
**Before the
Federal Communications Commission
Washington, DC 20554**

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

COMMENTS OF CENTURYLINK, INC.

Craig Brown
CENTURYLINK, INC.
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
(303) 992-2503

Bryan N. Tramont
Russell P. Hanser
Bradley K. Gillen
WILKINSON BARKER KNAUER, LLP
2300 N. Street, NW, Suite 700
Washington, DC 20037
(202) 783-4141

Jonathan E. Nuechterlein
Samir C. Jain
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000

February 11, 2013

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY.....	1
II. THE COMMISSION MUST ENFORCE ITS MANDATORY COMPREHENSIVE DATA COLLECTION AND FACILITATE FULL PUBLIC COMMENT ON THE MATERIALS SUBMITTED.....	6
III. THE WHOLESALE AND ENTERPRISE MARKETPLACE HAS BEEN ALTERED IRREVOCABLY BY THE RISE OF COMPETITIVELY PROVISIONED HIGH-CAPACITY ETHERNET SERVICES.....	10
A. The Commission’s Analytical Framework Must Account for the Full Range of Available and Potential Alternatives to Price-Cap Carriers’ Facilities.....	11
B. Demand for Special Access Services Has Dramatically Shifted Away From DSn Offerings to Higher-Capacity Ethernet Services.....	14
C. Numerous Providers Supply Wholesale and Enterprise Customers’ Growing Capacity Needs.....	18
D. The Commission Must Ensure That Any New Rules Do Not Imperil The Migration to High-Capacity IP Networks.....	32
IV. CENTURYLINK’S TERMS AND CONDITIONS FOR HIGH-CAPACITY SERVICES ARE JUST AND REASONABLE.....	36
A. The Competitive Marketplace for Wholesale and Ethernet Services Protects Against Unreasonable Term and Conditions.....	37
B. Special Access Customers Are Sophisticated Entities Fully Capable of Negotiating Reasonable Terms and Conditions.....	38
C. In Any Event, CenturyLink’s Terms and Conditions Are Just and Reasonable.....	40
V. CONCLUSION.....	44

Before the
Federal Communications Commission
Washington, DC 20554

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

COMMENTS OF CENTURYLINK, INC.

I. INTRODUCTION AND SUMMARY

For more than a decade, the Commission has taken aggressive action across many fronts to promote the deployment of next-generation networks. The result has been a revolutionary shift in how Americans communicate: Legacy telephone networks have given way to high-speed residential broadband networks offering speeds of four, ten, or twenty megabits per second. Analog “cellular” wireless voice offerings have ceded ground to multiple generations of mobile digital broadband services, culminating (for now) in 4G “Long-Term Evolution” services. And, across platforms, legacy services have been supplanted by packetized Internet Protocol (“IP”) offerings, opening a wealth of new opportunities for American consumers.

Advocates of aggressive regulation in this docket posit a world in which these developments left wholesale and enterprise data services untouched. In their telling, carriers and businesses in every market across the nation still clamor for – and, indeed, cannot survive without – the legacy DS1 and DS3 services on which they relied a decade ago or more. They see a marketplace not significantly different from the one that existed in 1999, when the Commission adopted the *Pricing Flexibility Order* – a marketplace in which entities such as CenturyLink hold

a dominant position with respect to the services demanded by carriers and businesses, and those services must be subjected to aggressive price regulation.

But these dial-up era talking points have no place in today's gigabit-per-second world. The transformations that have reconfigured residential services have, of course, reshaped wholesale and enterprise services as well. The Commission has recognized competition with respect to packetized and optical services, and worked to deregulate them, and such offerings have proliferated, driven by the advent of cloud computing, real-time video, 4G wireless, and other innovations. Here, too, the Commission's pro-investment policies have borne fruit, fueling deployment not only by former "incumbents" but also by competitive fiber providers, cable operators, wireless companies, and others. These providers are serving customers at all capacity levels, ratcheting up competition throughout the market, for businesses and carriers large and small.

Moreover, the correlation between advances in residential services and in wholesale and enterprise services is no coincidence. The Commission's pricing flexibility framework has been a key driver of the entire industry's efforts to build fiber networks, deploy Ethernet services, expand dramatically the functionalities of services available to enterprise customers, both big and small, and even push higher-speed broadband to residential customers. Thus, while this proceeding is properly concerned only with the regulation of facilities still subject to price-cap regulation and the Commission's pricing flexibility rules – and not with residential offerings or with packetized and optical services, which have largely been removed from the price-cap regime – actions taken here threaten to disrupt the broader transition to IP networks. Excessive regulation of DS1 and DS3 offerings in price-cap jurisdictions would inhibit the deployment of

all these services, and undercut the immense benefits customers have enjoyed as next-generation networks have proliferated. The choice faced by the Commission in this docket, then, is simple: Will it maintain and advance policies that facilitate further investment in IP networks? Or will it accede to the parochial demands of some rival providers to turn back the regulatory clock to antiquated monopoly era regulation of DS1 and DS3 services – services that offer speeds below or barely surpassing those of today’s basic residential broadband offerings?

Those who ask the Commission to retreat from its investment-focused framework have objected to nearly *all* elements of the Commission’s almost fifteen-year-long investment-based agenda. If their advice had been heeded then, we might well be living today in the bleak world their filings portray. Fortunately, the Commission instead pursued market-based policies based on the time-tested notion that competition best protects consumers, and the market has thrived. Advocates of regulation have invested, won market share, developed new offerings, and moved to compete aggressively in the provision of next-generation IP networks and services, as they repeatedly tell prospective investors. They have been joined by new intermodal competitors, which also have won growing market shares. Along the way, customer demand and Commission policies have substantially transitioned wholesale and enterprise service demand from heavily regulated narrowband offerings to largely unregulated platforms with vastly superior functionalities, increasing competition throughout the ecosystem. Residential consumers also have benefited tremendously, as the fiber facilities deployed to serve enterprise customers have enabled faster residential service as well: Average broadband speeds have skyrocketed even since this proceeding opened in 2005, while the number of broadband connections serving the nation’s consumers has more than quadrupled. Burgeoning bandwidth has fueled the rise of new

applications and devices that were unheard-of just several years ago but are now transforming Americans' lives.

Under these circumstances, a decision to increase regulation of special access services would depress investment among both incumbents and competitors, which would both face strong financial incentives to rely on inferior legacy offerings rather than constructing new IP facilities of their own. The effect of those incentives would be felt far beyond the wholesale and enterprise markets, undercutting the ongoing drive toward the ubiquitous and robust broadband that Americans need to compete and thrive in the 21st century. This result would contradict the Commission's longstanding policy goals as articulated in the *National Broadband Plan*.¹

In directing its Wireline Competition Bureau to issue a mandatory data request, the Commission has taken a critical step toward a new framework that can account for these policy goals. If competitive providers of high-capacity services comply fully with the terms of the ultimate request, the Commission should be able to conduct a comprehensive market-power analysis of the high-capacity services market for the first time. Thus, the Commission must ensure the integrity of its process by demanding comprehensive responses to its mandatory data request and by soliciting comment on the data received and any analytical tools it proposes to apply to such data. Furthermore, in conducting its subsequent analysis, the Commission should acknowledge the market's irrevocable (and desirable) migration away from DSn-capacity services toward OCn-capacity fiber-optics and gigabit Ethernet offerings, and should account for

¹ Federal Communications Commission, *Connecting America: The National Broadband Plan* (2010), available at <http://download.broadband.gov/plan/national-broadband-plan.pdf>.

all competitors in the market, including incipient providers. While the data submitted may reveal certain geographic areas in which the prospects for facilities deployment remain limited, the Commission should recognize that the widespread (or universal) imposition of sub-market rates and one-size-fits-all tariffs for legacy DS_n services would suppress the incentives of *all* providers to deploy next-generation network architectures. Under these circumstances, the Commission should advance consumer interests by immediately granting universal “Phase I” pricing flexibility, permitting price-cap carriers to compete on a level playing field while maintaining their tariffed offerings. It should also stand ready to grant new “Phase II” flexibility in areas shown to be competitive under whatever new analytical methodology it adopts, and decline to *remove* Phase II flexibility – to *reregulate* – where such flexibility already applies.²

Similarly, the Commission should resist calls to interfere with the terms and conditions and discount plans that virtually every provider of high-capacity services offers to attract and retain highly sophisticated customers. In areas subject to pricing flexibility, CenturyLink’s contracts for high-capacity services provide customers a menu of options to design their network and traffic volumes to meet their needs, and do nothing to preclude or inhibit customers’ self-supply or use of alternative providers for some (or all) of their needs. These types of discounts are fully consistent with antitrust and competition law principles. Stripping incumbents of the ability to offer specialized contract offerings suited to the particular demands of wholesale and

² See, e.g., Comments of Qwest, WC Docket No. 05-25, RM-10593, at 61-62 (filed Aug. 8, 2007) (“Qwest 2007 Comments”); Comments of Embarq, WC Docket No. 05-25, RM-10593, at 23 (filed Aug. 8, 2007) (“Embarq 2007 Comments”).

enterprise customers would harm competition and run counter to the industry's shift toward individualized services, with no countervailing benefit.

II. THE COMMISSION MUST ENFORCE ITS MANDATORY COMPREHENSIVE DATA COLLECTION AND FACILITATE FULL PUBLIC COMMENT ON THE MATERIALS SUBMITTED.

CenturyLink's predecessor companies have for years urged the Commission to issue a mandatory data request³ and conduct a genuine market-power analysis prior to reassessing its special access regime.⁴ As detailed in prior filings, the marketplace for retail and wholesale high-capacity services has been transformed over the past decade by the entry and growth of intra- and inter-modal competitors.⁵ Recent developments confirm the migration away from the DSn-capacity services at issue here⁶ and toward higher-capacity Ethernet offerings provisioned

³ See, e.g., Comments of Qwest, WC Docket No. 05-25, RM-10593, at 34 (filed Jan. 19, 2010) ("Qwest 2010 Comments"); Embarq 2007 Comments at 26.

⁴ See Qwest 2010 Comments at 25.

⁵ See, e.g., Qwest 2007 Comments at 19-41.

⁶ To varying degrees, the Commission has granted AT&T, Qwest, Embarq, Frontier, and Citizens relief from certain tariffing and dominant-carrier regulations with respect to packetized and optical networking services. See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, 22 FCC Rcd 18705 (2007) ("*AT&T Enterprise Forbearance Order*"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, 23 FCC Rcd 12260 (2008) ("*Qwest Enterprise Forbearance Order*"); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, 21 FCC Rcd 11577 (2006) ("*Embarq et al. Enterprise Forbearance Order*"). Separately, Verizon won somewhat broader relief after the Commission did not act on its petition seeking forbearance from application of those regulations within the period prescribed by Section 10(c) of the Communications Act, 47 U.S.C. § 160. See Public Notice, *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services Is Granted by Operation of Law*, WC Docket No. 04-440 (rel. Mar. 20, (continued on next page)

most commonly over fiber-optics. As the Commission has recognized, no provider today enjoys any ingrained advantage over another, and CenturyLink’s competitors have amassed a host of successes in the marketplace. Ultimately, however, only comprehensive data can provide the basis for a reliable market analysis, and only a mandatory inquiry can ensure accurate self-reporting. The sheer scope and variety of entities actively competing in the high-capacity market underscore the need for the Commission to conduct its data collection in the broadest and most comprehensive fashion possible.

At this stage of the proceeding, it is critical that the Commission ensure that all participants in the high-capacity market respond comprehensively to the mandatory data request, and that those submissions are amenable to aggregation and analysis. The Commission is only faced with the need for a *mandatory* data collection because so many competitive providers simply ignored the *voluntary* requests issued previously. The Commission explained to the D.C. Circuit that “fewer than 10 percent of ... COMPTTEL’s service provider members (7 of approximately 90) submitted data concerning their experience in the special access market.”⁷ Even those that did respond provided often-inadequate data.⁸ The Commission has highlighted

2006). CenturyLink has petitioned the Commission for similar relief throughout its territory. *See* CenturyLink Petition for Forbearance, WC Docket No. 12-60 (filed Feb. 23, 2012) (“CenturyLink 2012 Enterprise Forbearance Petition”).

⁷ Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTTEL, et al.*, No. 11-1262, at 21-2 (D.C. Cir. dismissed Jan. 26, 2012).

⁸ *See generally* Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (Oct. 19, 2012); Letter from Frank Simone, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, WCB/Pricing File Nos. 12-04 & 12-05, Attachment at 3 (May 22, 2012); Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, at 1 (Mar. 7, 2011).

the repeated “failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable.”⁹ Given this track record, it seems likely that some providers, intent on continuing to mask their success in the market, will try to underreport the reach of their networks, or seek outright waivers from the forthcoming mandatory request.

Because the Commission’s ability to conduct a viable “one-time, multi-faceted market analysis” is completely reliant on an accurate and complete data set, the Commission must ensure that all parties respond fully and on a timely basis. The Commission should be skeptical of any waiver requests seeking to avoid filing or limiting the scope of their required data submission. Likewise, it must make clear that it stands ready to take swift enforcement action against entities that do not comply.¹⁰ In short, the Commission should remain focused first and foremost on obtaining a useful and comprehensive data set.

To maintain the integrity of its process, the Commission must also ensure that the data ultimately provided, and any methodology employed to analyze such data, are subject to meaningful analysis and comment by the parties and/or their counsel. The Administrative Procedure Act requires the agency to “give interested persons an opportunity to participate in [a]

⁹ Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTTEL, et al.*, No. 11-1262, at 2 (D.C. Cir. Dismissed Jan. 26, 2012).

¹⁰ *See, e.g., Telseven LLC*, 27 FCC Rcd 6636, 6648 ¶ 25 (2012) (forfeiture of \$100,000 for failure to file Quarterly Worksheet providing a good faith estimate of filer’s projected telecommunications revenue); *SBC Communications, Inc.*, 17 FCC Rcd 7589, 7589 ¶ 1 (2002) (\$100,000 forfeiture for responding to Enforcement Bureau Letter of Inquiry without required sworn declaration); *Alltel Corp.*, 21 FCC Rcd 746, 746 ¶ 1 (EB 2006) (\$100,000 proposed forfeiture for submitting a CPNI compliance document that did not comply with rule); *SBC Communications, Inc.*, 16 FCC Rcd 5535, 5535-36 ¶¶ 1-2 (EB 2001) (\$88,000 forfeiture for deficiencies in performance measurement data submitted to the Commission), *aff’d*, 16 FCC Rcd 12306 (2001).

rule making through submission of written data, views, or arguments,”¹¹ and the courts have explained that “[this] opportunity for comment must be a meaningful opportunity.”¹² Consistent with these principles, “[t]he agency cannot ... rely on data known only to the agency: ‘when an agency takes official or administrative notice of facts, a litigant must be given an adequate opportunity to respond.’”¹³ As the D.C. Circuit has explained:

The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.... To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport. An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.¹⁴

Thus, for example, in *National Black Media Coalition v. FCC*, the Second Circuit found that conclusions “based on maps which were appended to [its final] order and internal studies” were “arbitrary and capricious” where neither the maps nor the studies were disclosed during the

¹¹ 5 U.S.C. § 553(c).

¹² *American Med. Ass’n v. Reno*, 57 F.3d 1129, 1132-33 (D.C. Cir. 1995). See also *Engine Mfrs. Ass’n v. EPA*, 20 F.3d 1177, 1181 (D.C. Cir. 1994); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530-31 (D.C. Cir. 1982)).

¹³ *Nat’l Classification Comm. v. United States*, 779 F.2d 687, 695 (D.C. Cir. 1985) (quoting *Heckler v. Campbell*, 461 U.S. 458, 469 (1983)).

¹⁴ *Conn. Light & Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982); see also *Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (“Among the information that must be revealed for public evaluation are the technical studies and data upon which the agency relies.”) (internal quotations omitted); *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“[E]ven in the informal rulemaking context, we have cautioned that the most critical factual material that is used to support the agency’s position on review must have been made public *in the proceeding* and exposed to refutation.”) (citation omitted).

proceeding: “It is clear that it is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data or on data that, [in] critical degree *is known only to the agency*.”¹⁵ Likewise, in *American Radio Relay League, Inc. v. FCC*, the D.C. Circuit found that “[t]he Commission failed to satisfy the notice and comment requirements of the [APA] by redacting studies on which it relied in promulgating [a] rule...”¹⁶ The court remanded the matter to the Commission, ordering it to “afford a reasonable opportunity for public comment” on unredacted versions of the studies.¹⁷ Thus, the Commission must afford parties access to the data it collects here, and provide an opportunity for meaningful comment on those data, on any peer review it might solicit,¹⁸ and on any methodology it considers applying.

III. THE WHOLESALE AND ENTERPRISE MARKETPLACE HAS BEEN ALTERED IRREVOCABLY BY THE RISE OF COMPETITIVELY PROVISIONED HIGH-CAPACITY ETHERNET SERVICES.

The *Notice* seeks comment on how the Commission might conduct its “one-time, multi-faceted market analysis.”¹⁹ The Commission’s inquiry must recognize the sweeping changes that have revolutionized the high-capacity marketplace. That marketplace has moved decisively toward reliance on competitively provisioned scalable Ethernet services that provide economical

¹⁵ *National Black Media Coalition v. FCC*, 791 F.2d 1016, 1023 (2d Cir. 1986) (internal quotations omitted) (alteration in original).

¹⁶ *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 231 (D.C. Cir. 2008). Notably, these “studies” consisted merely of “data” compiled by the Office of Engineering and Technology. *See id.* at 237-38.

¹⁷ *Id.* at 242.

¹⁸ *See Special Access for Price Cap Local Exchange Carriers et al.*, 27 FCC Rcd 16318, 16359 ¶ 72 n.63 (“*Notice*”).

¹⁹ *Id.* at 16318 ¶ 72.

substitutes for copper DS1 and DS3 facilities but can also provide speeds many times higher than those legacy offerings. A DS1 circuit offers speeds of up to 1.544 Mbps – less than half the speed the Commission now deems suitable for residential broadband service. A DS3 circuit offers speeds of up to 44.736 Mbps – about one and a half times the speeds enjoyed by some residential cable modem subscribers.²⁰ As detailed below, recent events – including the advent of 4G wireless service, cloud computing, online video, and other capacity drivers – have eliminated the dominant role once played by these legacy DS_n services. Wholesale and business users now regularly require far greater speeds – sometimes up to 100 Gbps – and obtain services provisioned over not only fiber-optic links, but also cable plant, wireless spectrum, and in some cases, incumbent LEC facilities obtained as unbundled network elements at TELRIC rates. The result is a marketplace in which providers using a host of technologies compete for customers with disparate needs, serving demand with a variety of products offering speeds ranging from a few megabits to 100 or more gigabytes per second.

A. The Commission’s Analytical Framework Must Account for the Full Range of Available and Potential Alternatives to Price-Cap Carriers’ Facilities.

In the *Notice*, the Commission “agree[s] with those commenters who state that [its] analysis must take account of both actual and potential competition, as well as sources of

²⁰ See FCC’s Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, *Measuring Broadband America*, at 42-43 (July 2012), <http://transition.fcc.gov/cgb/measuringbroadbandreport/2012/Measuring-Broadband-America.pdf>.

intramodal and intermodal competition.”²¹ These points are critical, and central to a viable market analysis.

First, bedrock principles of competitive analysis call for including all substitutes in a product market.²² Thus, Commission precedent makes plain that a market is defined to include all services that customers can and would treat as effective replacements should the price of one rise significantly. As the agency has said, “when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.”²³

²¹ *Notice* at 16347 ¶ 69 n.52.

²² See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 369 ¶ 562 (3d ed. 2007) (a product market “includes (1) identical products, (2) products with such negligible physical or brand differences that buyers regard them as the same product, and (3) other products that buyers regard as such close substitutes that a slight relative price change in one will induce intolerable shifts of demand away from the other”) (internal citations omitted).

²³ *Application of Echostar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and Echostar Communications Corporation (Transferee)*, 17 FCC Rcd 20559, 20606, ¶ 106 (2002) (citing U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* (2010)). See also, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC.2d 1, 24 ¶ 67 (1980) (“We concur in the selection of the market definition standard which calls for reasonable interchangeability among products as to price, quality and use.”); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 99 FCC 2d 1020, 1031 ¶ 15 (1985), *vacated*, *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), *aff’d*, *MCI v. AT&T*, 512 U.S. 218 (1994); *Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses et al.*, 27 FCC Rcd 10698, 10724 ¶ 70 (2012); *COMSAT Corporation et al.*, 13 FCC Rcd 14083 (1998) (granting rate regulation relief because recent deployment of undersea fiber optic cables undercut satellite technical advantage in competing for international voice traffic); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415, 19444 ¶ 59 (2005) (recognizing that cable-based competition in certain wire centers justified forbearance), *aff’d*, *Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007); *AT&T Inc. and BellSouth Corp., Application for Transfer* (continued on next page)

This understanding comports with that of the courts and the expert antitrust agencies. The D.C. Circuit long ago made plain that the Commission may not ignore intermodal alternatives in its competitive analyses.²⁴ As the DOJ/FTC Horizontal Merger Guidelines explain, “[m]arket definition focuses solely on demand substitution factors, i.e., on customers’ ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service.”²⁵ At a minimum, the Commission must include in its analysis all services being marketed and purchased as alternatives to price-cap carriers’ “special access” offerings – “all services that enterprise customers view as substitutable, including services used by small- and medium-sized businesses.”²⁶

Second, the Commission must (as it acknowledges) conduct a “forward-looking” evaluation that accounts for prospective competition.²⁷ It is axiomatic that a robust competitive analysis includes scrutiny of potential and future entry into the relevant market.²⁸ Accordingly, the Commission has in many cases eased regulatory restrictions or approved transactions based

of Control, 22 FCC Rcd 5662, 5665 ¶ 3 (2007) (“*AT&T/BellSouth Merger Order*”) (recognizing rapid growth of intermodal competitors such as cable-based telephony providers).

²⁴ See *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (“*USTA I*”). See also *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 572-73 (D.C. Cir. 2004) (“*USTA II*”).

²⁵ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Horizontal Merger Guidelines* § 4, at 7 (2010) (“DOJ/FTC Horizontal Merger Guidelines”).

²⁶ *Notice* at 16350 ¶ 75.

²⁷ *Id.* at 16350 ¶ 73.

²⁸ See DOJ/FTC Horizontal Merger Guidelines § 5.1, at 15–16.

in part on the prospect of incipient competition.²⁹ For example, in reconsidering unbundling obligations imposed on incumbents, the FCC in its 2005 *Triennial Review Remand Order* established “an approach that relie[d] – to a far greater degree than our previous analyses – on the inferences that can be drawn from one market regarding the prospects for competitive entry in another.”³⁰ The Commission has emphasized that considering potential entry is particularly appropriate where, as here, the market at issue is dynamic: Such a market “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot data that may quickly and predictably be rendered obsolete as this market continues to evolve.”³¹ This approach is warranted here as well.³²

B. Demand for Special Access Services Has Dramatically Shifted Away From DSn Offerings to Higher-Capacity Ethernet Services

Any analysis that accounts for all actual and incipient competition must reflect the precipitous growth in capacity demand from buyers of wholesale and enterprise communications over the past several years, and the ways in which that growth has fueled competition for DSn

²⁹ See *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5687 ¶ 51; *SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, 20 FCC Rcd 18290, 18313 ¶ 44 (2005) (“*SBC/AT&T Merger Order*”); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18455 ¶ 51 (2005).

³⁰ *In re Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2558 ¶ 43 (2005), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

³¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14881 ¶ 50 (2005).

³² For example, many competitive fiber providers build fiber rings that pass close to a building, but do not drop “laterals” to serve that building until a customer subscribes to a service. The Commission must account for this potential competition, given the very limited costs the competitive provider would face in extending a lateral once its fiber passes a location.

services. As CenturyLink and others have noted, new high-bandwidth consumer and business offerings are dramatically increasing demand for higher and higher capacity carriage.³³ Whereas DS1 and DS3 links top out at 1.544 Mbps and 44.736 Mbps, respectively, Frost and Sullivan reports that “[s]ervice providers are seeing increased demand for 100 Mbps and 1 GigE speeds from their wholesale customers.”³⁴

This demand boom is being driven in significant part by an explosion in mobile data traffic. “In the early LTE rollouts that started in 2010, carriers [were] deploying 50Mbps to 100Mbps cell site backhaul.”³⁵ This demand is expected to grow to “300 Mb to 1 gigabit by 2015.”³⁶ Such demand is commensurate with expected growth in mobile data traffic overall.

³³ See, e.g., Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, Attachment at 4 (Apr. 20, 2012) (“As the market migrates to Ethernet, TDM purchases will continue to decline.”); Qwest 2010 Comments at 19 (“There is increasing consensus that copper-based, DS_n-level special access services will be incapable of supporting backhaul requirements for this explosion of data traffic.”).

³⁴ Frost & Sullivan, *Analysis of the Wholesale Carrier Ethernet Services Market, 2012: Mobile Backhaul and Retail Market Trends Fuel Revenue Growth* 18 (2012) (“Carrier Ethernet Services Market”). See also Ravi Yekula & Merrion Edwards, Cyber Media (India) Ltd., *Enabling an Efficient Cloud* (Nov. 16, 2012), available at <http://www.voicendata.com/voice-data/news/159932/enabling-efficient-cloud> (“Data rates in enterprise networks and data centers worldwide have increased continuously to the point where 10Gb/s is now fairly common. Furthermore, 40 Gb/s and 100 Gb/s data rates are increasingly being adopted.”).

³⁵ Michael Howard, Infonetics Research, Inc., *Using Carrier Ethernet to Backhaul LTE* 8 (2011), available at <http://www.infonetics.com/whitepapers/2011-infonetics-research-whitepaper-using-carrier-ethernet-to-backhaul-lte.pdf>.

³⁶ Scott Knox, *Reader Forum: 10GigE delivers mobile backhaul scalability*, RCRWireless (Mar. 19, 2012), available at <http://www.rcrwireless.com/article/20120319/opinion/reader-forum-10gige-delivers-mobile-backhaul-scalability/>.

Cisco predicts that such traffic will increase by 16 times between 2011 and 2016.³⁷ This growth is “motivating carriers to change from synchronous technology over to Ethernet.”³⁸ One analyst found that most wireless carriers already “have 70 to 80 percent of their backhaul switched to fiber, provided by numerous alternative suppliers,”³⁹ and another has predicted that “the number of cell sites served by Ethernet over fiber will grow at a 45% compound annual growth rate through 2015.”⁴⁰

This paradigmatic shift in demand patterns has prompted a rush to deploy new next-generation Ethernet services. Wholesale carrier Ethernet services generated revenues of about \$1.3 billion in 2011, and those revenues are poised to exceed \$4.2 billion by 2016, reflecting a

³⁷ See Cisco, *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2012–2017*, at 3 (2013), available at http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf (“Cisco Visual Networking Index”).

³⁸ Press Release, Frost & Sullivan, Growth in Mobile Backhaul Spurs Demand for Gigabit Ethernet Test Equipment (Mar. 5, 2012), available at <http://www.frost.com/prod/servlet/press-release.pag?docid=254943525>.

³⁹ See Roger Entner, *Re-regulating a dying market won't impact cost structure of operators*, FierceWireless (June 25, 2012), available at <http://www.fiercewireless.com/story/entner-re-regulating-dying-market-wont-impact-cost-structure-operators/2012-06-26>. See also Barry Zipp, *2013 Predictions: Mobile backhaul evolution in 2013 and beyond*, RCRWireless News (Jan. 22, 2013), available at <http://www.rcrwireless.com/article/20130122/infrastructure-2/2013-predictions-mobile-backhaul-evolution-2013-beyond> (noting that “Infonetics predicts that Ethernet will account for more than 80% of all backhaul services revenue by 2015”).

⁴⁰ *Id.* Wireless providers are themselves racing to deploy fiber to carry this backhaul traffic. T-Mobile, for example, commenced an aggressive rollout of “enhanced” backhaul in 2007, and now enjoys fiber backhaul covering 95 percent of its 4G network. See Dave Mayo, *T-Mobile's Backhaul Strategy Key to a Competitive 4G Experience*, T-Mobile Issues & Insights Blog (Aug. 1, 2012), available at <http://blog.t-mobile.com/2012/08/01/t-mobiles-backhaul-strategy-key-to-a-competitive-4g-experience>; Wayne Rash, *T-Mobile LTE backhaul nearly complete*, FierceMobileIT (Aug. 7, 2012), available at <http://www.fiercemobileit.com/story/t-mobile-lte-backhaul-nearly-complete/2012-08-07>.

compound annual growth rate of 26.5%.⁴¹ INSIGHT sized revenues from Ethernet services in the United States at “over \$3 billion annually” as of late 2012, and predicted them to grow to \$25-\$30 billion by 2017.⁴² These figures reflect exponential growth since 2005, when this docket opened and Ethernet services accounted for only \$650 million per year.⁴³

The shift to high-capacity Ethernet services – which itself reflects the success of the Commission’s efforts to promote infrastructure investment – has, in the vast majority of geographic areas, undercut reliance on the DS_n circuits at issue in this proceeding. One analyst has reported that the proportion of enterprise purchasers’ spending attributed to DS₃s and lower-capacity circuits declined from 68 percent in 2008 to 36 percent in 2011.⁴⁴ Comcast has cited the “‘death’ of the T1 [i.e., DS₁].”⁴⁵ Wireless backhaul needs have evolved especially abruptly: AT&T has observed that its sales of DS₁s and DS₃s to wireless carriers “peaked in April 2011” and that, by the end of 2011, “wireless carrier purchases of DS₁s declined by nearly 20%.”⁴⁶

⁴¹ *Carrier Ethernet Services Market* at 8, 13.

⁴² The Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, at 83 (Sept. 2012) (“*Cable Enterprise Services*”).

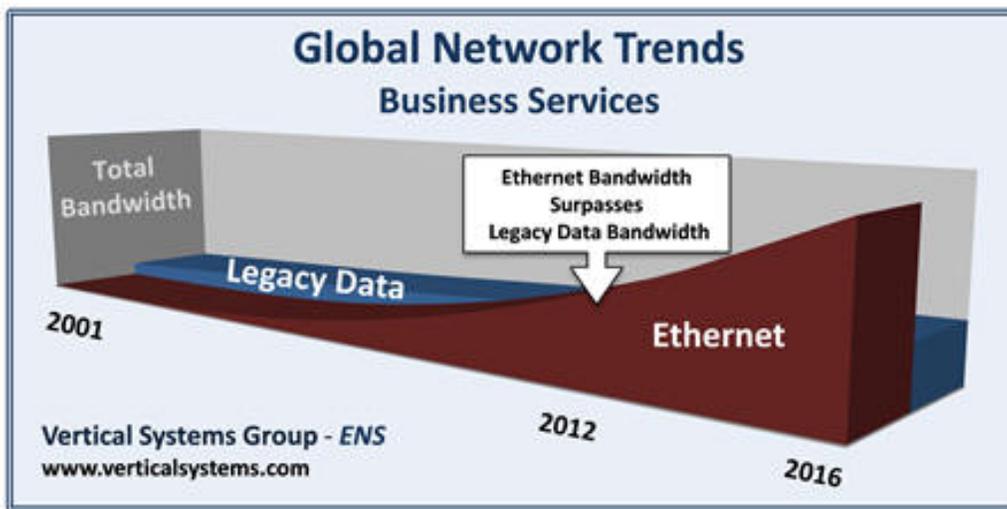
⁴³ The Insight Research Corp., *Public Ethernet Services: 2007-2012*, at 5 (2007).

⁴⁴ Letter from Frank Simone, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, WCB/Pricing File Nos. 12-04 & 12-05, Attachment at 1 (June 6, 2012) (citing analyst findings).

⁴⁵ Karen Schmidt, *Comcast Survey: High-Speed Networks Are Helping Transform Businesses* (May 3, 2012), available at <http://corporate.comcast.com/comcast-voices/comcast-survey-high-speed-networks-are-helping-transform-businesses>.

⁴⁶ *See, e.g.*, Letter from Frank Simone, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, WCB/Pricing File Nos. 12-04 & 12-05, Attachment at 1 (June 6, 2012); Letter from David L. Lawson, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, at 2 (Mar. 28, 2012) (“2011 marked the year in which the shift toward Ethernet services finally sent legacy TDM services into decline”).

CenturyLink’s experience is similar – demand for DS1s and DS3s peaked in 2010 and 2011, respectively. The Commission itself has found that the historically “heavy reliance on copper transmission [of backhaul traffic] is diminishing,” even while “demand for backhaul capacity is increasing.”⁴⁷ Thus, while DSn services are still used by many entities, they are quickly being supplanted by Ethernet offerings for many customers, as this Vertical Systems Group graphic shows:



C. Numerous Providers Supply Wholesale and Enterprise Customers’ Growing Capacity Needs

As the discussion above makes clear, mushrooming capacity needs have reduced the preeminent role once played by the DSn-capacity facilities at issue here, forcing them into competition with packet-switched Ethernet services. As the Commission has recognized for years, the marketplace for these more advanced services is competitive: “There are a myriad of

⁴⁷ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 et al.*, 26 FCC Rcd 9664, 9845–46 ¶¶ 320, 322 (2011).

providers prepared to make competitive offers to enterprise customers demanding packet-switched data services located both within and outside any given incumbent LEC's service territory," including "many competitive LECs, cable companies, systems integrators, equipment vendors, and value-added resellers..."⁴⁸ There are, as the Commission has found, "[m]any significant providers of Frame Relay services, ATM services, and Ethernet-based services" that "either are providing, or readily could enter the market to provide, these services."⁴⁹ The Commission has noted further that competing carriers are "able to economically deploy OCn-level facilities to compete with [the ILECs'] offerings" and that "OCn-level facilities produce revenue levels that can justify the high cost of loop construction."⁵⁰ Thus, the Commission does not apply tariffing and pricing mandates to the "Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services," offered by Verizon, AT&T, Qwest, Frontier, and Citizens or any competitive fiber provider.⁵¹

The Commission's deregulatory approach to optical and packetized services has triggered additional growth of these services, rendering high-capacity wholesale and enterprise services

⁴⁸ *AT&T Enterprise Forbearance Order*, 22 FCC Rcd at 18718-19 ¶ 22; *Embarq et al. Enterprise Forbearance Order*, 22 FCC Rcd at 19491 ¶ 21; *Qwest Enterprise Forbearance Order*, 23 FCC Rcd at 12274-75 ¶ 25.

⁴⁹ *AT&T Enterprise Forbearance Order*, 22 FCC Rcd at 18718 ¶ 23; *Embarq et al. Enterprise Forbearance Order*, 22 FCC Rcd at 19491-92 ¶ 22; *Qwest Enterprise Forbearance Order*, 23 FCC Rcd at 12275 ¶ 26.

⁵⁰ *AT&T Enterprise Forbearance Order*, 22 FCC Rcd at 18724 ¶ 32; *Embarq et al. Enterprise Forbearance Order*, 22 FCC Rcd at 19496-97 ¶ 31.

⁵¹ *See supra* note 6. Embarq has also received relief with respect to certain offerings in these categories.

even more competitive today. At least 30 providers now offer enterprise broadband services nationally or to large areas of the country.⁵² As detailed herein, every major cable provider now competes aggressively for enterprise and wholesale customers. Moreover, wireless providers are capitalizing on new technologies to offer wireless wholesale and enterprise services. Finally, entities relying on unbundled DS0 loops – available ubiquitously at TELRIC rates – are providing “Ethernet over copper, or “EoC” to high-volume enterprise customers not requiring OCn-level speeds.

1. Competitive Fiber Providers

In recent years, dozens of competitive fiber providers have capitalized on burgeoning bandwidth needs by providing carrier- and enterprise-grade Ethernet services over their ever-more-ubiquitous long-haul and metropolitan networks. Moreover, the cost of deploying new fiber “continues to fall.”⁵³ Market leader tw telecom offers service “across the United States to thousands of enterprise customers and buildings through a single Ethernet connection scalable to 10 Gig.”⁵⁴ tw telecom’s network boasts access to about 17,000 buildings⁵⁵ with ubiquitous

⁵² See *CenturyLink 2012 Enterprise Broadband Forbearance Petition* at Attachment E.

⁵³ Joshua Wilshusen, *Deploying Tomorrow’s Fiber Networks Today*, Intergraph Connect (Jan. 15, 2013), available at <http://www.intergraphblogs.com/connect/2013/01/deploying-tomorrows-fiber-networks-today/>.

⁵⁴ Press Release, tw telecom, tw telecom Launches Ubiquitous Availability of National Ethernet Solutions for Carriers (Dec. 17, 2012), available at <http://newsroom.twtelecom.com/2012-12-17-tw-telecom-Launches-Ubiquitous-Availability-of-National-Ethernet-Solution-for-Carriers>.

⁵⁵ Investor Presentation, tw telecom, at 4 (Dec. 2012), available at http://www.twtelecom.com/PDFs/Investors/Financial-Reporting/TWTC_Investor_Presentation_Dec2012/ (“TWT Investor Presentation”).

Ethernet service “across 75 markets.”⁵⁶ In December 2012, the company reported its 41st consecutive quarter of enterprise service growth,⁵⁷ with 22% year-on-year growth in Ethernet and VPN products from the third quarter of 2011 to the third quarter of 2012.⁵⁸ tw telecom “focus[es] on the medium and large enterprise,” serving “about 40% of the Fortune 1000 in some form or fashion.”⁵⁹

XO provides a full suite of wholesale and retail enterprise services, including point-to-point private line, hub service, Ethernet (offering “bandwidth options ranging from 3Mbps to 10Gbps”), and “Wavelength” wireless connectivity.⁶⁰ In August 2012, XO announced that it had become “the first service provider in the United States to deploy 100 Gbps ... optical technology across a long haul fiber network on a nationwide basis.”⁶¹ XO offers Ethernet services in 60 markets⁶² and its metropolitan networks include “more than 1 million fiber miles.”⁶³ XO

⁵⁶ See Wholesale, tw telecom, <http://www.twtelecom.com/telecom-solutions/wholesale-ethernet/> (last visited Feb. 7, 2013).

⁵⁷ *TWT Investor Presentation* at 15.

⁵⁸ *Id.* at 16.

⁵⁹ Corrected Transcript of TW Telecom, Inc., UBS Global Media and Communications Conference, at 9-10 (Dec. 4, 2012) (Michael A. Roleau, Senior VP-Business Development & Strategy, TW Telecom, Inc.).

⁶⁰ Network Transport Overview, XO Communications, <http://www.xo.com/services/carrier/transport/Pages/overview.aspx> (last visited Feb. 7, 2013).

⁶¹ Press Release, XO Communications, XO Communications First Service Provider to Deploy 100G Nationwide (Aug. 14, 2012), available at <http://www.xo.com/about/news/Pages/539.aspx>.

⁶² XO Communications, *Choosing the Right Ethernet Solution for Your WAN*, at 16, available at <http://www.xo.com/SiteCollectionDocuments/Whitepapers/right-ethernet-solution.pdf> (2012) (“*XO Choosing the Right Ethernet Solution for Your WAN*”).

estimates that “10 Mbps Internet service provisioned over Ethernet can save 50% to 65% in cost per Mbps over legacy T1 and bonded T1 service.”⁶⁴

Level 3’s network, for its part, includes “54,000 intercity route miles in North America connecting more than 150 cities,” “26,000 metro route miles in North America,” including “116 metro fiber networks in the United States,” and access to “more than 8000 on-net buildings.”⁶⁵ In addition to “lit” services, Level 3’s dark fiber offering gives customers “control over scalability and capacity management, network management, technology evolution, and reliability and network uptime....”⁶⁶ President Jeff K. Storey told investors in September that the company had “100,000 buildings within 500 feet of [its] network,” and thus “can add those buildings at a very low cost....” That approach, he explained, reflected the company’s preferred means of expansion: “When we get a customer, if we can turn up that building quickly enough, we’ll turn up the building on fiber and never use an off-net service.”⁶⁷

Smaller entities also successfully target specific enterprise customer niches. Cbeyond, for example, has deployed fiber facilities to about 1000 buildings, and emphasizes that its

⁶³Ethernet Private Line, XO Communications, <http://www.xo.com/services/network/ethernet/Pages/EthernetPrivateLine.aspx> (last visited Feb. 7, 2013).

⁶⁴ *XO Choosing the Right Ethernet Solution for Your WAN* at 5.

⁶⁵ See Level 3, *Level 3 Dark Fiber Service*, at 2, http://cdn1.cust.footprint.net/prod/App_Data/Replicated/MediaFiles/4/E/D/%7B4ED3E219-0F8B-4A96-9028-591C50F9195B%7Dbrochure_dark_fiber_004.pdf (“*Level 3 Dark Fiber Service*”).

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 12.

presence in those buildings provides “the opportunity ... to serve an additional seven, eight, nine, 10 more customers in those same buildings, with little or no additional expense,” opening a potential for “huge revenue[s].”⁶⁸

2. Cable Providers

Cable MSOs are also making deep inroads into wholesale and enterprise high-capacity services, ratcheting up capital expenditures and enjoying significant revenue growth in this segment. Cable providers “are in the ideal position to develop comprehensive carrier Ethernet architecture to support a wide range of business services.”⁶⁹ Indeed, while cable plant “passes three quarters of the businesses in the US, ... only one third of business broadband subscribers use [cable] services.”⁷⁰ For this reason, “MSOs have made significant capital and organizational commitments to growing their commercial services market....”⁷¹ That commitment is bearing fruit: By 2011, Comcast, Time Warner Cable, and Cox had each passed \$1 billion in annual “commercial services” revenue.⁷² Moreover, INSIGHT projects that cable operators will see “commercial service” revenues grow at a compound annual rate of 10 percent annually through

⁶⁸ Corrected Transcript of Cbeyond, Inc., Bank of America Merrill Lynch Media, Communications and Entertainment Conference, at 4 (Sept. 12, 2012) (J. Robert Fugate, Executive Vice President and Chief Financial Officer, Cbeyond, Inc.).

⁶⁹ *Cable Enterprise Services* at 88.

⁷⁰ *Id.* at 105.

⁷¹ *Id.* at 4.

⁷² *See id.* at 26.

2017,⁷³ while their market share for such services grows from 8 percent in 2012 to 13.3 percent in 2017.⁷⁴

Comcast touts its suite of scalable enterprise services as a flexible alternative to incumbent LEC services.⁷⁵ For example, Comcast offers Ethernet private line services in “flexible, scalable point-to-point configurations delivering high-capacity fiber connections between two sites,” with business-class support, at capacities ranging from 1 Mbps to 10 Gbps.⁷⁶ It also offers Ethernet VPN service (“an ideal replacement for frame relay or ATM services,” configurable from 1 Mbps to 10 Gbps)⁷⁷ and “[a]ny-to-any connectivity between physically distributed locations.”⁷⁸ Comcast invested \$607 million in business-service Capex in 2011 alone,⁷⁹ and has seen “strong returns well above [its] cost of capital.”⁸⁰ On the company’s third-quarter 2012 earnings call, company Vice Chairman and Chief Financial Officer Michael

⁷³ *Id.* at 115.

⁷⁴ *Id.* at 9.

⁷⁵ See Ethernet Data Services, Comcast, <http://business.comcast.com/enterprise/services/data> (last visited Feb. 7, 2013).

⁷⁶ Ethernet Private Line, Comcast, <http://business.comcast.com/enterprise/services/data/ethernet-private-line> (last visited Feb. 7, 2013).

⁷⁷ Ethernet Virtual Private Line, Comcast, <http://business.comcast.com/enterprise/services/data/ethernet-virtual-private-line> (last visited Feb. 7, 2013).

⁷⁸ Ethernet Network Service, Comcast, <http://business.comcast.com/enterprise/services/data/ethernet-network-service> (last visited Feb. 7, 2013).

⁷⁹ Corrected Transcript of Comcast Corp., Q4 2011 Earnings Call, at 6 (Feb. 15, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

⁸⁰ Corrected Transcript of Comcast Corp., Q1 2012 Earnings Call, at 5 (May 2, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

Angelakis reported that the company “continue[d] to experience strength in [its] Business Services Group, ... with revenue increasing 34% to \$621 million” for the quarter.⁸¹ Angelakis also has noted that Comcast had begun by targeting businesses with 20 or fewer employees, but has moved on to serving businesses with between 20 and approximately 250 employees.⁸² Comcast is also seeing growth in its cell-site backhaul offerings, noting in early 2012 that it had “increased the number of installed towers by about 79% since 2010.”⁸³ Angelakis recently noted that “the existing addressable market for [Comcast’s] Business Services group is probably around \$20 billion to \$25 billion, and we’re in the \$2.5 billion range so somewhere around 10%.”⁸⁴

Time Warner Cable (“TWC”) is seeing similar success and opportunity. The company offers business-class Ethernet services with “scalable bandwidth speeds ranging from sub-T1 to 10 Gbps.”⁸⁵ In 2012, TWC doubled the number of commercial buildings connected to fiber, and enjoyed “organic growth of more than 20%” among enterprise customers.⁸⁶ TWC CEO Glenn

⁸¹ Corrected Transcript of Comcast Corp., 3Q 2012 Earnings Call, at 7 (Oct. 26, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.).

⁸² Corrected Transcript of Comcast Corp., Wells Fargo Securities Technology, Media & Telecom Conference, at 9-10 (Nov. 7, 2012) (Michael J. Angelakis, Vice Chairman & Chief Financial Officer, Comcast Corp.) (“Angelakis Wells Fargo”).

⁸³ Corrected Transcript of Comcast Corp., Q1 2012 Earnings Call, at 10 (May 2, 2012) (Neil Smit, President & Chief Executive Officer, Comcast Cable Communications LLC).

⁸⁴ Angelakis Wells Fargo at 9.

⁸⁵ See EPL, Time Warner Business Class®, <https://www.twcbc.com/NYC/Products/ProductDetails/epl.ashx> (last visited Feb. 8, 2013).

⁸⁶ Corrected Transcript of Time Warner Cable, Inc., Q4 2012 Earnings Call, at 5 (Jan. 31, 2013) (Robert D. Marcus, President & Chief Operating Officer, Time Warner Cable, Inc.).

Britt recently observed that business and government services were the company's largest growth area. "I think it's only going to get bigger as we look at different verticals and the changes going on and our economy around us.... [T]he sky's the limit in this area."⁸⁷ Indeed, just this January, TWC reorganized its management structure, creating a new business unit responsible for enterprise services – a change meant to “reflect[]” that segment's “increasing importance” and position the company “to fully capitalize on this significant growth opportunity.”⁸⁸

Cox is also competing successfully for high-capacity customers. Cox now boasts 290,000 business and wholesale customers, 80 percent of whom are very small businesses.⁸⁹ Cox serves clients including healthcare, hospitality, and education providers as well as government agencies and wireless providers requiring cell-site backhaul.⁹⁰ Cox Business owns and operates a national backbone comprising 13,000 miles of fiber, with tailored offerings for

⁸⁷ Corrected Transcript of Time Warner Cable, Inc., UBS Global Media and Communications Conference, at 12 (Dec. 3, 2012) (Glenn A. Britt, Chairman & Chief Executive Officer, Time Warner Cable, Inc.).

⁸⁸ Press Release, Time Warner Cable, Time Warner Cable Announces New Organizational Structure, (Jan. 23, 2012), *available at* http://www.timewarnercable.com/en/about-us/press/time_warner_cable_new_organizational_structure.html.

⁸⁹ Press Release, Cox Communications, Cox Launches Mobile Version of Small Business Social Destination (Oct. 9, 2012), *available at* <http://cox.mediaroom.com/index.php?s=43&item=634> . Cox also touts its expertise providing business services to these industries, in addition to the real estate and residential communities industries. *See generally* Industries, Cox, <http://ww2.cox.com/business/lasvegas/industries.cox> (last visited Feb. 8, 2013).

⁹⁰ *See generally* Industries, Cox, <http://ww2.cox.com/business/lasvegas/industries.cox> (last visited Feb. 8, 2013).

businesses including 10 Gbps speeds available to those with the most demanding requirements.⁹¹ In September 2012, Cox announced the first market with new 80 Mbps and 100 Mbps offerings for small and medium business customers; the company intends to expand this offering into additional markets early this year.⁹²

Of course, success is not limited to the largest cable providers. Cablevision's business services unit, branded Lightpath, provides "Ethernet-based communications solutions for New York metropolitan area business," "leveraging the flexibility of Ethernet to create product suites for the education, healthcare and government verticals, as well as adding Next Generation Hosted Voice, Conference Bundle, Managed Video and Managed WiFi to its managed services lineup."⁹³ In the third quarter of 2012, Lightpath's net revenues increased 4.9%, to \$81.3 million.⁹⁴ Third-quarter results reflected a 12.7% increase in revenue from Ethernet services.⁹⁵

⁹¹ Press Release, Cox Communications, Cox Business Continues to Meet Customer Needs with Launch of Accelerated Broadband Tiers (Sept. 12, 2012), *available at* <http://cox.mediaroom.com/index.php?s=43&item=631>.

⁹² *Id.*

⁹³ Press Release, Lightpath, Lightpath Introduces New Branding and Logo (Dec. 5, 2012), *available at* https://golightpath.com/pressreleases?p_p_id=56_INSTANCE_K0en&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=column-2&p_p_col_count=2&articleId=340393.

⁹⁴ Press Release, Cablevision, Cablevision Systems Corporation Reports Third Quarter 2012 Results, at 2 (Nov. 6, 2012), *available at* <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTYwNzExfENoaWxkSUQ9LTF8VHlwZT0z&t=1>.

⁹⁵ *See id.*

3. Wireless Providers

As wireless technology continues to mature, high-capacity services once available only over copper, coaxial cable, or fiber optics are increasingly being provisioned over the airwaves. For example, Broad Sky networks “now offers Spectrum 4GWiMAX, a fixed-wireless solution[,] in 88 markets....”⁹⁶ Its networks “are built on fixed-wireless technology that is scalable up to GigE speeds” not reliant on “T1 or DS3 increments.”⁹⁷ BroadSky also offers 4G LTE enterprise services “to replace expensive frame relay,” with “download speeds averaging 10MB.”⁹⁸ XO has broadband wireless spectrum in 80 major metropolitan markets to provide Broadband Wireless Access for Ethernet, Private Line and dedicated Internet access services.⁹⁹ Its “Fixed Wireless Access” service offers “an alternative last-mile and metro-area access solution” with “speeds up to 10 Gbps.”¹⁰⁰

Others are also exploring opportunities in the wireless space. BridgeWave uses millimeter-wave spectrum to provide “full gigabit (GigE) wireless transmission [as] an

⁹⁶ See Broadband Internet Sample Pricing, BroadSkyNetworks, <http://www.broadskynetworks.net/pricing.html> (last visited Feb. 8, 2013).

⁹⁷ *Id.*

⁹⁸ See Broad Sky’s Spectrum 3G/4G LTE Fixed Wireless Service, BroadSkyNetworks, <http://www.broadskynetworks.net/4G-LTE-Business-Router-Back.html> (last visited Feb. 8, 2013).

⁹⁹ See Network Maps, XO Communications, <http://www.xo.com/about/network/Pages/maps.aspx> (last visited Feb. 8, 2013).

¹⁰⁰ Fixed Wireless Access, XO Communications, <http://www.xo.com/services/network/Pages/broadband-wireless.aspx> (last visited Feb. 8, 2013).

affordable alternative to high capacity leased circuits.”¹⁰¹ BridgeWave cites “many advantages of utilizing high-capacity gigabit wireless links,” including “a rapid return-on-investment,” the absence of recurring costs, ease of deployment, and scalability.¹⁰² Towerstream offers high-speed Internet access to businesses in 12 major markets.¹⁰³ It highlights its ability to place antennas “in locations where it is not physically possible or financially feasible to install fiber,” recognizing that, in those cases, its network provides a means by which carriers and other users can “backhaul their traffic to an aggregation location of their choice.”¹⁰⁴

4. Providers Relying on Unbundled Copper Loops

In addition to the many providers deploying their own facilities to provision wholesale and enterprise services, competitors are also leveraging new technologies to provide “Ethernet over copper,” or “EoC,” using unbundled DS0-capacity copper loops. EoC offers speeds ranging from 3 to 50 Mbps in certain areas today,¹⁰⁵ and is therefore another substitute for the DSn-capacity offerings at issue here. Incumbent LECs are required to make these loops available at

¹⁰¹ BridgeWave Communications, *Gigabit Wireless Leased-Line Replacement*, at 2 (2001), available at http://www.digitalairwireless.com/files/Leased-Line-Replacement_1332962764.pdf.

¹⁰² Leased-Line Replacement, BridgeWave Communications, <http://www.bridgewave.com/solutions/leased-line-replacement.cfm> (last visited Feb. 8, 2013).

¹⁰³ See About Towerstream, Towerstream, <http://www.towerstream.com/Company.aspx> (last visited Feb. 8, 2013).

¹⁰⁴ Corrected Transcript of Towerstream Corp., Q3 2012 Earnings Call, at 4 (Nov. 8, 2012) (Joseph Hernon, Chief Financial Officer, Towerstream Corp.).

¹⁰⁵ See Letter from Joshua M. Bobeck *et al.*, Counsel to Mpower Communications Corp., U.S. TelePacific Corp., ACN Communications Services, Inc., Level 3 Communications, LLC, TDS Metrocom, LLC, and Telecommunications for the Deaf and Hard of Hearing, Inc., to Marlene H. Dortch, FCC, WC Docket Nos. 10-188, 12-353, GN Docket Nos. 09-51, 13-5, RM-11358, at 5-6 (filed Jan. 25, 2013) (“*CLEC EoC Ex Parte*”).

TELRIC rates in virtually all their wire centers,¹⁰⁶ rendering EoC an economical means of obtaining high-capacity carriage. According to a recent *ex parte* filing made by several competitive LECs, “the unbundling regime gives competitors the ability to enter less concentrated markets and prove the business case that eventually may lead to deploying their own last mile facilities.”¹⁰⁷

Given its low cost, it is not surprising that many competitors have used EoC to serve enterprise customers. “[A] TelePacific survey of nine CLECs in California shows that they have installed EoC capability in 343 California wire centers, giving the majority of small and medium sized businesses served by those wire centers the ability to purchase EoC based broadband service today,” whereas a similar study found that “six CLECs provide EoC broadband options to more than 400,000 business customers in 130 wire centers in Texas.”¹⁰⁸ XO, for example, pitches its EoC offering as “an easy, affordable, and immediate solution for providing feature-rich, high-speed access and services.”¹⁰⁹ XO further emphasizes the benefits of its reliance on unbundled loops: “Thanks to legacy voice and the widespread deployment of DSL, twisted-pair copper is relatively ubiquitous throughout the first mile. Consequently, [EoC] is ideal as a

¹⁰⁶ While the Commission has forbore from applying the copper loop unbundling mandate in a small handful of MSAs, its rules mandate that copper loops be made available for unbundling in all other areas. See 47 C.F.R. § 51.319(a)(1); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, 22 FCC Rcd 1958 (2007); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005).

¹⁰⁷ CLEC *EoC Ex Parte* at 6-7.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *XO Choosing the Right Ethernet Solution for Your WAN* at 12.

deployment topology for residential neighborhoods and office complexes.”¹¹⁰ In November, XO announced the addition of 100 Mbps EoC services to “nearly two million business locations.”¹¹¹

XO is hardly alone. Integra, for example, announced in November that it was offering “60 megabit-per-second (Mbps) Ethernet over Copper (EoC) symmetrical access throughout its network footprint.”¹¹² As Integra states, an EoC architecture permits use of “[s]ervices such as IP/MPLS VPN Solutions, Ethernet Services, high bandwidth internet, SIP Solutions and Hosted Voice Services..., allowing businesses to prioritize and easily manage complex network traffic while ensuring Class of Service and Quality of Service, even at peak traffic loads.”¹¹³ Other providers are following suit: In October 2012, Windstream announced that it was expanding its Carrier Switched Ethernet product to more than 300 new markets in which it is a competitive LEC, offering “interconnect ports of 100 Mbps, 1 Gbps, and 10 Gbps” and “end user loops from 3 Mbps to 1 Gbps” over technologies including EoC.¹¹⁴ MegaPath, which claims to offer the nation’s *largest* EoC network, has deployed service to almost 700 central offices in 50 major

¹¹⁰ *Id.*

¹¹¹ Press Release, *XO Communications*, *XO Communications Extends its Ethernet Services Leadership with New Speeds and Expanded Nationwide Coverage* (Nov. 7, 2012), available at <http://www.xo.com/about/news/Pages/546.aspx>.

¹¹² Press Release, Integra Telecom, *Integra Boosts Network Bandwidth with Symmetrical 60-Mbps Ethernet Over Copper Access* (Nov. 6, 2012), available at <http://www.integratelecom.com/about/news/Pages/Integra-Boosts-Network-Bandwidth-with-Symmetrical-60-Mbps-Ethernet-Over-Copper-Access.aspx>.

¹¹³ *Id.*

¹¹⁴ Press Release, Windstream, *Windstream announces Carrier Switched Ethernet expansion* (Oct. 8, 2012), available at http://news.windstream.com/article_display.cfm?article_id=1419.

markets nationwide.¹¹⁵ Granite Telecom offers EoC at 3 Mbps, 5 Mbps, or 10 Mbps, citing “[s]ignificant cost savings over DS-3 and older network technologies.”¹¹⁶ In May 2012, Channel Partners reported that Cbeyond was providing 22 percent of its customers with EoC.¹¹⁷

D. The Commission Must Ensure That Any New Rules Do Not Imperil The Migration to High-Capacity IP Networks.

Given the dynamic changes transforming the wholesale and enterprise marketplace, regressive regulation of the sort advocated by some in this docket would pose a threat to the Commission’s broader policy objectives. Specifically, the Commission should take care here not to imperil its multi-pronged and successful efforts to promote broadband infrastructure investment that benefits both residential and high-capacity enterprise customers.¹¹⁸

¹¹⁵ See Business Ethernet, MegaPath, <http://www.megapath.com/data/ethernet/product-spotlight/> (last visited Feb. 8, 2013).

¹¹⁶ See Granite, <http://www.granitenet.com/> (under “Data Services,” “High Capacity”) (last visited Feb. 8, 2013).

¹¹⁷ See *Cbeyond’s New Fiber Partnerships Speed Expansion Plans*, Channel Partners Telecom (May 2, 2012), available at <http://www.channelpartneronline.com/news/2012/05/cbeyond-s-new-fiber-partnerships-speed-expansion.aspx>; see also Sean Buckley, *Cbeyond employs Fiberlight, Zayo to expand its national fiber network reach*, FierceTelecom (May 4, 2012), available at <http://www.fiercetelecom.com/story/cbeyond-employs-fiberlight-zayo-expand-its-national-fiber-network-reach/2012-05-04> (same).

¹¹⁸ See, e.g., *Connect America Fund et al.*, 26 FCC Rcd 17663 (2011) (“*USF/ICC Transformation Order*”); *Implementation of Section 224 of the Act et al.*, 26 FCC Rcd 5240 (2011); *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 26 FCC Rcd 5384 (2011); News Release, FCC Chairman Julius Genachowski Announces Formation of ‘Technology Transitions Policy Task Force’ (Dec. 10, 2012), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1210/DOC-317837A1.pdf.

The Commission has acted consistently to “accelerate the transition from circuit-switched to IP networks.”¹¹⁹ As detailed above, the high-speed market has seen a drastic rise in capacity levels, with service provisioned over various network architectures. This rise has been accompanied by a similar transformation in residential services. When carriers deploy new fiber to serve the high-capacity markets, that fiber also benefits residential users, who are able to access fiber over shorter copper loops, improving broadband speeds to enable (for example) triple-play service, or even permitting broadband services to be offered to a given location for the first time. Thus, advances in the high-capacity sector have facilitated the deployment of robust broadband to residential consumers as well. Internet traffic volumes have increased tenfold since this docket opened in 2005, and nearly 800-fold since the *Pricing Flexibility Order*¹²⁰ issued in 1999.¹²¹ Speeds have skyrocketed as well: According to the Commission’s most recent published data, nearly 30 percent of fixed and mobile broadband connections as of mid-2011 offered downstream speeds of 6 Mbps or more, and nearly 40 percent offered speeds of 3 Mbps or more.¹²² There were nearly 66 million broadband lines offering 3 Mbps or more downstream – more than double the number just two and a half years before¹²³ – and 206 million lines

¹¹⁹ *USF/ICC Transformation Order* 26 FCC Rcd at 17670 ¶ 11.

¹²⁰ *Access Charge Reform, et al.*, 14 FCC Rcd 14221 (1999), *aff’d WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

¹²¹ *See Cisco Visual Networking Index* at 1.

¹²² *See* FCC, Internet Access Services: Status as of June 30, 2011, at Figure 1(a) (Industry Analysis and Technology Div., Wireline Comp. Bur. June 2012).

¹²³ *Id.* at Table 2.

offering speeds of at least 200 Kbps in at least one direction.¹²⁴ By contrast, at the end of 2005, there were just 50 million lines offering 200 Kbps in at least one direction, and the Commission did not even track offerings with higher speeds.¹²⁵ Average downstream speeds have increased 77% over the past two years alone.¹²⁶ Increased bandwidth has driven demand for online video, smartphones, tablets, and other innovations that are transforming Americans' lives.¹²⁷

Thus, in reassessing its framework for regulating DSn-capacity incumbent LEC offerings, the Commission must remain mindful of the risks that such regulation might pose to customers throughout the communications ecosystem. As the *Notice* recognizes, regulation might “hinder[], for example, by keeping prices low, competitive investments that would reduce or obviate the need for regulation.”¹²⁸ In particular, the elimination of pricing flexibility would have two pernicious consequences: It would subject certain areas to below-cost pricing, undermining incentives to migrate to next-generation networks and services, and it would prevent buyers and sellers of high-capacity services from negotiating contracts designed to meet their specific needs, forcing them to rely instead on one-size-fits-all tariffed offerings. The

¹²⁴ *Id.* at Table 1.

¹²⁵ See FCC, Local Telephone Competition: Status as of December 31, 2005, at Table 1 (Industry Analysis and Technology Div., Wireline Comp. Bur. July 2006).

¹²⁶ See Telogical Systems, *Trends in U.S. Consumer Broadband Pricing* (January 2010 to December 2012) (2012), at 8, available at http://www.teamlightbulb.com/Broadband/Heimann_Woessner_Telogical%20Systems.pdf.

¹²⁷ See generally International Data Corporation, *IDC Predictions 2013: Competing on the 3rd Platform*, (Nov. 2012), available at <http://www.idc.com/research/Predictions13/downloadable/238044.pdf>.

¹²⁸ *Notice* ¶ 67.

imposition of non-market prices would promote dependence on legacy services even when it would be less costly – and thus more socially efficient – to shift to next-generation Ethernet offerings, adversely affecting the demand for new infrastructure investment across the sector. As Drs. Timothy Tardiff and Dennis Weisman have cautioned, Commission policies may harm “the incentives for *both incumbents and competitors* to invest in broadband facilities and services provided over rapidly developing alternative technologies.”¹²⁹ This result would of course retard the proliferation of advanced IP-based offerings and undermine the goals of the Telecommunications Act of 1996.¹³⁰

In addition to undermining deployment incentives, continued (or even increased) application of strict tariffing requirements would distort the market by limiting some (but only some) providers’ competitive flexibility. Absent Phase I pricing flexibility, price cap carriers would be left unable to offer the types of discount plans and national and regional packages customers demand in a timely fashion. Price-cap carriers already operate at a severe disadvantage to alternative providers because of the piecemeal regulation of their offerings depending upon pricing flexibility policies and forbearance status on a MSA-by-MSA basis. CenturyLink loses business today “to competitors that are authorized to negotiate customized service arrangements, with the uniform rates, terms and conditions demanded by wireless

¹²⁹ See Declaration of Timothy Tardiff and Dennis Weisman, ¶ 12, *attached to* Comments of Qwest Communications International Inc., WC Docket No. 05-25, RM-10593 (Jan. 19, 2010) (emphasis added); see also Declaration of Michael D. Topper, ¶ 18, *attached to* Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM-10593 (Jan. 19, 2010) (“Topper Declaration”).

¹³⁰ 47 U.S.C. § 1302.

providers.”¹³¹ CenturyLink experiences particular difficulty in providing large customers with the necessary flexibility, because it currently faces disparate regulatory requirements in its legacy Qwest, Embarq and CenturyTel regions.¹³² For example, a CenturyLink contract with a large enterprise customer might require the application of negotiated rates in some areas, contract tariff rates in other areas, and baseline tariffed rates in still other areas. A regime that *further* truncated the flexibility to craft individualized deals and discount plans would have significant negative impact on the competitiveness of the high-capacity market.¹³³ That result would harm consumers – both the wholesale/enterprise customers who would be unable to negotiate deals with a major potential provider, and the residential customers whose service would be impaired by more limited deployment of higher-capacity services aimed at those larger entities.

IV. CENTURLINK’S TERMS AND CONDITIONS FOR HIGH-CAPACITY SERVICES ARE JUST AND REASONABLE.

The Commission should not interfere with the terms and conditions negotiated at arm’s length by sophisticated purchasers.¹³⁴ As detailed above, the marketplace for services used by carriers and businesses is robustly competitive. That competitiveness is itself the most important

¹³¹ See Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 12-60, at 2 (Dec. 7, 2012).

¹³² See *CenturyLink 2012 Enterprise Forbearance Petition*, at 6.

¹³³ See Anna-Maria Kovacs, *Regulation in financial translation: The importance of current data in the FCC’s special access proceeding*, Georgetown University Center for Business and Public Policy, Economic Policy Vignette 2012-6-4, at 14 (May 2012) (explaining that “[w]ere the CLECs to get their wishes, the ILECs would not be able to implement volume and term conditions, which would make it difficult to justify discount plans, and impossible to provide assurance of capital recovery on long-lived assets.”), available at http://www.gcbpp.org/files/EPV/FCC_Special_Access_Proceeding.pdf.

¹³⁴ See, e.g., *Notice* ¶¶ 91-93.

defense against unjust and unreasonable terms and conditions.¹³⁵ In addition, purchasers of special access services are sophisticated businesses, governments, and telecommunications providers, placing them on equal footing with providers when negotiating special access contracts. Finally, the terms and conditions about which competitors have complained are not, in any case, anticompetitive. Rather, the marketplace has worked to meet customers' needs, resulting in the development of specialized contract offerings suited to the particular demands of carriers and enterprises.

A. The Competitive Marketplace for Wholesale and Ethernet Services Protects Against Unreasonable Term and Conditions.

As detailed above, the marketplace for the services at issue is competitive, with incumbents facing rivals relying on competitive fiber, cable plant, wireless facilities, and unbundled incumbent LEC network elements.¹³⁶ The Commission has recognized time and again that “[c]ompetition can protect consumers better than the best-designed and most vigilant regulation.”¹³⁷ In pricing flexibility jurisdictions, the marketplace has worked to create a wide

¹³⁵ See e.g., Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 1-6 (July 22, 2011); Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 20 (Dec. 5, 2011). See generally *Special Access for Price Cap Local Exchange Carriers, et al.*, 20 FCC Rcd 1994, 2031-34 ¶¶ 114-25 (2005); see also *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd 13638, 13642-43 (2009).

¹³⁶ See *supra* Part III.

¹³⁷ See *The Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15351, 15429 ¶ 204 (1997). See also *Comsat Corp.; 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 et al.*, 13 FCC Rcd 14083, 14149 ¶ 134 (1998) (noting the Commission's actions “to limit the application of unnecessary regulation where competition would serve as a better regulator”).

variety of options that benefit consumers. Like every other provider of high-capacity services, CenturyLink offers a mix of discounts that have evolved over time to satisfy customer demand and competitive offerings.¹³⁸ The prevalence of discounts and options in this segment is evidence of a competitive, customer-led marketplace, not a marketplace in need of government intervention.¹³⁹

B. Special Access Customers Are Sophisticated Entities Fully Capable of Negotiating Reasonable Terms and Conditions.

The Commission has long recognized that wholesale and enterprise customers are “are highly sophisticated”¹⁴⁰ actors, capable of making informed decisions “aware of the multitude of choices available to them.”¹⁴¹ Such companies routinely have access to “expert advice about service offerings and prices,”¹⁴² and “demand the most flexible service offerings possible.”¹⁴³

¹³⁸ See e.g., Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 1-6 (July 22, 2011); Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 20 (Dec. 5, 2011).

¹³⁹ Topper Declaration ¶ 68 (noting that “[t]he profusion of different tariffs and agreement structures, is, if anything, an indication of competition”).

¹⁴⁰ *SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18332 ¶ 74 & n.226 (2005).

¹⁴¹ *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18475 ¶ 76 (2005). See also *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, et al.*, 22 FCC Rcd 18705, 18720 ¶ 24 (2007) (“*AT&T Enterprise Forbearance Order*”); Topper Declaration ¶ 68 (noting that “many purchasers of high-capacity services are large, sophisticated buyers who spend hundreds of millions of dollars annually on telecommunications services”); Declaration of Emily Binder ¶¶ 12-14, *attached to CenturyLink 2012 Enterprise Forbearance Petition* (“*Binder Declaration*”).

¹⁴² *AT&T Enterprise Forbearance Order*, 22 FCC Rcd at 18720 ¶ 24.

¹⁴³ *Id.*

Indeed, even customers with “more regional or localized operations ... are able to solicit telecommunications services from a range of potential providers.”¹⁴⁴ Wireless providers, for example, have issued numerous RFPs for regional or national backhaul services.¹⁴⁵ High-capacity customers “use the[ir] buying power to play carriers off each other to get more favorable rates, terms and conditions.”¹⁴⁶

As one would expect, the diverse and sophisticated customer base has led to diverse and sophisticated high-capacity offerings. Through often intricate negotiations, wholesale and enterprise customers seek unique solutions for complex networks that often cover hundreds of locations. “[E]ach major customer uses a different procurement process and has different demands for its network design, volume and location,”¹⁴⁷ and providers must accommodate the specific demands of each potential multi-million dollar account or risk losing the business to a competitor. Different customers place priorities on different service components, ranging from obtaining favorable outage credits, to guaranteeing a specified service level agreement, to

¹⁴⁴ *AT&T Enterprise Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21; *Embarq et al. Enterprise Forbearance Order*, 22 FCC Rcd at 19491 ¶ 20; *Qwest Enterprise Forbearance Order*, 23 FCC Rcd at 12274 ¶ 24.

¹⁴⁵ *CenturyLink 2012 Enterprise Forbearance Petition* at 18.

¹⁴⁶ *See* Binder Declaration ¶ 13.

¹⁴⁷ *See* Declaration of Beth A. Halvorson ¶ 5, *attached to* Letter from Craig Brown, Qwest, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593 (Oct. 26, 2010). CenturyLink has entered into over 300 customized commercial agreements with enterprise broadband customers in the legacy Qwest and Embarq territories alone, each with its own heavily negotiated sets of rates, terms, and conditions. Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 2 (June 19, 2012).

acquiring a particular degree of flexibility in termination liability.¹⁴⁸ Thus, the sophistication of the customer base for special access and other offerings of similar capacities leads to a competitive marketplace in which complexity signals successful efforts to meet client needs, *not* the imposition of unreasonable terms and conditions.

C. In Any Event, CenturyLink's Terms and Conditions Are Just and Reasonable.

Unsurprisingly, critics have been unable to demonstrate that terms and conditions for wholesale and enterprise services are unreasonable or warrant Commission intervention. Their arguments rely on ill-founded factual assertions and unsupported insinuations. Commission precedent and long-standing antitrust doctrine make clear that discounts of the type offered by CenturyLink and other carriers are in fact procompetitive.

CenturyLink's discount plans are designed to win business and to serve customer needs. Those plans are voluntary, and customers can elect month-to-month and circuit-by-circuit options.¹⁴⁹ None of CenturyLink's plans restrict customers' ability to obtain service from alternative providers or self-supply, or restrict customers' ability to shift some or all of their business to alternative providers (or self-supply) at the end of a commitment term. In response to customer demand, CenturyLink has increasingly incorporated technological portability (i.e., shifting from legacy services to higher-capacity Ethernet services) and location portability into

¹⁴⁸ Binder Declaration ¶ 7. As noted above, CenturyLink faces special difficulties in this regard, because its different predecessor companies were subject to differing regulatory burdens. *See generally CenturyLink 2012 Enterprise Forbearance Petition.*

¹⁴⁹ *See e.g.*, Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, at 3 (July 22, 2011); Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25 RM-10593, at 4, 20 (Dec. 5, 2011).

its discount plans. CenturyLink’s innovative new Revenue Discount Simplification Plan includes numerous pro-customer features, including (1) a single, simplified nationwide arrangement, (2) a three-year term with a 1-year extension, (3) customer control of the discount level, (4) freedom to shift from DS1/DS3 to Ethernet and/or other services on the customer’s own timetable, and (5) no maximum or minimum spend requirements or shortfall penalties.

The Commission has recognized the benefits of such term and volume discounts for decades.¹⁵⁰ As the Commission observed 15 years ago, there is “a substantial body of precedent that promotional programs, volume discounts and other arrangements may be reasonable and non-discriminatory.”¹⁵¹ Nearly thirty years ago, it permitted volume discounts with respect to private line services in particular.¹⁵² The D.C. Circuit has concurred, holding that it would be difficult to justify regulation that “frustrat[es] Bell Operating Companies’ attempts to maintain stable utilization rates” through the use of discount plans.¹⁵³

Indeed, the courts have consistently held that “bundled discounts are a common feature of our current economic system.”¹⁵⁴ In doing so, they have cautioned that “we should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a

¹⁵⁰ *Private Line Rate Structure and Volume Discount Practices*, 97 FCC 2d 923 ¶ 40 (1984).

¹⁵¹ *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance For Broadband Personal Communications Services, et al.*, 13 FCC Rcd 16857, 16871 ¶29 (1998).

¹⁵² *Private Line Rate Structure and Volume Discount Practices*, 97 FCC 2d at 948 ¶ 39-40.

¹⁵³ *BellSouth Telecommunications Inc. v. FCC*, 469 F.3d 1052, 1056 (D.C. Cir. 2006).

¹⁵⁴ *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 905 (9th Cir. 2008), *vacated on other grounds* 2008 U.S. App. LEXIS 2279 (9th Cir. 2008); *LePage’s Inc. v. 3M*, 324 F.3d 141 (3rd Cir. 2003).

rule that discourages legitimate price competition.”¹⁵⁵ Likewise, courts have explained that “[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.”¹⁵⁶

There is, moreover, nothing inherently anticompetitive about price-cap carriers’ efforts to increase traffic on their networks – efforts that critics disparage as attempts to “lock-in” customers.¹⁵⁷ As leading antitrust commentators Areeda and Hovenkamp explain:

Of course, higher output injures rivals, because less of the market remains for them. But to protect rivals from a firm’s output-increasing strategies puts competitors ahead of consumers.... Bundling explained by ... scale economies is ‘exclusionary’ only in the quixotic sense that any practice that increases a seller’s output is exclusionary. If this firm sells more, then very likely someone else is selling less.¹⁵⁸

Indeed, “package discounting brings immediate social gains by driving prices toward marginal cost.”¹⁵⁹ Thus, “[d]iscounting in response to competitive pressures is exactly the sort of behavior we *hope* antitrust law will engender.”¹⁶⁰

¹⁵⁵ See *Cascade*, 515 F.3d at 896 (referencing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

¹⁵⁶ *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (noting “[i]t would be ironic indeed if ... antitrust suits themselves became a tool for keeping prices high.”). To CenturyLink’s knowledge, no party has alleged that price-cap carriers’ special access contracts reflect prices that are too *low* to be competitive.

¹⁵⁷ See Notice ¶ 92.

¹⁵⁸ AREEDA & HOVENKAMP at 7-119-120 (4th ed. 2011).

¹⁵⁹ Daniel A. Crane, *Multiproduct Discounting: A Myth of Nonprice Predation*, 72 U. Chi. L. Rev. 27, 42 (2005). See also *id.* at 43 (“Firms regularly employ mixed bundling strategies for all sorts of reasons that antitrusters would rate from neutral to procompetitive.”) (“*Multiproduct Discounting*”).

Finally, allegations that “incumbent LECs are engaging in anticompetitive tying arrangements that give purchasers benefits for services purchased in areas where the incumbent has market power in exchange for the purchase of services in more competitive markets” are clearly specious.¹⁶¹ Antitrust law provides clear guidance as to what behavior constitutes unlawful tying; critics have never alleged facts that satisfy the elements. Special access discount plans require the purchaser to commit to certain volumes, but do not require the purchase to commit to any specific type of product, to buy any product in any particular market, or to forego services from third parties. Nor do these plans require buyers wishing to purchase service in an area where there are few competitors to also buy service in areas with more competitors. CenturyLink offers national plans, regional plans, and more geographically targeted plans. Buyers are free to arrange their purchases in the manner that best suits their needs. Moreover, plans that include term and/or volume commitments are never the only option for any CenturyLink customer. Other options include monthly plans with no discounts, plans that have only volume but no term commitment (and vice versa), and various other discounts plans.¹⁶²

¹⁶⁰ *Multiproduct Discounting* at 43 (emphasis added). *See also* Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States*, Law and Economics Working Paper Series, George Mason University School of Law, 05-26, at 5 (2005) (“Volume discounts and non-linear pricing are an equilibrium outcome in a variety of models where exclusionary motives are absent.”).

¹⁶¹ *Notice* ¶ 92.

¹⁶² *See, e.g.*, Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, FCC, Attachment at 3-6 (Apr. 20, 2012); CenturyLink Voluntary Submission, Response III.A.1 and III.A.2, *attached to* Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593 (Dec. 5, 2011). Other ILECs offer similar flexibility. *See* Verizon, Special Access at 12, *attached to* Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC (May 2, 2012); Letter from David L. Lawson, Sidley Austin LLP, Attorney for
(continued on next page)

Finally, it cannot reasonably be argued that ILECs have “market power” with regard to any purportedly “tying” product. As discussed above, the wholesale and enterprise marketplaces are experiencing an extraordinary migration from legacy DS1 and DS3 services to a variety of competitors providing other technologies and higher capacity services.¹⁶³

V. CONCLUSION

The Commission has initiated a comprehensive and thoughtful process to evaluate competition in the provision of high-capacity services. The risk of rushed decision-making or acting on incomplete information is heightened here because advocates of radical regulation seek to upend over a decade of pro-investment and pro-consumer policies that have succeeded beyond expectation, expanding the reach and functionalities of our nation’s IP networks and Ethernet services. To ensure that its ultimate market analysis is reliable, the Commission should pursue its mandatory data collection in a comprehensive manner, and must permit review of, and comment upon, the data received and any analytical methodology applied. At that point, the story that CenturyLink’s high-capacity competitors have long told investors and prospective

AT&T, to Marlene H. Dortch, FCC, at 3-4 (Mar. 28, 2012); Verizon Voluntary Submission, Response III.A.1 and III.A.2, *attached to* Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC (Dec. 5, 2011); Letter from Linda Vandeloop, AT&T, to Marlene H. Dortch, FCC, Attachment at 2-6 (Jul. 15, 2011).

¹⁶³ *See supra* Part III.B. *See also* CenturyLink Voluntary Submission, Response III.D.5, *attached to* Letter from Jeffrey Lanning, CenturyLink, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593 (Dec. 5, 2011); Verizon, Special Access at 6-11, *attached to* Letter from Donna Epps, Verizon, to Marlene H. Dortch, FCC (May 2, 2012); Letter from David L. Lawson, Sidley Austin LLP, Attorney for AT&T, to Marlene H. Dortch, FCC, at 3-4 (Mar. 28, 2012); Topper Declaration ¶¶ 26-34; AT&T Voluntary Submission, Response D.1-5, *attached to* Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, FCC, WC Docket No-05-25, RM-10593 (Dec. 23, 2011).

customers – a story of robust competition and ever-more-robust services and facilities available at ever-falling prices, in which even the smallest provider has the ability to win business away from long-standing incumbents – will finally have been told to the Commission as well.

Respectfully submitted,

Craig Brown
CENTURYLINK, INC.
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
(303) 992-2503

Bryan N. Tramont
Russell P. Hanser
Bradley K. Gillen
WILKINSON BARKER KNAUER, LLP
2300 N. Street, NW, Suite 700
Washington, DC 20037
(202) 783-4141

Jonathan E. Nuechterlein
Samir C. Jain
WILMER CUTLER PICKERING
HALE & DORR LLP
1875 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 663-6000