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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.”).

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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

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[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.

[REDACTED] [END HIGHLY CONFIDENTIAL]

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).

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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).

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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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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.

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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

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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 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):

