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

REPLY COMMENTS OF CENTURYLINK, INC.

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I. INTRODUCTION AND SUMMARY

The comments filed last month demonstrate once again the critical importance of engaging in a comprehensive data-collection effort *before* altering the special access regulatory regime. The record evidence – including statements made by CLECs to their own customers and investors – reveals a dynamic, ever-changing, and increasingly competitive high-capacity services marketplace being continuously transformed by fast-growing demand, substantial investment, and rapid technological innovation. In that marketplace, so-called "incumbents" have lost significant market share to other parties relying on their own fiber optics, cable plant, wireless facilities, or even unbundled network elements, and stand to lose even more as demand for regulated services continues to pivot toward Ethernet services offering multiple gigabits per second.

Some parties, however, ask the Commission to ignore these inconvenient facts, which fail to support their expansive decade-old regulatory demands. They assert that the high-capacity services landscape is uncompetitive, that it has not "materially changed" since 2006, and that the prospects for competitive deployment are virtually nil. As the data will show, those claims lack credibility. For example, CLECs and their allies obscure the fact that scalable Ethernet offerings have quickly become the industry standard. And they claim that cable providers do not compete in the enterprise market, and that their ultra-high-speed Internet access services, which offer speeds vastly in excess of DS1 links and often match those of DS3 links, should be categorically excluded from any Commission analysis – even while several cable operators have achieved annual enterprise service revenues of over $1 billion apiece.[1]

The alternate universe descried by the CLECs and their allies bears no relation to reality. Competitive providers of high-capacity services have made substantial capital expenditures across hundreds of metropolitan areas, positioning them to meet the needs of small and large customers alike, whether they need a single DS1-equivalent, many gigabits per second, or anything in between. CLECs such as tw telecom boast to investors about their "big, beautiful, and powerful fiber network[s]."[2] Moreover, the climate for additional deployments is favorable: Just weeks after filing its comments here alleging that price-cap carriers' rates and practices precluded successful competition, Level 3 told investors that it enjoys margins of 50% on "off-net" traffic, and 80% on "on-net" traffic.[3] In these and other respects, the advocates of greater regulation continue their long tradition of self-contradiction: they give a bleak account of

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[1] *See* The Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, at 26 (Sept. 2012).

[2] Transcript of tw telecom, Inc. Fourth Quarter 2012 Earnings Call, at 8 (Feb. 12, 2013) (Larissa L. Herda).

[3] Transcript of Level 3 Communications, Inc. Presentation, Morgan Stanley Technology, Media & Telecom Conference, at 2-3 (Feb. 26, 2013) (James Q. Crowe).

competition when seeking regulatory benefits on Twelfth Street, while conveying an optimistic and far more accurate account when seeking investment on Wall Street.[4]

The Commission should reject the bleak account that these commenters offer here. After collecting and evaluating data, the Commission should ascertain which factors are most indicative of actual or potential competitive deployment, and on that basis establish administrable triggers for "Phase II"-like pricing flexibility.[5] In conducting its analysis, it should consider all sources of competition, not simply those that the pro-regulation advocates prefer to discuss. Where competitive facilities either exist or could feasibly be deployed, the Commission should free the price-cap carriers to compete on the same terms as their rivals.

Finally, the Commission cannot reasonably or lawfully grant CLEC requests to "take action now"[6] to abrogate terms in ILEC discount plans. Wholesale and retail customers can choose among a wide variety of providers today and, when dealing with ILEC providers in particular, can choose among a wide variety of contractual options as well. The breadth and

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[4] *See* Comments of Qwest Communications International, Inc., WC Docket No. 05-25, at 12-13 (filed Jan. 19, 2010) (quoting bullish market statements by tw telecom, Level 3, PAETEC, and XO).

[5] As CenturyLink has indicated, it believes that blanket Phase I pricing flexibility is appropriate now. Because a carrier with Phase I relief cannot raise rates and must continue to offer service pursuant to tariff, even a purported monopolist could not raise rates unilaterally under Phase I pricing flexibility (and, as the record makes clear, the "incumbents" of 1996 are not monopolists in 2013). Thus, there is no need to conduct any market analysis before granting Phase I relief, which would benefit customers (by permitting price-cap carriers to develop specialized offerings suited to their needs) and place price-cap carriers on more equal footing with their competitors. *See generally* Comments of CenturyLink, Inc., WC Docket No. 05-25, at 4-6, 35-36 (filed Feb. 11, 2013) ("CenturyLink Comments").

[6] Comments of BT Americas Inc. et al., WC Docket No. 05-25, at 42 (filed Feb. 11, 2013) ("Joint CLEC Commenters").

diversity of that customer choice belies any claim of anticompetitive conduct and underscores the Commission's observation that "[c]ompetition can protect consumers better than the best-designed and most vigilant regulation."[7] Indeed, the very CLECs demanding elimination of certain ILEC contractual terms offer *those same terms* to their own customers, precisely because those terms are economically efficient no matter who offers them. As the Commission acknowledges, it has absolutely no basis today for finding that the market is broken or that ILECs have market power in any relevant respect.[8] Such determinations, however, would be essential (though not sufficient) to justify the abrogation any existing terms or conditions. The Commission therefore cannot even consider doing so until it develops the full record it is assembling on the state of competition in this marketplace.

II. THE ANALYTICAL FRAMEWORK SHOULD FOCUS ON THE PROSPECTS FOR COMPETITIVE DEPLOYMENT AND ACCOUNT FOR RAPID TECHNOLOGICAL CHANGE.

The task before the Commission is to establish administrable triggers that identify areas in which the competitive deployment of high-capacity facilities is economically feasible. Those triggers should be based on the data submitted, which will reveal the correlations between

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[7] *The Merger of MCI Communications Corporation 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*, 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").

[8] *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd 16318, 16347 ¶ 69 (2012) ("*Notice*") (conceding that the Commission has "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market").

observable facts and the likelihood of competitive deployment in a given area. Some parties, however, attempt to distract the Commission's attention from this goal by urging it to conduct a static, old-economy-style market-power analysis ill-suited to the task at hand.[9] These commenters also ask the Commission to assign different weights to different types of competitors, limiting the import of cable-based competition, potential competitors, and competitors facing "financial distress."[10] This approach is wholly ill-suited to a dynamic industry that, like this one, is characterized by rapid technological change, and the extreme, building-specific granularity of the CLECs' proposed market analysis would thwart the Commission's search for simple triggers identifying areas suitable for competitive deployment.

A. The Commission Should Focus Its Analysis on Identifying Simple Triggers for Relief from Price-Cap Regulation.

The analysis contemplated by the CLECs would not be useful here. First, the building-building-by-building, route-by-route "market power" approach urged by competitors will not bring the Commission any closer to its goal, which must be to identify administrable triggers for use in determining where competitors have deployed or could feasibly deploy facilities to compete with the price-cap carrier's facilities. Second, even if it were useful to conduct a "market power" analysis, the specific approach CLECs advocate is not appropriate here, because

[9] *See* Joint CLEC Commenters at 17, 49-50, 58-59, 62, 66, 75; Comments of Level 3 Communications, LLC, WC Docket No. 05-25, at 4-5 (filed Feb. 11, 2013) ("Level 3 Comments"); Comments of The New Jersey Division of Rate Counsel, WC Docket No. 05-25, at 9 (filed Feb. 11, 2013) ("New Jersey Rate Counsel Comments"); Comments of TelePacific Communications, WC Docket No. 05-25, at 4 (filed Feb. 11, 2013) ("TelePacific Comments"); Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 5 (filed Feb. 11, 2013) ("Sprint Comments").

[10] *See* Joint CLEC Commenters at 63.

– as the Department of Justice ("DOJ"), the Federal Trade Commission ("FTC"), and this Commission have recognized – it fails to account for the effects of rapid technological change in a dynamic industry.

1. The Complex Analysis Urged By CLECs is Poorly Suited to the Commission's Task.

The Commission here must derive simple, administrable triggers, based on easily verified facts, that will determine where and in what measure a price-cap carrier is entitled to relief from the requirements of the price-cap regime. That inquiry, in turn, will be driven largely by one question: What are the factors that most accurately predict whether a provider other than the price-cap carrier either has deployed facilities capable of competing against the incumbent's wholesale and enterprise services, or economically could deploy such facilities?[11] This approach will allow the Commission to "draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics," just as it does successfully in the context of evaluating access to unbundled network elements.[12]

An analysis of this sort will necessarily rely upon the data submitted to the Commission in the coming months, but in ways that differ from the vision articulated by advocates of greater

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[11] *See, e.g.*, *Notice*, 27 FCC Rcd 16330 at ¶ 28 (discussing the Commission's desire to "associate particular factors with levels of deployment"); *id.* at 16332 ¶ 34 ("[D]etailed data on the evolution of competitive provider networks will help us understand how competitive facilities are deployed over time and whether the presence of competitive facilities in fact provides a threat of competitive entry in nearby or adjacent areas.").

[12] *Unbundled Access to Network Elements*, 20 FCC Rcd 2533, 2586 ¶ 87 (2005) ("*TRRO*"), *petitions for review denied*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

regulation. The proper focus will be on determining which features tend to render an area suitable for competitive deployment of facilities – using any technological platform – that can provision alternatives to price-cap carriers' high-capacity offerings.[13] The relevant factors might be those on which the Commission has relied in other contexts – namely, business-line density and competitive collocation[14] – or may differ. There is no need, however, to prejudge these matters, for the data submitted will themselves reveal which factors are most conducive to competitive deployment. After identifying those factors – whether through use of regression analysis or otherwise – the Commission should develop administrable triggers, and should grant "Phase II"-like relief to price-cap carriers in areas satisfying those triggers.

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[13] *See, e.g.*, Comments of AT&T Inc., WC Docket No. 05-25, at 11-12 (filed Feb. 11, 2013) ("[T]he Commission need only undertake a relatively straight-forward empirical analysis here. The proposed data collection should provide the Commission with information about the scope and location of competitors' networks, and thus allow the Commission to observe where competitors have sunk investment in network facilities capable of serving special access customers. This in turn will allow the Commission to determine how competitive deployment correlates with the Commission's existing triggers (or other easily observable marketplace facts) and, if necessary, modify the existing proxies or choose a different proxy."); *id.* at 17 ("In light of these basic economic principles, the relevant empirical issues to be resolved are fairly narrow: is there a readily observable fact that can be used as a reasonable proxy for the deployment of sunk, alternative facilities."); Comments of Verizon and Verizon Wireless, WC docket No. 05-25, at 10 (filed Feb. 11, 2013) ("For the Commission's comprehensive analysis to produce accurate results, the Commission must carefully consider qualitative data that demonstrate whether, going forward, competitive alternatives will better discipline market performance than regulation.").

[14] *TRRO*, 20 FCC Rcd at 2558-59 ¶ 43.

2. Even if Feasible, the Static Structural Analysis Urged By CLECs Would Fail to Reflect Dynamic Technological Change Within the Market.

In the context of the present inquiry, the static structural approach to market analysis – an approach assuming that existing market shares are the most useful evidence in predicting future market shares – is likely to yield badly flawed results. "The nature of competition in markets exposed to the effects of rapid technological innovation is quite different from competition in other markets. Market power is extremely difficult to measure, and the traditional models of competition may have limited utility."[15] This is so because "[m]arket positions built on a technological base which is changing rapidly are vulnerable to being overturned by new entrants from outside the industry as well as by competitors from within."[16] While static analysis relies on existing market shares, elasticities of supply and demand, and prices – and assumes that these features are likely to remain relatively constant over time – markets characterized by rapid technological change are often upended quickly by new suppliers relying on new means of provisioning service. "In high technology industries, the competitive positions of firms are never secure; incumbents, even those that appear dominant, can be unseated with alacrity by new technologies developed by others."[17] Under those circumstances, "market share is likely

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[15] Christopher Pleatsikas & David J. Teece, The Analysis of Market Definition and Market Power in the Context of Rapid Innovation, 19 INT'L J. INDUS. ORG. 665 (2001).

[16] Raymond Hartman, et al., *Assessing Market Power in Regimes of Rapid Technological Change*, 2 Industrial and Corporate Change 317, 319 (1993) ("Hartman et al.").

[17] *Id.*

irrelevant,"[18] and "[s]uccess in one round of innovation does not guarantee success in the next – it merely gives incumbents the opportunity to compete again."[19] Thus, one article concludes:

> The static, short-run notions informing key components of competition policy are inadequate to assess the longer-run behavioral issues and the welfare implications of innovative activities. The static price-driven approach will often lead to the conclusion that an innovating firm has market power when it really does not in any economically meaningful way.[20]

The Commission has recognized that fast-changing markets are not suited to the static market analysis often applied elsewhere. For example, the *Qwest Phoenix Forbearance Order*[21] held that the analysis it applied – which several commenters urge it to adopt here[22] – might not be relevant "when the Commission addresses advanced services," because in those cases it must "take into consideration" the ways in which the "newer market continues to evolve and develop."[23] Likewise, the Commission's prior orders have regularly recognized that it would be inappropriate to premise findings regarding the marketplace for next-generation offerings "on

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[18] J. Gregory Sidak & David J. Teece, Dynamic Competition in Antitrust Law, 5 J. Competition L. & Econ. 581, 615 (2009), available at http://www.criterioneconomics.com/pdfs/SidakTeece.pdf.

[19] Hartman et al. at 317.

[20] *Id.* at 324.

[21] *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622 (2010) ("*Qwest Phoenix Forbearance Order*").

[22] *See* Joint CLEC Commenters at 17, 49-50, 58-59, 62, 66, 75; Level 3 Comments at 4-5; New Jersey Rate Counsel Comments at 9; TelePacific Comments at 3; Comments of XO Communications, LLC, WC Docket No. 05-25, at 4 (filed Feb. 11, 2013) ("XO Communications Comments"); Sprint Comments at 5.

[23] *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39.

limited and static data that failed to account for all of the forces that influence the future market development."[24]

Weaknesses in the approach urged by CLECs here also prompted the DOJ and the FTC to revise their Horizontal Merger Guidelines in 2010. The 1992 version of the Guidelines focused significant attention on static market shares and Herfindahl-Hirschman Index ("HHI") scores.[25] In 2009, the two agencies sought comment on whether the Guidelines "[s]hould . . . be revised to explain more fully than in the current [version] how market shares and market concentration are measured and interpreted in dynamic markets, including markets experiencing significant technological change."[26] In response to comments received,[27] the agencies addressed this concern in the 2010 version of the Guidelines:

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[24] *See, e.g.*, *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, 12273 ¶ 23 (2008), *citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14853, 14880-81 ¶ 50, 14901-03 ¶¶ 91-94 (2005).

[25] U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 1.51 (issued Apr. 2, 1992, revised Apr. 8, 1997), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

[26] Fed. Trade Comm'n and U.S. Dep't of Justice, *Horizontal Merger Guidelines: Questions For Public Comment*, at 4 (Sept. 22, 2009), *available at* http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf.

[27] *See, e.g.*, Comments of J. Gregory Sidak and David J. Teece, Before the Federal Trade Commission & U.S. Department of Justice, Project No. P092900, at 16 (filed Nov. 9, 2009), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1504706_code206474.pdf?abstractid=1504706&mirid=1 ("We favor revision of the Horizontal Merger Guidelines in a manner that acknowledges the competitive characteristics of high-technology industries…. [A] focus on dynamic competition is likely to be especially relevant to computing market shares and measures of market concentration in such industries. Schumpeterian competition, engendered by product and process innovation, does more than bring price competition—it tends to overturn the existing

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> Market concentration and market share data are normally based on historical evidence. However, recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. The Agencies consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agencies may conclude that that firm's historical market share overstates its future competitive significance.[28]

There should be no doubt that high-capacity services are characterized by rapid technological change. As CenturyLink and others have explained in detail, these services have developed at an exponential pace even since this proceeding began. The DS1- and DS3-capacity offerings of yesteryear have been joined by OCn-capacity Ethernet offerings providing many megabytes or even gigabits per second, and an assortment of intra- and inter-modal competitors have won market share quickly, attracting billions and billions of dollars of annual revenues. Burgeoning capacity needs are prompting further tumult, as all providers scramble to devise new mechanisms for satisfying the demand for more and more throughput. Ethernet services accounted for just $650 million in revenues in 2005.[29] In contrast, wholesale carrier Ethernet

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order. A revision of the Merger Guidelines that favors dynamic over static competition would place less weight on market share and concentration in the assessment of market power and more weight on assessing innovation and enterprise-level capabilities. Such a revision would substantially benefit consumers.").

[28] U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 5.2 Market Share (issued Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

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

services generated revenues of about $1.3 billion in 2011, and are expected to exceed $4.2 billion by 2016,[30] as more and more customers transition away from legacy DS1 and DS3 services. Most wireless carriers already "have 70 to 80 percent of their backhaul switched to fiber, provided by numerous alternative suppliers,"[31] and "the number of cell sites served by Ethernet over fiber will grow at a 45% compound annual growth rate through 2015."[32] Competitive fiber, cable, and wireless providers are driving capital into their wholesale and business services offerings, and are being rewarded with substantial gains in market share. At the same time, competitors relying on unbundled incumbent LEC loops are transforming the industry landscape with aggressive deployment of "Ethernet over Copper" services. Ethernet bandwidth has already surpassed legacy data bandwidth, and will more than double legacy carriage within just a few years.[33]

Consistent with its prior decisions, as well as those of the DOJ and the FTC, the Commission should recognize the inadequacies of the approach urged by CLECs now, and

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[30] Frost & Sullivan, *Analysis of the Wholesale Carrier Ethernet Services Market, 2012: Mobile Backhaul and Retail Market Trends Fuel Revenue Growth* 8, 24 (2012).

[31] *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) ("Zipp 2013 Predictions"), *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").

[32] Zipp 2013 Predictions.

[33] *See, e.g.*, CenturyLink Comments at 18.

instead adopt a forward-looking approach focused on the growing prospects for competitive infrastructure deployment.

B. In Evaluating the Prospects for Competitive Deployment, the Commission Should Be Led By the Data, Not By Unsupported Assumptions.

Critics of price-cap carrier practices propose a variety of measures apparently designed to guarantee that the Commission's analysis produces the results they desire. They ask the Commission to ignore or discount the role played by best efforts cable offerings, potential competition, and facilities operated by providers in "financial distress." But all of those are highly relevant sources of competition in this market, as the data will show, and the Commission cannot reasonably ignore them, let alone decide to exclude them from consideration *before even examining* the data.

Substitutes. Several commenters argue that the Commission should exclude "best efforts" cable offerings from its analysis because (they assert) these services have no impact on competition for high-capacity services. For example, the Joint CLEC Commenters contend that it should exclude "best efforts" services, such as cable modem services, from *any* relevant product market,"[34] while Ad Hoc dismisses the "novel notion" that best efforts services are "potential substitutes" for price-cap carriers' offerings.[35]

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[34] Joint CLEC Commenters at 7 (emphasis added). *See also id.* at 51 ("The available evidence overwhelmingly demonstrates that 'best efforts' broadband Internet access services are not in the same product markets as dedicated special access services.").

[35] Comments of The Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, at 11 (filed Feb. 11, 2013) ("Ad Hoc Comments").

There is no reason, however, to rely on *a priori* notions as to what services are and are not substitutes for one another. Rather, the Commission should rely on the data submitted to guide such decisions. The Commission contemplates a data request that will pose detailed questions regarding services sold and prices charged in specific geographic markets. This information, when collected, will allow the Commission to determine – based on actual market behavior – whether purchasers view cable-based offerings as substitutes for price-cap LEC services.[36]

Potential Competition. Various commenters also endeavor to limit artificially the role of potential competition in the Commission's analysis. TelePacific, for example, argues that "the Commission should only look at competition where facilities have been deployed and either are already in service or can quickly be put into service by a competitor (within a month)."[37] Joint CLEC Commenters contend that future entry is relevant "only if it is timely, likely and of sufficient scale to counteract the exercise of market power by an incumbent LEC."[38]

These commenters misapprehend the meaning and relevance of potential competition. As noted above, the question before the Commission is how to identify simple triggers indicating

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[36] *See* Hartman et al. at 334 ("When competition proceeds primarily on the basis of features and performance, the pertinent question to ask is whether a change in the performance attributes of one commodity would induce substitution to or from another. If the answer is affirmative, then the differentiated products, even if based on alternative technologies, ought to be included in the relevant product market.").

[37] TelePacific Comments at 5.

[38] Joint CLEC Commenters at 75 (citation omitted). *See also* New Jersey Rate Counsel Comments at 9-10 ("Rate counsel recommends that the FCC afford little weight to potential competition as a market-disciplining factor….").

that competitive deployment of facilities is *feasible* in a given market, because the very threat of such competition serves to discipline prices.[39] Addressing the same question in the context of unbundled network elements, the courts have instructed that what matters is *not* whether deployment is imminent (or has already occurred), but rather whether "competition is *possible*."[40] The Commission, in turn, adopted a regime "that accounts for both actual and potential competition,"[41] recognizing that "competitive deployment in one market [is] probative of the prospects for competition in similar markets."[42] In upholding that regime, the D.C. Circuit emphasized fifteen separate instances in which the implementing Order had stressed the Commission's reliance on potential (as opposed to existing) competition.[43] The Commission should adopt the same approach here. In this context, too, it is appropriate to "infer[] from competitors' facilities deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner,"[44] and to afford regulatory relief accordingly. Thus, the Commission should, using the data supplied, identify appropriate bases for drawing *inferences* regarding the prospects for competitive infrastructure deployment even in

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[39] *See supra* n.11 and associated text.

[40] *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004) (emphasis added).

[41] *TRRO*, 20 FCC Rcd at 2586 ¶ 87.

[42] *Id.* at 2558 ¶ 42.

[43] *See Covad*, 450 F.3d at 540-41.

[44] *TRRO*, 20 FCC Rcd at 2559 ¶ 43.

areas where such facilities do not now exist, and relaxing regulation in those areas ripe for investment.[45]

Financial Distress. Joint CLEC Commenters argue that "the FCC should not consider firms that are in financial distress to be market participants."[46] This claim defies logic. Actual deployment of facilities is undoubtedly the most certain evidence (though, to be sure, not the *only* evidence) that competitors may feasibly construct such facilities in a given area. In fact, Joint CLEC Commenters provide no evidence that bankruptcy generally affects the customer's experience, and in most cases, it does not. To the extent a provider enters bankruptcy,[47] its network facilities and existing contracts will be among its most valuable assets, and are likely to be acquired by another entity that will continue to provide service. As the Commission itself has explained, where a competitor is driven from the market, "the fiber-optic transmission capacity of that carrier [will] remain intact, ready for another firm to buy the capacity at distress sale and immediately undercut [any resulting] noncompetitive prices."[48] Thus, the presence of facilities owned by an entity in distress is appropriate evidence that incumbents in that area face competition, and will continue to do so.

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[45] *See, e.g., id.* at 2549 ¶ 28 (citing reliance on "inferences regarding the potential for deployment … based on the characteristics of markets where actual deployment has occurred").

[46] Joint CLEC Commenters at 63.

[47] *Id.*

[48] First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16103, ¶ 281 (1997) (internal quotation marks and brackets omitted).

III. ADDITIONAL REGULATION OF TERMS AND CONDITIONS IS PREMATURE AND UNWARRANTED.

The Commission should not entertain calls to micromanage discount plans prior to completing its comprehensive data collection. Indeed, it *may not* take such action before finding that incumbents have market power, and the Commission has acknowledged that the record does not support such a finding today. When the Commission obtains the data it plans to solicit, the record will confirm that these discount plans are pro-competitive. Moreover, customers have a wide variety of different discount options and plans from which to choose. CenturyLink offers a broad array of service options to its high-capacity customers, and its newest plan involves none of the features about which critics complain. In cases where CenturyLink's plans do involve volume or revenue commitments, those features have been implemented for procompetitive and economically sound reasons, and are often employed by the CLECs themselves. Finally, the so-called "remedies" demanded by some – under which the Commission would unilaterally excise certain contractual provisions while leaving in place the discounts that rely on them – would be unwarranted and unlawful.

A. The Commission Should Reject Calls for Premature Action.

The Notice appropriately concludes that there is "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market."[49] In the *Pricing Flexibility Suspension Order*, the Commission refused to "presume the

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[49] *Notice*, 27 FCC Rcd at 16347 ¶ 69.

outcome at the heart of our inquiry prior to conducting any analysis of market conditions."[50] More recently, it has acknowledged that there is "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market,"[51] explaining that it needs additional data "to more effectively determine where relief from special access regulation is appropriate and otherwise update [its] special access rules to ensure that they reflect the state of competition today and promote competition, investment, and access to services used by businesses across the country."[52] The Commission is exactly right: it should not and may not intervene further in this marketplace until after it has collected and analyzed all relevant data. In particular, as discussed below, it lacks any empirical predicate for concluding that existing discount plans are anti- rather than pro-competitive.

Nevertheless, proponents of additional regulation appeal for premature action – action they insist must be taken before the Commission collects, much less analyzes, the data it stands ready to solicit. The Joint CLEC Commenters argue that "the Commission need not and should not wait until it has concluded its market analysis to begin to curb incumbent LECs' harmful exclusionary practices,"[53] but instead "can and should take action now."[54] They assert that "the

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[50] *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd 10557, 10602 ¶ 81 (2012) ("*Pricing Flexibility Suspension Order*").

[51] *Notice*, 27 FCC Rcd at 16347 ¶ 69.

[52] *Id.* at 16341 ¶ 56.

[53] Joint CLEC Commenters at 11.

[54] *Id.* at 42. *See also id.* at 46 (stating that "the Commission need not and should not wait until it has concluded its data collection and market analysis to" impose new regulation with respect to terms and conditions").

result of [the Commission's] analysis should already be clear."[55] Indeed, notwithstanding a voluminous record detailing the rise of OCn-capacity and Ethernet-based services offered by incumbents, competitive fiber providers, cable companies, and wireless providers over the past five years – often to customers that previously purchased legacy DS1 and DS3 services – the Joint CLEC Commenters claim that "[a]ll available evidence indicates" that the market has not "materially changed" since 2006.[56] Level 3 – one of the Joint CLEC Commenters – also filed separate comments "to stress the need for near term action," arguing that the Commission need not gather any additional data "to know" the extent of competitive deployment.[57] Ad Hoc contends that the analyses contemplated in the Notice "are not necessary" to find market power.[58]

These pleas notwithstanding, the Commission's approach is the right one, and premature action would be unwarranted and unlawful. The demand for interim relief is untimely because the Commission's comprehensive review of the high-capacity services markets – a necessary predicate to any greater regulatory intervention – has only now begun. Analysis of the data collected will be difficult, and the task facing the Commission and the public alike is complicated. That, however, is no reason to abandon the data collection or to proceed immediately to implementation of rules lacking factual foundation. Rather, the Commission should await responses to the data request and should focus on the factors most relevant to

[55] *Id.* at 9. *See also id.* at 10-11.

[56] *Id.* at 16.

[57] Level 3 Comments at 1, 7-8.

[58] Ad Hoc Comments at ii, 9.

competitive deployment. It should not – and *may* not – abandon its commitment to a data-driven process by simply assuming what the data would show once collected.

The adoption of new rules at this juncture would be not only unwise but also unlawful. Section 205 of the Act authorizes the Commission to prescribe rates or conditions only "after full opportunity for hearing."[59] The courts have clarified that the "hearing" requirement is satisfied by a notice-and-comment rulemaking proceeding,[60] but have also been clear that the Commission may not base a prescription – even a purportedly "interim" prescription – on "interim" conclusions.[61] As noted, the Commission has acknowledged that it lacks any sufficient foundation for assessing the markets for high-capacity services, and that it must collect and analyze additional data before doing so.[62] The Commission has not yet collected the relevant data, and "§ 205(a) require[s] [it] to leave the matter of prescription for resolution on an adequate record."[63]

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[59] 47 U.S.C. § 205(a).

[60] *See AT&T v. FCC*, 572 F.2d 17, 21-23 (2d Cir. 1978).

[61] *See generally Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1520 (D.C. Cir. 1995); *AT&T v. FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973); *AT&T* v. *FCC*, 449 F.2d 439, 451 (2d Cir. 1971); *AT&T Revisions to Tariff F.C.C. No. 259, Wide Area Telecomms. Serv.* (*WATS)*, 86 F.C.C. 2d 820, 854 ¶ 88 (1981).

[62] *See Notice*, 27 FCC Rcd at 16347 ¶ 69.

[63] *AT&T*, 449 F.2d at 451.

B. CenturyLink's High-Capacity Service Discount Plans Are Responsive to the Needs of Customers and Offer a Diverse Array of Terms and Conditions.

The market for special access and high capacity services is highly dynamic, and high-capacity customers have many choices. To provide a sense of the options available, CenturyLink briefly describes the plans available to its customers below. The Declaration of Carolyn Hammack, attached as Exhibit 1,[64] provides a more detailed review of the major plans offered by CenturyLink.

CenturyLink's "Price Flex tariff" – available in jurisdictions in which it has obtained pricing flexibility – provides CenturyLink with the ability to negotiate Individual Case Basis ("ICB") contracts to try to meet the needs of the company's special access customers. The company sought feedback from customers when CenturyLink was investigating what components customers wanted to see in a company-wide offering to complement existing plans available in the former CenturyTel, Embarq and Qwest territories. Under the flexibility provided by the Price Flex tariff, and taking into account the feedback received, CenturyLink has negotiated ICB contracts with certain high-volume customers. For these contracts, customers negotiated discount levels based on their own current and projected future purchases from all CenturyLink companies. Each month, the level of discount received is based on the tier into which the customer's purchases for that month fall. The discount is applied to that products and services purchased in areas in which CenturyLink has pricing flexibility. These discount levels are based purely on revenue figures, and each month's bill is based on the applicable tier for that

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[64] Declaration of Carolyn Hammack, attached hereto as Exhibit 1 ("Hammack Decl.").

month. For example, a customer will receive a certain percentage discount if its monthly revenues fall within a pre-established range, a greater discount if those revenues fall within a higher pre-established range, and a lesser discount if they fall into a lower pre-established range. Because of this negotiated tier structure, there are no penalties applied when revenues associated with the customer fall below or above particular usage thresholds. The new CenturyLink discount option also does not apply early termination fees.[65]

In addition to the company-wide option available through the Price Flex tariff, each of the individual CenturyLink Operating Companies – CenturyTel, Embarq, and Qwest – offers a range of special access discount plans, providing numerous options for customers beyond the company-wide option and the standard month-to-month options always available to customers. As detailed in prior *ex parte* filings, these legacy pricing plans are completely voluntary and provide a diverse assortment of terms and conditions.[66] The plans provide customers a wealth of options from which to choose.

Different CenturyLink plans offer discounts based on volume, term, and revenue. Some are nationwide, others are statewide or regional, and still others are circuit-based. Some plans provide portability options, others Ethernet migration options. The type of commitment and corresponding enforcement terms vary considerably by plan.[67] Customers select from a variety

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[65] *Id.* at ¶ 3.

[66] *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Jeffrey S. Lanning, Assistant Vice President, Federal Regulatory Affairs, CenturyLink, WC Docket No. 05-25 (filed July 22, 2011).

[67] *See* Hammack Decl. at ¶¶ 4-30.

of plans to find one that best meets their needs, and are not presented with the binary "lock-in" contract or month-to-month rates presupposed by some commenters.

C. CenturyLink's Plans Raise No Anti-Competitive Concerns.

Basic economic principles underscore the pro-competition and pro-consumer nature of terms and conditions found in CenturyLink discount plans. Unable to attack the plans as they exist, critics attack straw men bearing little resemblance to the plans actually offered by CenturyLink. These parties rely heavily on an economic declaration and academic literature[68] that are, in turn, based on assumptions that do not pertain here – namely, (1) the existence of market power and (2) discounts fixed to the purchaser's total spending level.[69]

First, the argument that loyalty discounts may be anticompetitive presupposes the existence of a dominant firm that possesses market power, which does not exist here, and which the Commission has already acknowledged it has no current basis to find. Drs. Besen and Mitchel base their analysis on the presumption that "ILECs are the types of dominant firms for

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[68] *See, e.g.,* Joint CLEC Commenters, Appendix A, Stanley M. Besen and Bridger M. Mitchel, *Anticompetitive Provisions of ILEC Special Access Arrangements* ("Besen and Mitchel"); Sprint Comments at 26-27.

[69] As CenturyLink has explained, its volume and term discounts are not unlawful tying arrangements, as the Joint CLEC Commenters suggest. Joint CLEC Commenters at 30-33. As CenturyLink explained more fully in its opening comments, antitrust law provides clear guidance as to what behavior constitutes unlawful tying and the competing carriers do not prove facts sufficient to satisfy the elements. Unlawful tying exists only where: (1) two separate "products" are involved; (2) the defendant affords its customers no choice but to take the tied product in order to obtain the tying product; (3) the arrangement affects a substantial volume of interstate commerce; and (4) the defendant has "market power" in the tying product market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 12-18 (1984). All four elements must exist for a tying arrangement to be considered unlawful under section 1 of the Sherman Act. *Id.* The Supreme Court has since reaffirmed this test in *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 461-62 (1992). *See generally* CenturyLink Comments at 43-44.

which the use of loyalty contracts are likely to be anticompetitive."[70] The academic literature cited by Besen and Mitchel reflects similar underlying premises. For instance, Fiona Scott-Morton states:

> The competitive effect of a particular [contract with a loyalty discount] depends on the market circumstances. Of course, not all [such contracts] cause competitive harm. . . . The economic literature indicates that the settings where [such contracts] are most likely to harm consumers and competition involve dominant firms possessing market power and a high market share.[71]

Others similarly presuppose the existence of market power.[72]

This assumption of a dominant firm with market power, however, does not hold here. As detailed in the comments filed to date, the market for these services is competitive, with incumbents facing rivals relying on competitive fiber, cable plant, wireless facilities, and unbundled incumbent LEC network elements. There is no dominant firm possessing market power. In any event, the Commission has explained that there is "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the

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[70] Besen and Mitchel at ¶ 13.

[71] F. Scott-Morton, *Contracts that Reference Rivals*, Presentation to Georgetown University Law Center, at 5 (Apr. 5, 2012), *available at* www.justice.gov/atr/public/speeches/281965.pdf ("Scott-Morton").

[72] Hans Zenger, also cited by Drs. Besen and Mitchel, *see* Besen and Mitchel at ¶ 13, similarly recognizes that discounts would be anticompetitive only "[i]f a dominant firm is in a position to foreclose such a substantial part of the market that the output of the smaller competitors is suppressed below the minimum efficient scale of production." Hans Zenger, *Loyalty Rebates and the Competitive Process*, Journal of Competition Law & Econ., Mar. 9, 2012, at 33, *available at* www.papers.ssrn.com/sol3/papers.cfm?abstract id=2019185.

special access market."[73] Thus, completion of the data collection and analysis is a necessary predicate for a finding that ILEC terms and conditions are anticompetitive.

Second, the competing carriers' loyalty discount arguments are falsely premised on the assumption that carriers are required to make a large percentage of their *overall* purchases in the market from the price-cap carrier as a precondition to enjoying the discount. But that feature is *not present in the discount plans at issue here*.[74] For instance, in describing how loyalty contracts work, Besen and Mitchel state:

> As many commenters have observed, contracts that require a customer to make a very large fraction of its purchases from one supplier in order to obtain a significant discount or avoid a significant penalty, effectively serve as a "tax" on purchases from competitors of that supplier.[75]

Other sources cited by critics also presuppose contracts limiting customers' use of other providers.[76] Similarly, the Third Circuit decision in *ZF Meritor v. Eaton*, cited by the Joint CLEC Commenters, is premised on the judicial finding that the defendant manufacturer

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[73] *Notice*, 27 FCC Rcd at 16347 ¶ 69.

[74] Joint CLEC Commenters at 25-26; Level 3 Comments at 3; Sprint Comments at 28-30; XO Comments at 11-13.

[75] Besen and Mitchel at ¶ 14.

[76] Fiona Scott-Morton assumes that anticompetitive loyalty discounts involve a situation in which "the buyer will receive a discount on incremental units, or perhaps all purchased units, if it buys 90 percent or more *of its needs* from one seller." Scott-Morton at 2 (emphasis added). Likewise, Einer Elhauge and Abraham L. Wickelgren, in the 2010 paper relied upon by Sprint, *see* Sprint Comments at 27, "assume that buyers who accept loyalty discounts make contractual commitments to buy only from the incumbent." Einer Elhauge and Abraham L. Wickelgren, *Robust Exclusion Through Loyalty Discounts,* at 4 (Harvard Law School, John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 662, 2010), available at www.law.harvard.edu/faculty/elhauge/pdf/Elhauge_662.pdf.

conditioned discounts on a customer meeting purchase volume thresholds ranging from 70 to 97.5 percent of the customer's *total requirements*.[77]

The concern raised by these authorities, then, is that the price charged to a customer by one provider will turn, in part, on whether and to what degree it also purchases service from *another* provider.[78] That link, however, does not exist with regard to CenturyLink's special access discount plans. As explained above, some of those plans, do not involve any revenue or volume commitments, and even where CenturyLink plans do involve such commitments, the commitments *are not tied to the customer's overall purchases in the market*, and thus do not trigger the "requirements contract" concerns raised in the economic literature.

D. CenturyLink's Terms and Conditions Are Reasonable and Provide Consumers With Different Sets of Options, Commitments, and Discounts.

Critics next attack individual terms and conditions they find objectionable. Their claims rely on a counterfactual reality in which customers are forced to choose between "rack rates" and plans involving anticompetitive commitment discounts, overage penalties, and shortfall penalties/early termination charges. In the real world, this is not so. As discussed below, no plan offered by CenturyLink imposes overage charges, and to the extent that CenturyLink offers plans involving commitment discounts and shortfall penalties or early termination fees, those features reflect legitimate business considerations. Indeed, the same complaining carriers use the same type of terms in their own contracts for the same valid reasons.

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[77] Joint CLEC Commenters at 38 (citing *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 265 (3d Cir. 2012)).

[78] *See* Scott-Morton at 2.

The commitments reflected in some CenturyLink legacy plans, and the related shortage and/or termination fees, are fundamentally pro-customer options that provide customers with significant flexibility. The customer selects its volume or revenue levels under the commitment plans.[79] These plans provide portability, which allows the customer to add or remove circuits under its plan without penalty as long as it continues to meet the minimum commitment.[80] Further, CenturyLink's plans provide customers with flexibility to upgrade services with no terminating liability,[81] and permit customers to convert circuits to next-generation Ethernet offerings without penalty.[82]

Where they are used, CenturyLink's volume commitments are economically justified because they protect a level of revenue necessary to ensure that the company recovers its risk-adjusted capital costs. When a customer commits to a particular volume, CenturyLink incurs costs to provision service at the committed traffic level – costs it expects to recover over the life of the agreement. CenturyLink is able to offer a discount on its rate, knowing that the commitment will enable it recoup its investment. When the customer breaks that commitment, however, the savings that the carrier had shared with its customer are lost, and the carrier is at risk of being unable to recoup its investment. Thus, shortage and early termination fees work to help ensure that the expected revenue stream on which the carrier's investment was premised

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[79] Hammack Decl. at ¶¶ 9-11, 24.

[80] *Id.* at ¶¶ 12, 25.

[81] *Id.* at ¶¶ 12, 16-17.

[82] *Id.* at ¶ 27.

will continue over the life of the customer's commitment, and to provide some compensation to the provider if it does not.[83]

Notably, the very same CLECs that indict commitment discounts as anticompetitive themselves rely on such discounts.[84] Last year, CenturyLink analyzed the high-capacity term discount plans offered by the vendors from which it purchases services. In an April, 2012 *ex parte* filing in this docket, CenturyLink presented the results of the analysis for six of these competitive LECs.[85] All six CLECs required a commitment of 100 percent of historical volumes in order for a customer to enjoy special access discounts.[86] CLECs also employ shortage and termination fees in connection with their volume commitments. Level 3's tariff requires that if a customer cancels a service order for any reason other than interruption, the customer must pay

[83] In their Declaration for the Joint CLEC Commenters, Besen and Mitchell take the position that "if a customer were to purchase a smaller percentage of its requirements [from the incumbent LEC], presumably [the incumbent LEC] would make smaller special access investments and would be able to recover the costs of those investments from the proceeds of special access purchases that are actually made by the customer." Joint CLEC Commenters at 36 (quoting Besen and Mitchel at ¶ 47). This statement misconceives the realities of network deployment. It is true that a carrier would provision at lower capacities if it *knows in advance* to expect reduced demand. However, when a customer commits to a particular volume, the provider must provision the network to carry those traffic levels, and a large portion of the costs will be incurred up-front. CenturyLink incurs additional risk in this regard because its plans often offer portability options, such that customers are able to request a circuit to a location one month and then disconnect it the next. *See*, *e.g.*, Hammack Decl. ¶ 25. In these circumstances, it is reasonable for CenturyLink under this plan to protect the stream of revenues needed to recoup its investment – investment it undertook in reliance on the customer's commitment in the first place.

[84] As CenturyLink and others have explained previously, term and volume discounts are indeed ubiquitous throughout the economy. *See, e.g.*, CenturyLink Comments at 41-42.

[85] *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Melissa Newman, Vice President, Federal Regulatory Affairs, CenturyLink, WC Docket No. 05-25, Attachment at 8 (filed Apr. 20, 2012) ("April 20 Letter").

[86] *Id.*

(1) nonrecurring charges; (2) disconnection, early cancellation or termination charges incurred and paid to a third party; and (3) all recurring charges for the balance of the then-current term.[87] Likewise, tw telecom applies a non-specified termination liability charge for early termination of the term agreement.[88] These practices are not limited to tariffed offerings. For example, in one agreement in which CenturyLink is a customer of the CLEC, CenturyLink must pay early termination charges, including the monthly recurring charge for months in which CenturyLink does not receive service, if it terminates service during the initial service term or a fixed renewal term.[89] Of course, CLECs also offer basic volume and term discounts. For example, XO's tariff offers limited-time "credits and incentive discounts associated with [a] customer's aggregate DS1 Direct Connect service commitment" in certain wire centers.[90]

Finally, CenturyLink does not penalize overages. Under the majority of CenturyLink's plans, circuits/revenues above and beyond the commitment will be subject to the same discount otherwise applied in the plan. A few legacy Embarq CLOC plans have a maximum volume limitation for the particular discount set at 130 percent of the original commitment level, but even those do not penalize overages in the manner suggested by commenters.[91] When a

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[87] Level 3 Communications, LLC, Tariff F.C.C. No. 4, at 28 (issued May 7, 2002, revised Dec. 28, 2011).

[88] tw telecom, Tariff FCC No. 1, Sections 2.5.1, 2.8 (issued March 20, 2008, effective March 21, 2008).

[89] *See* April 20 Letter at 8.

[90] XO Communications, LLC, Tariff FCC No. 1 Section 13.1 (issued June 22, 2011, effective June 23, 2011).

[91] Under these plans, service above the maximum level is simply provided at the month-to-month rate, unless the customer modifies its service arrangement.

customer's circuit count exceeds 130 percent of the commitment, CenturyLink sends that customer a notice asking the customer to increase its commitment level.[92] If the customer elects to increase its commitment level, the discount will apply to the new volume; otherwise, the additional capacity will be priced at month-to-month rates beginning on the 91st day after the notice is sent.[93]

E. The "Remedies" Proposed by Critics for Alleged Terms and Conditions Issues Would Undermine, Not Promote, Consumer Interests.

Competitive providers demand that the Commission rewrite existing arrangements – whether reflected in contracts or tariffs – to arbitrarily cap so-called loyalty discounts and strike termination penalties not based on critics' notions of "costs."[94] Moreover, they urge the Commission to eliminate these bargained-for commitments while retaining the corresponding bargained-for discounts, even though the latter are premised entirely on the former. These self-serving proposals are based on a flawed understanding of the underlying terms, would distort the market, and would needlessly insert the government into individual terms of private contracts.[95]

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[92] Hammack Decl. at ¶ 11.

[93] *Id.*

[94] *See* Joint CLEC Commenters at 43-47; Level 3 Comments at 9-10; XO Communications Comments at 18-19.

[95] The specifics of the proposed remedies underscore that the interim relief proposals are directed at gaining an unfair competitive advantage for CLECs, not curing any alleged anti-competitive conduct by ILECs. Competitive providers assert that the public interest requires that these provisions be abrogated from private contract and tariffs absent any showing of market power or case-by-case adjudication. Yet the requested relief presumably would only apply to price-cap carriers' offerings. As detailed above, CLECs include the same types of terms and conditions in
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As detailed above, the "problems" that commenters' proposed "remedies" are meant to address are illusory. But even if the Commission had some basis for concluding otherwise, it would still have no basis for rewriting existing agreements, replacing bargained-for terms with new provisions not contemplated by the parties. As the Commission recognized in the context of interconnection agreements, a regime that permits one party to "pick and choose" advantageous terms without undertaking corresponding obligations leads to "the adoption of largely standardized agreements with little creative bargaining to meet the needs of both [parties]."[96] Likewise, the Commission has repeatedly cautioned against "unduly interfering with business arrangements between LECs and their customers."[97] The "heavy burden" that must be carried to justify abrogating contract terms is clearly not met here.[98] Competitive providers not only fail to make such a showing, they neglect to even concede that the burden must be met.[99]

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their own service offerings, and, as the Commission has acknowledged, it lacks any record basis for distinguishing between price-cap carriers and CLECs on the basis of market power.

[96] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494, 13501-02 ¶ 12 (2004), *review denied by New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (9th Cir. 2006).

[97] *Expanded Interconnection with Local Telephone Company Facilities*, 8 FCC Rcd 7341, 7346 ¶ 13 (1993).

[98] *ACC Long Distance Corp v. Yankee Microwave, Inc.*, 10 FCC Rcd 654, 657 ¶ 17 (1995). *See also Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670-71 (D.C. Cir. 2009) (holding that agency must "balance the harmful 'secondary retroactivity' of upsetting prior expectations" when "significantly altering the bargained-for benefits" of a contract by invalidating certain provisions).

[99] Instead, competitive providers reply on the Commission's *Video Exclusivity Order*. *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007). There, however, residents of multi-dwelling units (MDUs) were deprived of *any* competitive options because they were at the mercy of the decisions made by the owners of
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CLECs' requests are especially inappropriate here. They posit that ILECs should be required to maintain existing discount plans absent the protections and bargained-for benefits that make them possible. However, the contract and tariff provisions that competitive providers criticize are part of the "bargain containing terms that both benefit and burden [a carrier's] subscribers."[100] The Commission has long recognized that these types of provisions are the "valid quid pro quo for the rate reductions included in the long-term plans."[101] Critics seek to eliminate commitments but retain access to the associated discounts, ignoring the obvious link between a customers' willingness to adhere to an enforceable commitment of time, volume, and/or revenue and the options and flexibility now available to special access customers.

The proposed "remedies" therefore would be unfair and chill providers' willingness to craft new discount plans in the future. If the consequences of a customer breaking a long-term commitment are the same as for disconnecting a single month-to-month circuit, then there is no economic basis for any discount associated with the "commitment." Discount plans originally premised on volume or revenue commitments would need to be reformulated if such commitments were altered or excised, and customers would wind up with fewer options and less flexibility than they enjoyed in the past. Long-sought features such as geographic circuit

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the buildings in which they resided. Thus, MDU exclusivity provisions completely foreclosed consumer choice in a manner not applicable here.

[100] *Bellsouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006).

[101] *Ryder Communications, Inc. v AT&T Corp.*, 18 FCC Rcd 13603, 13617, ¶ 33 (2003); *Transport Rate Structure and Pricing*, 10 FCC Rcd 12979, 12984 ¶ 13 (1995) (explaining that "both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships.").

portability, migration rights for next-generation Ethernet offerings, and reduced pricing opportunities might be limited, or eliminated entirely, to account for new costs and increased uncertainty on the part of price-cap carriers.

IV. CONCLUSION

The choice facing the Commission is clear: It can move forward prematurely, basing its decisions on the parallel universe described in some parties' comments, or it can collect the data it has begun to solicit, analyze those data, and then move forward based on the facts as they exist. Having initiated the data-collection process, the Commission should adhere to its stated course, resisting calls for rushed action. The facts it collects will reveal a competitive landscape in constant flux, in which price-cap carriers must vie aggressively to win and retain high-capacity customers, facing alternative providers willing and able to provision DSn-capacity services, Gigabit offerings, and everything in between using scalable new technologies.

In evaluating the data submitted, the Commission should work to identify administrable triggers indicating areas in which such competitive facilities either exist or could feasibly be deployed. The Commission also should recognize that the terms and conditions set out in discount plans offered by CenturyLink and similar providers are responsive to customer needs, as one would expect in a competitive marketplace – and, indeed, are in most cases utilized by competing carriers as well. Thus, after collecting and analyzing the data, the Commission should move quickly to establish a new pricing flexibility regime – one that sets similarly situated providers on similar footing, promotes deployment by all market players, and removes current impediments hindering the migration to the all-IP networks of the future.

Respectfully submitted,

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March 12, 2013

EXHIBIT 1

DECLARATION OF CAROLYN HAMMACK

1. My name is Carolyn Hammack. My business address is 1801 California Street, Denver, Colorado. I am employed as a Director-Public Policy for CenturyLink. In that capacity, I am responsible for all Wholesale-related regulatory and policy issues. I have been employed by CenturyLink and its predecessor companies for 24 years.

2. The purpose of my declaration is to describe the relevant terms and conditions of CenturyLink's high capacity service offerings, including both tariff- and contract-based arrangements.

CenturyLink's Newest Company-Wide Option

3. CenturyLink's "Price Flex tariff" – available in jurisdictions in which it has obtained pricing flexibility – provides CenturyLink with the ability to negotiate Individual Case Basis ("ICB") contracts to try to meet the needs of the company's special access customers. The company sought feedback from customers when CenturyLink was investigating what components customers wanted to see in a company-wide offering to complement existing plans available in the former CenturyTel, Embarq and Qwest territories. Under the flexibility provided by the Price Flex tariff, and taking into account the feedback received, CenturyLink has negotiated ICB contracts with certain high-volume customers. For these contracts, customers negotiated discount levels based on their own current and projected future purchases from all CenturyLink companies. Each month, the level of discount received is based on the tier into which the customer's purchases for that month fall. The discount is applied to that products and services purchased in areas in which CenturyLink has pricing flexibility. These discount levels are based purely on revenue figures, and each month's bill is based on the applicable tier for that

month. For example, a customer will receive a certain percentage discount if its monthly revenues fall within a pre-established range, a greater discount if those revenues fall within a higher pre-established range, and a lesser discount if they fall into a lower pre-established range. Because of this negotiated tier structure, there are no penalties applied when revenues associated with the customer fall below or above particular usage thresholds. The new CenturyLink discount option also does not apply early termination fees.

CenturyLink's Legacy Special Access Discount Plans

4. Each CenturyLink Operating Company ("CLOC"), which includes legacy CenturyTel, legacy Embarq and legacy Qwest Incumbent Local Exchange Carriers, offers a range of special access discount plans, providing numerous options for customers. Many of these plans are available without volume commitments.

Discount Plans for Legacy CenturyTel CLOCs

5. For legacy CenturyTel companies, DS1 and DS3 special access services and other high capacity transmission services (including OCn services and Ethernet services) are fully price regulated, and are offered pursuant to publicly filed tariffed rates.[1] Customers can purchase high capacity circuits at a discount under generally available term plans contained in these tariffs. The terms range from three years to seven years with larger discounts for longer terms. The discounts apply to the standard tariffed rates and thus vary by CLOC study area.

6. Three of legacy CenturyTel's small rural operating companies remain as Average Schedule Companies. The rates for their high capacity products and services are contained in the

[1] With the exception of the Average Schedule operating companies mentioned below, those tariffs are CLOC FCC #1, CLOC FCC #2, CLOC FCC#3, CLOC FCC #6, CLOC FCC #7, and CLOC FCC #8.

publicly filed NECA FCC #5 tariff. NECA FCC #5 plans for the DS1, DS3 and SONET level services match the legacy CenturyTel provisions described above.

7. NECA FCC #5 also contains the terms for Ethernet Transport Service. The discount plan associated with Ethernet Transport Service provides discounts off the monthly tariffed rate ranging from 10 percent for a 36-month commitment to 20 percent for a 60-month commitment, and has no minimum committed ports requirement. At the end of the term, the customer can subscribe to a new Ethernet Transport Service Term Discount Plan ("ETS TDP") or revert to month-to-month rates found in the tariff. Customers may also establish a new plan or replace/upgrade their ETS TDP with a Fixed Rate Option for 36 or 60 months. This will stabilize the customer's rates for the 36 or 60 month term. Further, if the customer commits to purchase five or more ports, it is eligible for an additional 10 percent discount (e.g., a total of a 20 percent discount for a 36 month commitment or 30 percent for a 60 month commitment) under an Ethernet Transport Service Volume Discount Plan.

Discount Plans for Legacy Embarq Companies

8. Legacy Embarq CLOCs have varying degrees of pricing flexibility for high capacity services. In some instances, the legacy Embarq CLOCs have Phase I pricing flexibility, while in other cases, the relevant CLOC has Phase II pricing flexibility. For a majority of the Metropolitan Statistical Areas ("MSAs") in legacy Embarq CLOC territory, however, the Embarq CLOC has no pricing flexibility. Approximately 90 percent of Embarq CLOC wire centers are still fully price-regulated.

Legacy Embarq Companies' Discount Plans in Non-Price Flex Areas

9. *Term Discount Plans ("Legacy Embarq TDPs").* In the non-price flex areas, customers may purchase services pursuant to one of several term discount plans outlined in the

tariff. Legacy Embarq TDPs range from three to five years, with larger discounts applying to longer term plans. Under Legacy Embarq TDPs, a customer can agree to maintain a certain volume of circuits during the term of the commitment, and then can add and remove circuits subject to the discount without incurring any termination liability.

10. Customers decide up front how many circuits to include in the Legacy Embarq TDP at either a state or a national level and then, in exchange for the discounted rates, the customer agrees to maintain at least 90 percent of its stated commitment for the term of the plan. Discounts range from 15 percent to 30 percent off the month-to-month tariffed rate, with the discount level depending on the length of the term. Eligible services include, but are not limited to, DDS, DS1, DS3, STS1, and Shared SONET Ring service.

11. When signing up for TDPs, the customer has the option of adding all new growth to the plan or simply maintaining the committed volume. It is the customer's decision when signing up for the plan whether to add growth or maintain flexibility to decide on circuit-by-circuit basis. Legacy Embarq TDPs include a ceiling of 130 percent of circuits in-service under the plan. Customers can add new circuits above the 130 percent commitment and still receive the discount on the additional circuits for 90 days. Once the circuit count exceeds 130 percent of the commitment, however, the company issues a 90 day notice asking the customer to increase its commitment level. If the customer increases its commitment level, the discount continues. If the customer chooses not to increase its commitment level, the discount for circuits above the 130 percent commitment level will go to month-to-month rates on day 91 after notice is sent.

12. Customers may upgrade services covered under the Legacy Embarq TDP with no termination liability charges. The TDP also can be extended for up to one year upon expiration of the initial term. If a customer chooses not to renew the Legacy Embarq TDP, a 365 day grace

period begins automatically after the plan expires before the customer is moved back to month-to-month rates.

13. *The Premier Term Discount Plan ("PTDP").* Legacy Embarq CLOCs also offer the PTDP. The PTDP is a five-year, national discount plan. The PTDP was developed in response to requests by customers for greater discounts than the tariffed five-year term discount in cases where the customer was willing to commit all of the existing circuits they purchased from the Company. In addition, customers wanted to be able to take advantage of the greater discount on day one of any new circuit being installed. The PTDP contains both of these customer-requested elements.

14. In exchange for additional discounts, customers under the PTDP are asked to maintain 95 percent of an agreed-to level of the special access services they purchase from the legacy Embarq CLOCs. In turn, customers receive discounts on all eligible special access purchases from the legacy Embarq CLOCs that are covered under the plan. The discounted rates are reflected on customer bills. Eligible services include, but are not limited to, Digital Data Service, Fractional DS1 service, DS1 and DS3 private line services, STS1 and Multiplexing services.

15. The PTDP is national, but requires state-specific commitment levels. Commitment levels are based on DS1 equivalent circuits and are updated annually. Under this national plan, a customer might be under or over commitment levels in one state, but overall still within the bounds of the plan. In other words, a customer must maintain a threshold of 95 percent of its total agreed-to state-specific commitment levels.

16. Shortfall penalties apply if a customer falls below the threshold. The customer is notified if there are any circuit shortfalls, and the plan allows a 60-day grace period to rectify any

shortfall. As with other discount plans, customers may upgrade services with no termination liability charges. At the end of the plan, the customer has the option to renew for one year at its existing rates. If the customer chooses not to renew, there is a 365-day grace period before the customer is converted back to month-to-month rates.

17. *Revenue Volume Discount Plan ("RVDP").* Legacy Embarq CLOCs also offer the RVDP, which is a generally available volume discount plan with a three-year term. The RVDP was developed to provide greater discounts (up to 50 percent) as revenues increase in exchange for the three-year plan commitment. Customers receive a discount off the month-to-month rates for the services, which include DS1, DS3, STS1, Optipoint, SONET OC Ring, Ethernet Transport, and Ethernet Virtual Private Line. Customers also have the flexibility to upgrade an RVDP committed circuit to a higher speed or to upgrade a non-qualifying circuit (e.g., DDS) to a qualifying circuit (e.g., DS1).

18. Discounted elements provided under the RVDP include, but are not limited to: channel terminations; channel mileage termination (CMT, fixed); channel mileage facility (CMF, per mile); and MUX. Customers can achieve discounts on a recurring monthly revenue basis in lieu of making circuit volume commitments. The discount is based upon the total monthly recurring charges billed during each calendar month a customer remains on the plan. The discount is calculated by taking the monthly recurring revenue and comparing it to a discount table associated with various spending levels.[2]

19. At the end of the three-year commitment period, the customer may extend the RVDP for up to a maximum of an additional 12 months at the rates, terms and conditions in

[2] The discount tables are found in CLOC FCC #9 at Page 7-425 - Section 7.5.17(A) and Page 22-203 - Section 22.5.17(A).

effect at the time of extension, may sign a new three-year RVDP, or may remain on month-to-month rates without a discount applied.

Discount Plans in Price Flex Areas

20. For the areas where it has pricing flexibility, legacy Embarq CLOC offers negotiated contract tariffs. Generally, customers request individualized discount plans. A description of the terms of these contract tariffs is contained in Section 24 of the legacy Embarq CLOC FCC #9.

21. Examples of negotiated discount plans include (1) a flat rate on all of special access purchases or for specific products in the covered areas where legacy Embarq CLOCs have obtained pricing flexibility rates, and (2) a percentage discount off of legacy Embarq CLOC's standard tariffed rates in covered areas where the legacy Embarq CLOC has obtained pricing flexibility relief (which may vary by study area or rate zone).

22. For the limited areas where the legacy Embarq CLOC has pricing flexibility, the company offers multiple discount opportunities. For instance, overlay plans provide for discounts in addition to RVDP discounts, in exchange for increased revenue commitments on the part of the customer.[3]

[3] Contracts reflecting the terms of these overlay plans, as well as other contract tariffs are on file in Section 24 of legacy Embarq's CLOC FCC #9 tariff. Summaries of these contract tariffs are on file with the FCC.

Discount Plans for the Legacy Qwest CLOC

23. In limited instances, the legacy Qwest CLOC has Phase I pricing flexibility. In even fewer areas, the Company has some Phase II pricing flexibility. A majority of legacy Qwest CLOC territory, however, is still price-regulated (*i.e.,* there is no pricing flexibility).[4]

Discount Plans in Non-Price Flex Areas

24. *Term Discount Plans ("Qwest TDPs").* In the non-price flex areas, the Qwest CLOC offers customers several term discount plans, all of which are set out in Qwest's FCC #1 tariff. The Qwest TDPs range from one year to five years with the larger discounts applying to longer term plans. The discounts range from three percent to 38 percent off the month-to-month tariffed rate and do not require a volume commitment. Customers may subscribe to different terms for each circuit, depending on the specific customer's needs in a particular location or situation. This approach minimizes the likelihood of the customer incurring any termination liability charges.

25. *The Regional Commitment Plan ("RCP").* The legacy Qwest CLOC also offers the RCP. The RCP has a four-year term and provides for a 22 percent discount off the month-to-month tariffed rates for DS1 and DS3 circuits. RCP customers may add or subtract facilities throughout the legacy Qwest territory as their business needs require without incurring termination charges, provided that the applicable minimum revenue commitment is satisfied. The RCP allows customers to disconnect circuits in areas where they are building out facilities and add new circuits in areas where they may not yet have facilities.

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[4] Approximately 64 percent of legacy Qwest wire centers are still price regulated for Transport and 80 percent of the wire centers are still price regulated for channel terminations.

26. In exchange for the discounted rates received, the RCP requires a customer to commit to maintain 95 percent of the committed monthly revenue for the term of the plan, but there is no maximum revenue commitment. Customers can, and do, purchase special access services from competitors of legacy Qwest, and in many instances also self-supply the facilities necessary to provide service to their customers.

27. After an RCP is established, customers may migrate DS1s currently under an RCP to a fixed-term contract. To facilitate moves to a fixed-term plan, legacy Qwest waives the RCP termination liability when the DS1s are migrated to a fixed term contract. The RCP also contains an "exit provision" that enables customers to migrate DS1s to new fiber-based technologies, *e.g.*, SONET or Ethernet. CLEC customers are also allowed to retain their UNE services as a vehicle for providing service to their end-user customers.

Discount Plans in Price Flex Areas

28. For the limited areas where the legacy Qwest CLOC has pricing flexibility, the company offers multiple discount opportunities. For instance, overlay plans provide for discounts in addition to the RCP discounts, in exchange for increased revenue commitments on the part of the customer.[5]

Forborne Services

29. For services for which legacy Qwest CLOC received forbearance in August 2008, and legacy Embarq CLOC received forbearance to a lesser extent in late 2007, the CLOCs may respond in a more meaningful way to each customer's situation and business needs. For example, in competitive bids for wireless backhaul facilities, some carriers have sought city-

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[5] Contracts reflecting the terms of these overlay plans, as well as other contract tariffs are on file in Section 24 of legacy Qwest's FCC #1 tariff. Summaries for over 300 of these contract tariffs are on file with the FCC.

specific pricing while other customers have requested region-wide rates. City- and region-specific pricing flexibility is critical to remain competitive with deregulated competitors. For some contracts, the customers negotiate a flat rate for products and services covered by the forbearance grant. Under these contracts, customers pay the same rate for all rate zones and study areas in which the covered circuits are located. In other cases, customers negotiated for a percentage discount off of legacy Qwest's and legacy Embarq's tariffed rates.

30. Legacy Qwest also offers a fiber-based Ethernet backhaul service designed for wireless service providers. Building on its existing Fiber-to-the-Node deployments, Qwest's Mobile Ethernet Backhaul offering extends fiber to cellular towers to help wireless service providers increase the bandwidth and quality of service provided to end users, addressing the increasing demands of next-generation mobile technologies such as smartphones, laptops, tablets, netbooks, and other bandwidth-demanding devices. The service provides incremental, scalable bandwidth to wireless service providers, enabling them to increase capacity to cell towers on an as-needed basis. Fiber-to-the-Cell contracts have terms ranging from six to eight years and provide custom-built solutions for each customer.

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I hereby declare under penalty of perjury that the foregoing declaration is true and correct to the best of my knowledge and belief. Dated this 12th day of March, 2013.

Carolyn Hammack

CAROLYN HAMMACK