strong business case and demonstrated capacity need for at least 3 DS-3s.”¹⁶⁰ The Commission also relied on similar evidence submitted by tw telecom that, in order to justify construction of its own loop facilities, “the potential revenue [associated with a given building or given customer] must be sufficient to cover the total cost of construction and recurring expenses and simultaneously achieve a reasonable rate of return on investment.”¹⁶¹ The costs of construction vary based on, among other things, the distance between the competitive LEC’s transport network and the commercial building (the longer the lateral facility, the greater the deployment cost) and the costs associated with obtaining access to poles, ducts, conduits, rights-of-way and the commercial building.¹⁶²

As a result of the high relevant barriers to entry and the limited deployment of facilities by competitors,¹⁶³ the Commission found “potential competition from either supply-side substitution [(i.e., whether an existing provider of services is likely to construct new loop

¹⁶⁰ See *Phoenix Order* n.217 (citing Broadview et al. September 21, 2009 Comments at 49).

¹⁶¹ See Declaration of Scott Liestman on behalf of tw telecom inc. ¶ 5, attached as Attachment C to Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., WC Dkt. No. 09-135 (filed Sept. 21, 2009) (“Liestman Declaration”); see also *Phoenix Order* n.217 (citing Liestman Declaration ¶¶ 5-11).

¹⁶² See Liestman Declaration ¶ 5; see also Govil Declaration ¶¶ 13-16. It is worth noting that self-deployment of loop facilities is costly even where a commercial building or cell site is located near a competitive LEC’s existing transport network. See, e.g., Govil Declaration ¶¶ 13-16 (explaining that the “construction of laterals to connect office buildings to the XO network is extremely difficult, time consuming and costly, even when adding buildings to our [Metro Fiber] rings that are in close proximity to our [Metro Fiber] rings”); Reply Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 29-30 (filed Aug. 15, 2007) (citing Declaration of Steven Sachs ¶ 9, attached as Attachment 2 to Reply Comments of Nextel Communications, Inc., WC Dkt. No. 05-25 (filed July 29, 2005)) (explaining that “the costs associated with the new construction needed to connect a cell site to a competitive carrier’s ring are substantial” even if the cell site is located near the ring).

¹⁶³ See *Phoenix Order* ¶ 73 (“[T]he fact that facilities-based competitors have so few last-mile connections suggests that entry is costly and difficult.”).

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facilities to expand its service offerings)] or from *de novo* entry [(i.e., whether an entrant is likely to construct its own last-mile networks)] to be unlikely in the Phoenix MSA.”¹⁶⁴ In other words, the Commission concluded that, in Phoenix, competitive entry at a level sufficient to constrain the incumbent LEC’s market power could not realistically be expected to occur in a timely manner.

This conclusion applies to potential entry in geographic markets other than the Phoenix MSA as well as in the product market(s) that include(s) non-TDM-based special access services. *First*, the Commission found that the general barriers to entry it identified in the *TRO* and *TRRO* still exist today.¹⁶⁵ Thus, the criteria used by a competitive LEC such as tw telecom or XO to determine whether to construct its own loop facilities are not at all unique to the Phoenix MSA.¹⁶⁶ Indeed, during its reviews of the SBC-AT&T and Verizon-MCI mergers, the DOJ found that competitive LECs in the affected regions used factors similar to those discussed above

¹⁶⁴ *Id.*; *see also id.* ¶ 72.

¹⁶⁵ *See id.* n.216; *see also id.* ¶ 90 (“We see nothing in the record to indicate that the passage of time [since the *TRO*] has lowered these barriers for competitive LECs that do not already have an extensive local network used to provide other services to enterprise locations today.”); *id.* ¶ 84 (“We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today.”).

¹⁶⁶ *See, e.g.*, Liestman Declaration ¶ 5 (explaining the criteria that tw telecom uses to determine whether it will construct its own loop facilities to a given building in a metropolitan area, including the Phoenix MSA); Declaration of Stephanie Pendolino on behalf of Time Warner Telecom Inc. ¶ 5, *attached as* Attachment A to Opposition of Time Warner Telecom Inc., Cbeyond, Inc., and Eschelon Telecom, Inc., WC Dkt. No. 07-97 (filed Sept. 13, 2007) (explaining the criteria that Time Warner Telecom used to determine whether it will construct its own loop facilities to a given building in a metropolitan area, including the Denver, Minneapolis, Phoenix, and Seattle MSAs); *see also* Govil Declaration ¶ 19 (explaining in the special access rulemaking proceeding that “XO utilizes a careful screening process to decide whether the investment in lateral construction is warranted” and that “XO’s current policy is not to consider the addition of a building to its network unless customer demand at that location exceeds at least 3 DS-3s of capacity”).

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to determine whether “to build[] a last mile connection to a given building.”¹⁶⁷ The DOJ concluded that “[a]lthough other CLECs can, theoretically, build their own fiber connection to each building in response to a price increase by the merged firm, such entry is a difficult, time-consuming, and expensive process.”¹⁶⁸

Second, because many of the same underlying facilities can be and are used to provide both legacy TDM-based switched or special access services and state-of-the-art, non-TDM-based special access services utilizing IP or other packet-based protocols, the barriers to entry identified by the Commission apply with equal force to competitive carriers seeking to provide non-TDM-based special access services. As in the case of a potential competitor offering TDM-based service, a potential competitor offering non-TDM-based service requires sufficient revenue to recover its costs of deploying transmission facilities to a particular location.¹⁶⁹ For instance, as competitive providers of Ethernet backhaul services have explained in other Commission proceedings, there must be demand from mobile wireless carriers such that “the

¹⁶⁷ See DOJ Complaint Against SBC-AT&T ¶ 27 (finding that competitive deployment of last-mile connections depends on numerous factors, including “the capacity required at the customer’s location (and thus the revenue opportunity),” “the proximity of the building to the CLEC’s existing network,” “the existence of physical barriers . . . between the CLEC’s network and the customer’s location,” and “the ease or difficulty of securing the necessary consent from building owners and municipal officials”); DOJ Complaint Against Verizon-MCI ¶ 27 (same).

¹⁶⁸ *United States v. SBC Communications Inc. and AT&T Corp.*, Civil Action No. 1:05-cv-02102, Competitive Impact Statement, at 8 (D.D.C. Nov. 16, 2005).

¹⁶⁹ See Comments of Time Warner Telecom and One Communications, WC Dkt. No. 05-25, at 13-14 (filed Aug. 8, 2007) (“The economics of loop deployment do not magically improve when a different protocol is used to transmit the signal. The same trench must be dug, the same fiber must be laid, and similarly priced electronics must be attached.”).

backhaul provider will be able to serve multiple carriers at any given [cell] site and receive sufficient revenue to reach profitability and reasonable return o[n] invested capital.”¹⁷⁰

6. Elasticity of Demand.

Under the traditional market power standard, the Commission examines elasticity of demand in the relevant markets.¹⁷¹ Demand elasticity “refer[s] to the willingness and ability of [an incumbent LEC’s] customers to switch to another telecommunications service provider or otherwise change the amount of services they purchase from [the incumbent LEC] in response to a change in the price or quality” of the incumbent LEC’s service.¹⁷² High demand elasticity indicates that “the particular service market is subject to competition.”¹⁷³ Here, there is low demand elasticity for non-TDM-based special access services.

¹⁷⁰ Letter from Eric J. Branfman, Counsel for Telecom Transport Management, Inc., to Marlene H. Dortch, Secretary, FCC, WT Dkt. No. 11-65, at 2 (filed Aug. 22, 2011) (“Telecom Transport Management Aug. 22, 2011 Letter”); *see also* Reply Comments of Zayo Group, LLC, WT Dkt. No. 11-65, at 8-9 (filed June 21, 2011) (“Zayo June 21, 2011 Reply Comments”) (“The importance of T-Mobile as an anchor fiber-to-the-cell site tenant is magnified by the fact that there are few customers at a cell site, and substantial economies of scale.”); *id.*, Declaration of David Howson ¶ 9 (“Zayo, like all other alternative fiber backhaul providers, cannot afford to build fiber networks on a speculative basis to any customer. Except in circumstances where Zayo is already serving a cell site, Zayo does not have existing fiber facilities that can provide backhaul service to a cell site. Instead, Zayo responds to RFPs from wireless carriers for fiber based services and if and when it is awarded a contract to provide such service, Zayo must deploy new fiber cable and bear the expense and delays associated with such fiber deployment.”).

¹⁷¹ *See, e.g., AT&T Nondominance Order* ¶ 38; *Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 14083, ¶¶ 71-73 (1998) (“*Comsat Nondominance Order*”).

¹⁷² *Comsat Nondominance Order* ¶ 71.

¹⁷³ *Id.*

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As demonstrated above, competitors to incumbent LECs have deployed facilities to a relatively small number of end-user customer locations.¹⁷⁴ “In a building or other location where there are no competitive facilities, the customer typically has little opportunity to switch to an alternative supplier, and so the demand elasticity faced by the incumbent LEC is lower than in buildings where a competitor supplies service.”¹⁷⁵ Even at the few locations where competitive facilities are available, however, incumbent LECs often impose terms and conditions in their special access tariffs and commercial agreements that limit a customer’s ability to switch from non-TDM-based or TDM-based special access services provided by the incumbent LEC to non-TDM-based special access services provided by a competitor. For example, **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

¹⁷⁴ See *supra* Part III.C.4.

¹⁷⁵ Mitchell January 2010 Declaration ¶ 67.

¹⁷⁶ See Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 27 (filed April 11, 2012).

¹⁷⁷ See *id.* at 28.

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7. Incumbent LECs’ Cost Structure, Size, and Resources.

In assessing whether a carrier possesses market power, the Commission also examines the carrier’s “cost structure, size and resources.”¹⁷⁸ Under Commission precedent, the relevant inquiry is whether the carrier has advantages in these areas that “are so great [as] to preclude the effective functioning of a competitive market.”¹⁷⁹ In the case of incumbent LECs providing non-TDM-based special access services, the answer is a resounding “yes.” This is so for several reasons.

To begin with, incumbent LECs possess a massive size and resource advantage in comparison to virtually every other provider of non-TDM-based special access services. In particular, incumbent LECs have ubiquitous networks of the facilities needed to provide special access services.¹⁸⁰ As one economist has observed, an incumbent LEC “enjoys certain indisputable advantages from its legacy network footprint (such as a ubiquitous network of

¹⁷⁸ See *AT&T Nondominance Order* ¶ 38.

¹⁷⁹ See *id.* ¶ 73 (internal citation omitted).

¹⁸⁰ See, e.g., Comments of Fibertech Networks, LLC, WT Dkt. No. 11-65, at 19 (filed May 31, 2011) (“As a result of their ubiquitous networks – a legacy of their previously state-sanctioned monopolies, AT&T and other ILECs gain market power from ubiquity that is unavailable to competitors.”) (citing Declaration of Lee L. Selwyn ¶¶ 2-8, *attached as Attachment A to Comments of the Ad Hoc Telecommunications Users Committee*, WC Dkt. No. 05-25 (filed Jan. 19, 2010)); *Phoenix Order* n.143 (“In the case of wholesale and retail enterprise services, only Qwest has ubiquitous coverage of the market and thus capacity to serve end-users.”); *6-MSA Order* ¶ 45 (finding that the record “d[id] not demonstrate that Verizon no longer possesses exclusionary market power” “arising from [its] control over ubiquitous local telephone networks”); *4-MSA Order* ¶ 44 (finding that the record “d[id] not demonstrate that Qwest no longer possesses exclusionary market power” “arising from [its] control over ubiquitous local telephone networks”).

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physical assets like rights-of-way, conduit, poles, fiber and copper facilities) that can be used to provide either Ethernet or TDM-based services.”¹⁸¹ For example,

the backhaul market is highly concentrated with an unmistakable advantage enjoyed by any provider (particularly the incumbent LEC) that enjoys a ubiquitous transport network as a result of its legacy monopoly. This advantage applies to not only traditional capacity offerings (such as DS1), but to new packet arrangements (such as Ethernet) that can benefit from a shared physical layer of rights-of-way, poles, conduit and transmission facilities (such as fiber or copper) as well. To the extent that legacy conditions benefit AT&T [or another incumbent LEC] in the provision of traditional dedicated transport services (such as DS1), those same advantages apply to Ethernet as well.¹⁸²

Incumbent LECs also possess a number of substantial cost advantages relative to competitive providers of non-TDM-based special access services. For example, incumbent LECs have a number of first-mover advantages over their competitors. These include “preferential access to buildings, access to rights-of-way,” and other “operational difficulties faced by an entrant that have already been worked out by the incumbent LEC when it built out its network as a monopolist.”¹⁸³ As competitors have explained, incumbent LECs do not face obstacles to large-scale facilities deployment such as “the need for consents from building owners,”¹⁸⁴ “municipalities’ increasing unwillingness to permit access to public rights-of-way already overburdened by other utilities,”¹⁸⁵ or “lack of space in existing conduits.”¹⁸⁶

¹⁸¹ Gillan Declaration ¶ 11.

¹⁸² *Id.* ¶ 17.

¹⁸³ *TRO* ¶ 89.

¹⁸⁴ Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 25 (filed Feb. 22, 2012); *see also* Comments of the NoChokePoints Coalition, WC Dkt. No. 05-25, at 13-14 (filed Jan. 19, 2010) (“A competitor wishing to obtain access to a building to serve a potential customer must obtain permission from the building’s owner. Even under the best circumstances, obtaining access can be time-consuming But building owners may also seek

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Incumbent LECs also enjoy substantial economies of scale and scope in the provision and use of facilities that no competitor can realistically replicate. As the Commission has recognized, “[m]ost of the cost of providing a special access line is in the support structure, . . . the rights-of-way, and the access to buildings”—not in the fiber strands themselves—and these “[s]tructure, rights and access costs vary little with respect to the number of fiber strands . . . , thereby producing economies of scale.”¹⁸⁷ Moreover, incumbent LECs can “increase capacity on many special access routes at a relatively low incremental cost” (compared to the total cost of new construction) simply by “adding or upgrading terminating electronics.”¹⁸⁸ As AT&T explained in the petition that resulted in the pending special access rulemaking proceeding, this is the case not only with loop facilities but also with transport facilities.¹⁸⁹

substantial payments for permitting the competitor access to the building. ILECs’ ubiquitous networks, however, were connected to buildings as a matter of course, without such obstacles.”).

¹⁸⁵ See, e.g., Declaration of Dave Bennett on behalf of Integra Telecom, Inc. ¶ 5, attached as Attachment B to Opposition of Integra Telecom, Inc., tw telecom inc., Cbeyond, Inc., and One Communications Corp., WC Dkt. No. 09-135 (filed Sept. 21, 2009) (“Bennett Declaration”); Zayo June 21, 2011 Reply Comments at 10 (“Zayo and other alternative [Ethernet backhaul] access providers encounter numerous obstacles in constructing fiber to cell sites that are not encountered by ILECs, including right of way and building access requirements . . .”).

¹⁸⁶ Bennett Declaration ¶ 5.

¹⁸⁷ *Special Access NPRM* ¶ 26.

¹⁸⁸ *Id.*

¹⁸⁹ *AT&T Corp. Petition for Rulemaking To Reform Regulation Of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, Petition for Rulemaking, RM-10593, at 29 (filed Oct. 15, 2002) (“Dedicated transport is also characterized by enormous economies of scale and scope. Not only do the Bells have fiber interconnecting virtually all of their LSOs (either directly or indirectly, they also generally deployed dark fiber capacity at the time of the initial facility construction, so they can dramatically increase capacity on most routes simply by adding terminating electronics at relatively minimal incremental costs (and certainly at a trivial cost compared to new construction). Thus, even on specific, high-demand point-to-point routes, a CLEC cannot hope to achieve the per-unit cost of the Bells’ transport.”).

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Furthermore, AT&T's and Verizon's affiliations with large wireless carriers yields scale economies that competitors do not have. For instance, as a result of the traffic generated by customers of their mobile wireless affiliates, AT&T and Verizon can aggregate substantially more traffic onto their transport networks and thereby decrease their average per-unit cost of transport.¹⁹⁰ And, because of their wireless affiliates, AT&T and Verizon each has a large captive demand for wireless backhaul in its incumbent LEC region "that will enable it to fund the fiber investment that it incurs to deploy its own fiber to serve cell sites."¹⁹¹

All of these advantages enable incumbent LECs to provide existing and new non-TDM-based special access services over their own facilities at far lower costs than is the case for competitors. At the same time, competitors' dependence on incumbent LECs for numerous inputs (such as Type II circuits, interconnection, and collocation) offers incumbent LECs significant opportunities to raise rivals' costs. As the Commission has recognized, "incumbent LECs, which are both competitors and suppliers to new entrants," have an incentive to "raise entrants' costs by charging high prices for interconnection, network elements and services."¹⁹²

¹⁹⁰ See *TRO* ¶ 373 (explaining that "transport facilities generally are used to carry traffic aggregated from multiple customers, or even multiple carriers, within an incumbent LEC's network").

¹⁹¹ Telecom Transport Management June 21, 2011 Comments at 5; see also Telecom Transport Management Aug. 22, 2011 Letter at 1 ([T]he Verizon ILECs are affiliated with Verizon Wireless, which is currently the largest wireless carrier Therefore, in its ILEC region, Verizon has a large captive customer for wireless backhaul in the form of its wireless affiliate. Because of economies of scale in providing Ethernet wireless backhaul to multiple wireless carriers on a single cell site, this gives Verizon an advantage over other providers in bidding to provide backhaul to other wireless carriers in the Verizon ILEC region.").

¹⁹² *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 107 (1999).

D. Dominant Carrier Regulation Is Necessary To Ensure That Incumbent LECs Offer Non-TDM-Based Special Access Services In Accordance With Sections 201 And 202 Of The Act.

As demonstrated above, incumbent LECs have substantial and persisting market power in the provision of non-TDM-based special access services. In other words, incumbent LECs are—and will likely remain for the foreseeable future—dominant in the provision of these services. As a result, incumbent LECs have the incentive and ability to engage in anticompetitive conduct in their provision of non-TDM-based special access services and they have already acted on those incentives in several ways.

First, incumbent LECs' prices for non-TDM-based special access services are well in excess of competitive levels. For example, as tw telecom has demonstrated, incumbent LECs' wholesale Ethernet prices generally exceed—and in some cases, vastly exceed—tw telecom's retail Ethernet prices, thereby placing tw telecom in a classic price squeeze.¹⁹³ tw telecom has also demonstrated that incumbent LECs' wholesale Ethernet prices are well above competitors' wholesale Ethernet prices.¹⁹⁴ In addition, BT has found that in the core metropolitan areas where Ethernet services are available, “incumbent LECs' [Ethernet] prices are often higher on a per megabit basis than even bonded DS-1 or DS-3 services.”¹⁹⁵

Second, incumbent LECs use their control over bottleneck last-mile facilities to limit the ability of rival firms to compete in the provision of non-TDM-based special access services and

¹⁹³ See Letter from Jonathan Lechter, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-51, 09-47 & 09-137, at 8 & Appendix (filed Dec. 22, 2009) (“tw telecom Dec. 22, 2009 Letter”).

¹⁹⁴ See *id.* at 9 & Appendix.

¹⁹⁵ Letter from Sheba Chacko, Head, Global Operational Regulation and Americas Regulation – BT Global Services, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Feb. 24, 2010).

other downstream services provided via non-TDM-based special access services. For instance, as tw telecom has explained in detail, many incumbent LECs charge wholesale Ethernet prices that are so high that they effectively preclude tw telecom and other competitors from relying on these facilities to serve off-net locations.¹⁹⁶ Incumbent LECs are thus able to limit the size of a competitor's addressable market for Ethernet services and keep retail Ethernet prices artificially high.¹⁹⁷

Third, as discussed above, incumbent LECs have used exclusionary terms and conditions in their special access contracts and tariffs to prevent their customers from switching to non-TDM-based special access services provided by competitors.¹⁹⁸

The Commission has held that, where a carrier has the incentive and ability to exercise market power in the provision of telecommunications services (*e.g.*, by sustaining supra-competitive prices), it is necessary to adopt appropriate dominant carrier regulation to limit the carrier's opportunities to do so.¹⁹⁹ Such regulation is necessary to ensure that the incumbent

¹⁹⁶ See tw telecom Dec. 22, 2009 Letter at 10-11. Incumbent LECs' failure to offer wholesale Ethernet loops at reasonable rates also prevents competitors from deploying fiber loop facilities as aggressively as they would otherwise. See *id.* at 7 (explaining that, because multi-location business customers generally demand that their service provider offer Ethernet service at most or all of the customers' locations, tw telecom must obtain access to reasonably priced wholesale Ethernet loops in order to deploy fiber infrastructure to even high-demand locations); see also *id.* (illustrating that, for example, even if tw telecom can efficiently self-deploy loop facilities to two locations of a multi-location business that require high-capacity Ethernet connections (*e.g.*, 100 Mbps), tw telecom will not win the customer's business unless it can obtain reasonably priced off-net facilities to serve the customer's other four locations which require relatively low-capacity Ethernet connections (*e.g.*, 10 Mbps)).

¹⁹⁷ See *id.* at 11.

¹⁹⁸ See *supra* Part III.C.6.

¹⁹⁹ See *Phoenix Order* ¶¶ 5-6 (explaining that, in the *Competitive Carrier First Report and Order*, the Commission distinguished between dominant carriers (which possessed market power, *i.e.*, the power to control price) and nondominant carriers (which lacked such power) and

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LECs offer the services in question on just and reasonable terms and conditions, as required by Section 201(b) of the Act, and that the carrier does not engage in unjust or unreasonable discrimination prohibited by Section 202(a).²⁰⁰

Accordingly, it is necessary for the Commission to address incumbent LEC market power in the provision of non-TDM-based special access services in two related steps. *First*, the Commission should reverse its decisions to forbear from classifying incumbent LEC non-TDM-based special access services as dominant carrier offerings. *Second*, the Commission should adopt regulations that are appropriately tailored to prevent incumbent LECs from exploiting their dominance in the provision of non-TDM-based special access services. These regulations should be similar to those that the Commission applies to those TDM-based special access services for which the Commission concludes that incumbent LECs have market power. Those regulations should include pricing regulations to be implemented in tariffs that incumbent LECs must file with the Commission. In addition, to prevent incumbent LECs from exercising their market power by degrading the quality of services offered to their competitors, the Commission should adopt appropriate service quality regulation for non-TDM-based special access services, to be implemented in incumbent LEC tariffs.²⁰¹

“determined that dominant carriers should remain subject to more extensive regulation under Title II of the Act”).

²⁰⁰ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308, ¶¶ 7-8, ¶¶ 46-52 (1979) (explaining that tariff filing requirements, such as the requirement to submit cost support data, should continue to apply to dominant carriers (*i.e.*, those with market power) because such carriers are able to charge supra-competitive prices in violation of Section 201(b) and to discriminate unreasonably in violation of Section 202(a)).

²⁰¹ The Commission has already adopted some service quality regulations for TDM-based special access services and a subset of non-TDM-based special access services. Specifically, legacy Qwest, AT&T, and Verizon are required to provide the Commission with quarterly reporting on

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Adoption of a robust dominant carrier regulatory regime will advance the Commission’s goal of increasing broadband deployment in numerous ways. For example, pricing regulation of non-TDM-based special access services will enable competitors to expand the size of their addressable markets for those services and to deploy more fiber end-user connections to business customers. That is, access to affordable non-TDM-based special access services will enable competitors to serve multi-location business customers and, in so doing, deploy fiber loops to such customers’ high-demand locations.²⁰² Dominant carrier regulation will also ensure that wireless carriers can obtain non-TDM-based special access circuits for wireless backhaul on reasonable rates, terms and conditions, thereby spurring the deployment of wireless broadband. And dominant carrier regulation of non-TDM-based special access services will help foster the competition that will ensure that these services are more affordable for business end users across the country.²⁰³

their performance against certain metrics designed to prevent non-price discrimination in their provision of DS0, DS1, DS3, and OCn special access services. *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd. 16440, ¶¶ 96-98 (2007); *see also Qwest Section 272 Sunset Forbearance Order* ¶¶ 64-65.

²⁰² *See supra* note 196 and accompanying text.

²⁰³ *See, e.g.*, Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users Committee, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, RM-10593 & WT Dkt. No. 11-65, at 5 (filed June 13, 2011) (“[W]e outlined the Ad Hoc Committee’s position that market power in the special access market enables AT&T, Verizon, and Qwest to engage in anti-competitive price squeezes of their competitors in retail markets for which special access is an input, including Ethernet Ad Hoc’s concern is that price squeezes can be used to impede competition and exploit ratepayers before (and regardless of whether) competitors are completely forced from downstream markets, *e.g.*, inflated input costs reduce profit margins and thereby deny competitors the revenues they need to build out networks or achieve scale economies that enable them to reduce their prices and drive market-wide prices down to competitive levels.”).

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IV. CONCLUSION.

For the foregoing reasons, the Commission should reverse the forbearance granted to AT&T, legacy Embarq, Frontier, legacy Qwest, and Verizon from dominant carrier regulation of their non-TDM-based special access services.

Respectfully submitted,

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(202) 777-7700

Counsel for Sprint Nextel Corporation

November 2, 2012

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ATTACHMENT 1

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**DECLARATION OF MICHAEL BUSO
ON BEHALF OF TW TELECOM INC.**

1. My name is Michael Buso and I am Senior Manager, Portfolio Management for the Ethernet Product Suite at tw telecom inc. (“tw telecom”). In this position, I am responsible for the development and management of all tw telecom Ethernet products. I have been employed by tw telecom for eight years, most recently as Product Manager, Data/Internet. Prior to joining tw telecom, I was Manager of Information Security at ICG Communications for four years.

2. tw telecom provides managed network services, including Ethernet, transport data networking, Internet access, local and long distance voice, VoIP, IP VPN, and security, to businesses and communications carriers throughout the United States.

3. The purpose of this declaration is to describe the differences in the demands of tw telecom’s wholesale and retail Ethernet services customers and the differences between tw telecom’s wholesale and retail Ethernet services.

4. The demands of tw telecom’s wholesale Ethernet services customers are different from those of tw telecom’s retail Ethernet services customers. tw telecom’s wholesale Ethernet services customers (*i.e.*, other carriers) typically seek only access. For instance, carriers purchase tw telecom’s Wholesale Switched Native LAN service in order to reach end-user customers that are located on or near tw telecom’s network in areas that are outside the reach of

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the carriers' networks. These wholesale customers are usually highly focused on price. tw telecom's retail Ethernet services customers (*i.e.*, non-carrier businesses) are typically seeking to connect their businesses' multiple locations to each other. These retail customers are generally more interested in the features and performance of the Ethernet service, the other services (such as Internet security, data storage, or VoIP service) that can be purchased with Ethernet, and the overall value provided by the service.

5. Consistent with the different needs of tw telecom's wholesale and retail Ethernet services customers, tw telecom's wholesale and retail Ethernet services differ in material respects. For example, both tw telecom's Wholesale Switched Native LAN service and its (Retail) Enterprise Switched Native LAN service utilize Ethernet technology. However, the Wholesale Switched Native LAN service is a point-to-multipoint service. More specifically, each end-user customer location is connected to a single entrance facility and the entrance facility aggregates the traffic from each end-user customer location for handoff from tw telecom's network to the carrier customer's network.

6. By contrast, tw telecom's Enterprise Switched Native LAN service provides end-user business customers with "any-to-any" connectivity. In other words, the service connects multiple end-user customer locations in such a way that any end-user customer's location can interconnect with any other location of that particular end-user customer. As a result, the Enterprise Switched Native LAN service generally requires more facilities and more ports than the Wholesale Switched Native LAN service.

7. Consistent with the different needs of tw telecom's wholesale and retail Ethernet services customers, there are also differences in the ordering processes for tw telecom's wholesale and retail Ethernet services. For instance, wholesale customers usually know the type

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of service they would like to order and their systems are typically electronically bonded with tw telecom's systems. Generally, wholesale customers place their orders electronically by submitting Access Service Requests to tw telecom after determining their service needs. In contrast, retail customers often do not know the type of service they would like to order. Therefore, tw telecom will typically assign an account executive and a network architecture expert to meet with the prospective customer and, among other things, determine its service needs, design the service accordingly, quote and negotiate a price, and order the service.

8. In addition, there are differences in the pricing of tw telecom's wholesale and retail Ethernet services. Purchasers of tw telecom's wholesale Ethernet services **[BEGIN HIGHLY CONFIDENTIAL]**

[REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL]**

9. In light of the different needs of tw telecom's wholesale and retail Ethernet service customers and the technical and other material differences between tw telecom's wholesale and retail Ethernet services, I do not believe that a tw telecom wholesale Ethernet service customer would switch to a tw telecom retail Ethernet service in the event of a significant increase (such as a five percent increase) in the price of the wholesale Ethernet service.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Michael Buso

Dated: 6-28-2012

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ATTACHMENT 2

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Special Access Rates for Price Cap Local) WC Dkt. No. 05-25
Exchange Carriers)

DECLARATION OF SUSAN M. GATELY

1. I am President of SMGately Consulting, LLC (SMGC), a consulting firm specializing in telecommunications and public policy. I have participated in numerous proceedings before the Federal Communications Commission (“FCC” or “Commission”) dating back to 1981 and have appeared as an expert witness in proceedings before state public utility commissions. My Statement of Qualifications is appended hereto as Attachment A.

2. I was asked by the Ad Hoc Telecommunications Users Committee, BT Americas, CCIA, EarthLink, Sprint, and tw telecom to analyze the data provided by respondents to the FCC’s first Data Request in the special access rulemaking proceeding¹ to determine, among other things, the extent to which providers other than the primary incumbent LEC own or lease from another entity under an IRU agreement connections to locations² in the 24 sample Listed Statistical Areas (“LSAs”) selected by the FCC.

¹ *Data Requested in Special Access NPRM*, Public Notice, WC Dkt. No. 05-25, DA 10-2073 (2010) (“Data Request”).

² The Data Request defines “location” as “a building, other free-standing site, cell site on a building, or free-standing cell site.” *See id.* at 3.



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3. For this purpose, I compiled and analyzed the responses provided by competitive LECs, cable companies, and out-of-region incumbent LECs to Question III.B.1 of the Data Request and the responses provided by in-region incumbent LECs to Question III.E.3 of the Data Request. In order to determine the percentage of locations to which providers other than the primary incumbent LEC in each LSA have connections, I assumed that the number of locations identified by the primary incumbent LEC in each LSA constitutes the total number of locations with demand for special access services in that LSA. To the extent that this assumption is incorrect for a given LSA (*e.g.*, because certain locations in that LSA are served only by a competitive LEC and not by an incumbent LEC), my analysis overstates the percentage of locations to which providers other than the primary incumbent LEC have connections to locations in that LSA.

4. The table on the next page sets forth the results of my analysis and shows the total number of locations with demand in each LSA, the number of locations to which providers other than the primary incumbent LEC reported having connections, the percentage of locations to which providers other than the primary incumbent LEC reported having connections, and the percentage of locations to which the primary incumbent LEC has the only reported connection(s):

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Based on my analysis, I found that providers other than the primary incumbent LEC have connections to **[BEGIN HIGHLY CONFIDENTIAL]**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[END HIGHLY**

CONFIDENTIAL]

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.



Susan M. Gately

Dated: July 10, 2012

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ATTACHMENT A TO DECLARATION OF SUSAN M. GATELY

Susan M. Gately
Statement of Qualifications

Susan M. Gately founded SMGately Consulting, LLC (SMGC) in January of 2011. Susan is an economic and policy expert specializing in the telecom arena with more than thirty years of consulting experience. Her specific experience lies in the areas of

- Telecom industry structure;
- Regulatory regimes;
- Cost development;
- Access charges;
- Pricing and rate structure; and
- Telecom services and network management practices.

Prior to founding SMGC Susan was a partner in and the Senior Vice President at Economics and Technology, Inc (ETI) providing advising, litigation support, expert testimony, white papers, and in-house training and education to ETI's myriad carrier, governmental agency and large business clients. Susan has provided expert testimony on a variety of telecom policy matters and participated in hundreds of FCC proceeding on access charges, universal service, separations and cost accounting, and form of regulation.

Throughout 2011 Ms. Gately was an active participant in the FCC's USF / ICC proceeding on behalf of the AdHoc Telecommunications Users Committee preparing and submitting two separate declarations and visiting the FCC on multiple occasions to discuss the results of her analyses. In particular, Ms. Gately devoted significant effort in the analysis of RLEC cost data filed as part of that proceeding and quantification of the financial impact upon RLECs of the potential combination of reduced USF payments and reduced access charge revenues.

For the last several years Ms. Gately has also been particularly active in the analysis of special access pricing, cost, and separations data. In 2010 she authored a paper entitled [*Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS*](#).¹ The paper detailed the workings of and interactions between Parts 36 and 69 of the FCC's rules (the results of which are codified in ARMIS for the largest of the ILECs). Susan has been involved in the analysis of incumbent LEC intrastate and interstate access tariffs since the filing of the initial access tariffs in 1983. Ms. Gately has participated in the preparation of hundreds of submissions to the FCC on issues including access service pricing and rate structures, price caps implementation, access

¹ [*Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS*](#) (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in January, 2010.) Prepared on behalf of the AdHoc Telecommunications Users Committee. Filed in FCC WC Docket # 05-25 January, 2010.

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service costs (including cost allocation of regulated and non-regulated services), and alternative forms of regulation.

Ms. Gately has also devoted significant time over the last several years to researching and analyzing conditions extant in the wireline and wireless telecommunications markets in the US, the conditions that have led to the current market structures and the implications for users of those networks. In addition to the *ARMIS* paper identified above Ms. Gately's research and analysis in this area were codified in the following papers released in 2010. [Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs](#) (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in February, 2010.) [Revisiting US Broadband Policy: How Reregulation of Wholesale Services Will Encourage Investment and Stimulate Competition and Innovation in Enterprise Broadband Markets](#) (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in February, 2010.)

Ms. Gately's most recent analysis of small independent company universal service issues in relation to the FCC's 2011 USF / ICC proceeding built upon her extensive past analysis of similar issues (as they relate to both state and interstate universal service funds). Beginning in 2003 and following on for the next several years she researched and documented systemic incentives to inefficiencies inherent in the FCC's USF funding mechanism and identified . The primary documentation of that early work was a paper entitled *Lost in Translation: How Rate of Return Regulation Transformed the Universal Service Fund for Consumers into Corporate Welfare for the RLECs*, (with Scott C. Lundquist) prepared on behalf of Western Wireless, February 2004. That work was followed later that same year with *Striking a Nerve: ETI's Rejoinder to the NTCA/OPASTCO False Premises Report*, (with Lee L. Selwyn and Scott C. Lundquist) also prepared on behalf of Western Wireless, October 2004. Ms. Gately has prepared presentations for on this issue for use at en banc panels of the Federal State Board on Universal Service and presented a session at NASUCA's 2005 annual conference as well.

Susan has been involved in the analysis of incumbent LEC intrastate and interstate access tariffs since the inception of the tariffs in 1984. She has participated in virtually every major FCC proceeding on access charges and price caps, and is among the nation's leading experts on access charge rate structure, methodology, and policy. Access issues addressed in the hundreds of submissions made to the FCC access service pricing and rate structures, price caps implementation, access service costs (including cost allocation of regulated and non-regulated services), and alternative forms of regulation. Among those issues recently addressed at the FCC has been the appropriate rate structure for the collection of universal service costs from end users, and rules related to the level of universal service funding that should be available to rural

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telecommunications service providers. Ms. Gately was also actively involved in the investigation of the level of cost to be recovered from the implementation of local number portability (LNP) and the appropriate method of recovering those costs. Ms. Gately was also involved in modeling and analysis of the FCC's last major revision to its access charge and price caps plan — the so called "CALLS" plan.

Ms. Gately has also been extensively involved in the analysis of cost and operational data submitted by telephone companies in the context of regulatory proceedings and audits, including the submission of expert testimony in state public utility proceedings. Her responsibilities have involved the analysis of telephone company cost data and cost study methodologies. Ms. Gately's work has included the development of alternative cost figures for the purpose of presenting alternative rate proposals. She has participated in the preparation of expert testimony on local calling area expansion, affiliate transactions, survey and statistical methodologies, cost study methodologies, revenue requirement, infrastructure and modernization, new service pricing, access pricing, unbundled network element pricing, avoided retail costs for use in setting wholesale prices and other issues related to the opening and operation of markets.

Throughout 1994, acting as a staff expert for the Delaware PSC Staff, Ms. Gately participated actively in the litigation of rules implementing an alternative regulatory plan put in place by the Delaware state legislature. Ms. Gately was one of the designated staff negotiators during an attempted negotiated settlement of the rules using Alternate Dispute Resolution (ADD) techniques. Subjects addressed by the PSC's Rulemaking included, among other things, the development of both incremental and fully distributed costing methodologies to be used by Bell Atlantic for use as incremental cost floors, and to ensure against cross-subsidization. She co-authored comments on behalf of staff regarding cost methodology, rate imputation, and unbundling requirements.

Ms. Gately was particularly active in the examination of ILEC cost data and deployment plans for basic rate interface (BRI) ISDN service. Ms. Gately was involved in all facets of a New England Telephone BRI ISDN investigation that culminated in an affordable, widely deployed ISDN offering in Massachusetts. She has also prepared and/or sponsored testimony and comments relative to the deployment and pricing of ISDN services in Colorado, Tennessee, Texas, Ohio, and Connecticut. Ms. Gately also co-authored two separate ISDN position papers in conjunction with Dr. Lee L. Selwyn; *A Migration Plan for Residential ISDN* for the Electronic Frontier Foundation and *The Prodigy ISDN White Paper: ISDN Has Come of Age* for Prodigy Services Company.

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Ms. Gately was also heavily involved in the development of avoided cost estimates for use in setting wholesale prices in a resale environment. Ms. Gately co-authored (with Dr. Lee L. Selwyn) *Commercially Feasible Resale of Local Telecommunications Services: An Essential Step in the Transition to Effective Local Competition*. She has participated in resale proceedings and or interconnection arbitrations (relative to wholesale pricing) in California, Hawaii, Illinois, Ohio, Puerto Rico, Nevada, and Louisiana.

Ms. Gately was also involved in the analysis of issues related to the application of several of the Bell Companies for Section 271 authority to enter the interLATA long distance market. Ms. Gately has also undertaken a detailed analysis of the Continuing Property Record (CPR) audits conducted by the Accounting and Audits Division of the FCC. That analysis culminated in the preparation of a paper (written in conjunction with Dr. Lee L. Selwyn) *Inflated BOC Prices: An Agenda for State PUC Actions Arising from the FCC CPR Audits*.

Ms. Gately has assisted numerous Fortune 100 companies in the evaluation of pricing, terms and conditions as part of the long distance and local procurement process.

In addition to her regulatory work, Ms. Gately has been a frequent speaker at various industry gatherings including large conventions and more specialized seminars and conferences. The subject matters have included the following wide range of issues:

- Negotiation of custom network contracts;
- ILEC central office collocation;
- The FCC's price cap plan for ILECs;
- Principles for pricing ISDN basic rate service.
- USF Funding for wireless CETCs
- Reformation of the USF High Cost Fund

Prior to joining ETI, Ms. Gately was employed as an Economic Analyst at Systems Architects, Inc. Her work there primarily involved the analysis of economic data and survey results for the Health Care Finance Administration, the Social Security Administration, and the Department of Defense.

Susan has a Bachelor of Arts degree in Economics from Smith College (1980).

Statement of Qualifications

Susan M. Gately

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Appearances in Regulatory Proceedings

Telecommunications Regulatory Board of Puerto Rico, *Telefónica Larga Distancia de Puerto Rico, Inc., Petition for arbitration pursuant to Section 47 U.S.C. 252 (b) of the Federal Communications Act and Section 5 (b), Chapter III, of the Puerto Rico Telecommunications Act, regarding interconnection rates, terms and conditions with Puerto Rico Telephone Company, Inc.*, Docket No. JRT-2006-AR-0001, on behalf of Telefónica Larga Distancia de Puerto Rico, Inc., Direct Testimony filed January 16, 2007, Reply Testimony filed February 7, 2007, cross-examination February 14, 2007, Declaration filed March 30, 2007.

United States District Court, District of New Jersey, in *Re: AT&T Corp. v. JM Telecom, LLC*, Civil Action No. 99-2578, on behalf of AT&T Corp., Expert Report filed December 5, 2003.

California Public Utilities Commission, in *Re: Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, Docket No. R.03-08-018, on behalf of AT&T Communications of California, Inc., Declaration filed November 12, 2003.

Colorado Public Utilities Commission, in *Re: Application of US West Communications, Inc. for Investigation into Switched Access Rates*, Docket No. 00A-201T, on behalf of AT&T Communications of the Mountain States, Inc., Testimony of Lee L. Selwyn, filed July 18, 2000, adopted by Susan M. Gately, cross-examined on October 17, 18, 2000.

Arizona Corporation Commission, in *Re: In the Matter of the Application of US West Communications, Inc., a Colorado Corporation, for a Hearing to Determine the Earnings of the Company, the Fair Value of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return Thereon and to Approve Rate Schedules Designed to Develop Such Return*, Docket No. T-1051B-99-105, on behalf of AT&T Communications of the Mountain States, Direct Testimony filed August 9, 2000, Supplemental Direct Testimony filed November 13, 2000.

United States District Court, District of Massachusetts, in *Re: Telephone Management Corporation, Plaintiff, v. State Street Bank and Trust Company, Defendant*, Civil Action No. 97-10993 PBS, on behalf of State Street Bank and Trust Company, Expert Report filed July 17, 1998.

Delaware Public Service Commission, in *Re: In the Matter of Development of Regulations for the Implementation of Telecommunications Technology Investment Act*, Docket No. PSC Reg. 41, on behalf of Delaware Public Service Commission Staff, cross-examination March 2, 1995.

New York Public Service Commission, in *Re: Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Docket No. 92-C-0665, on behalf of Cable Television Association of New York,

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Susan M. Gately

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Supplemental Testimony filed September 8, 1994.

California State Legislature, inRe: *California Long Distance Telecommunications Consumer Choice Act*, Assembly Bill 3720, on behalf of AT&T, Statement before the California State Legislature, April 11, 1994.

Tennessee Public Service Commission, inRe: *In the Matter of the Commission's Investigation of Integrated Services Digital Network (ISDN)*, on behalf of Prodigy Services Company, oral testimony, November 11, 1992.

Arizona Corporation Commission, in Re: *In the Matter of the Commission's Examination of the Rates and Charges of the Mountain States Telephone and Telegraph Company*, Docket No. E-1051-88-306, on behalf of Residential Utility Consumer Office, Direct Testimony filed July 13, 1990, Rebuttal Testimony August 7, 1990.

Papers and Reports

Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in February, 2010.)

Revisiting US Broadband Policy: How Reregulation of Wholesale Services Will Encourage Investment and Stimulate Competition and Innovation in Enterprise Broadband Markets- (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in February, 2010.)

Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS (With Helen E. Golding, Lee L. Selwyn and Colin B. Weir. Released in January, 2010.)

The Role of Regulation in a Competitive Telecom Environment: How Smart Regulation of Essential Wholesale Facilities Stimulates Investment and Promotes Competition (With Helen E. Golding, Lee L. Selwyn, and Colin B. Weir. Released in March, 2009.)

Special Access Overpricing and the US Economy: How Unchecked RBOC Market Power is Costing US Jobs and Impairing US Competitiveness (with Helen E. Golding, Lee L. Selwyn, and Colin B. Weir) Economics and Technology, Inc., prepared on behalf of the AdHoc Telecommunications Users Committee, August 2007.

HOLD THE PHONE: Debunking the Myth of Intermodal Alternatives for Business Telecom Users In New York, prepared on behalf of the UNE-L CLEC Coalition in New York, August 2005.

The 2005 Update of the 1999 TFP Model Calculating a Productivity Factor for Interstate Special Access, prepared on behalf of the Ad Hoc Telecommunications Users Committee, submitted as an attachment to Susan M. Gately's Reply Declaration, filed in FCC WC Docket No. 05-25, *Special Access Rates for Price Cap Local Exchange Carriers*, July 29, 2005.

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Susan M. Gately

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Striking a Nerve: ETI's Rejoinder to the NTCA/OPASTCO False Premises Report, (with Lee L. Selwyn and Scott C. Lundquist) prepared on behalf of Western Wireless, October 2004.

Competition in Access Markets: Reality or Illusion, A Proposal for Regulating Uncertain Markets, (with Lee L. Selwyn and Helen E. Golding), prepared on behalf of the Ad Hoc Telecommunications Users Committee, August 2004.

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