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

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]

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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*).

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

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[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

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[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.

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.

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 services[80] 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 future[83]—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.").

facilities[84]—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]

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[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 COMPTEL, 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).

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,

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[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*

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 Act[98] when evaluating the

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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

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-

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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

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

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'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.").

- 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*

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-

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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*").

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

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[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").

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

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[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).

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

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[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,

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

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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*,

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[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_prnews.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

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

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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 Vodaphone (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*").

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

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[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.

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

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[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.

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.