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March 12, 2013

**VIA COURIER AND ECFS**

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

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

Dear Ms. Dortch:

On behalf of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC and tw telecom inc. (collectively, the “Joint Commenters”), please find enclosed two copies of the redacted version of the Joint Commenters’ reply comments on Sections IV.A and C of the Further Notice of Proposed Rulemaking released on December 18, 2012 in the above-referenced proceeding<sup>1</sup> (the “Reply Comments”). The Reply Comments contain information that the Wireline Bureau has deemed highly confidential under the *Second Protective Order* in this proceeding,<sup>2</sup> including highly confidential information that was previously submitted into the record by other parties.

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<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (2012).

<sup>2</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Second Protective Order, 25 FCC Rcd. 17725 (2010) (“*Second Protective Order*”); *see also Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Paul Margie, Wiltshire & Grannis LLP, 26 FCC Rcd. 6571 (2011) (supplementing the *Second Protective Order*); *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, 27 FCC Rcd. 1545 (2012) (further supplementing the *Second Protective Order*).

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Pursuant to the procedures outlined in the *Modified Protective Order*<sup>3</sup> and *Second Protective Order*,<sup>4</sup> as modified by the instructions in the second data request in this proceeding,<sup>5</sup> the original highly confidential version of the Reply Comments is being filed with the Secretary's Office under separate cover, two copies of the highly confidential version of the Reply Comments will be delivered to Andrew Mulitz of the Pricing Policy Division of the Wireline Competition Bureau, and one machine-readable copy of the redacted version of the Reply Comments will be filed electronically via ECFS. In addition, one copy of the Reply Comments has been served upon each party other than the Joint Commenters who submitted highly confidential information that appears in the Reply Comments with that party's highly confidential information unredacted. Finally, pursuant to a request from members of the Wireline Competition Bureau staff, one copy of the highly confidential version of the Reply Comments will be delivered to Derian Jones of the Pricing Policy Division of the Wireline Competition Bureau.

Please do not hesitate to contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

*Counsel for BT Americas, Cbeyond, EarthLink,  
Integra, Level 3 and tw telecom*

Enclosure

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<sup>3</sup> See *In the Matter of Special Access for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168, ¶¶ 5, 14 (2010).

<sup>4</sup> See *Second Protective Order* ¶ 15.

<sup>5</sup> See *Competition Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, RM-10593, at 21 (rel. Sept. 19, 2011) (“[P]lease provide those copies of confidential and highly confidential filings that are to be delivered to staff of the Pricing Policy Division to Andrew Mulitz instead of Marvin Sacks.”)

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

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

**REPLY COMMENTS OF  
BT AMERICAS, CBEYOND, EARTHLINK, INTEGRA, LEVEL 3 AND TW TELECOM**

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Carrier Rates for Interstate Special Access )  
Services )

**COMMENTS OF  
BT AMERICAS, CBEYOND, EARTHLINK, INTEGRA, LEVEL 3 AND TW TELECOM**

BT Americas Inc. (“BT”), Cbeyond Communications, LLC (“Cbeyond”), EarthLink, Inc. (“EarthLink”), Integra Telecom, Inc. (“Integra”), Level 3 Communications, LLC (“Level 3”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these reply comments in response to comments filed on Sections IV.A and C of the December 18, 2012 Further Notice of Proposed Rulemaking in the above-referenced proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

As the Joint Commenters explained in their initial comments, incumbent LEC special access exclusionary purchase arrangements continue to stifle competition in the special access market and slow the transition from TDM-based services to more efficient Ethernet services. Because special access services are vital to virtually every part of the U.S. economy, the incumbent LECs’ conduct results in significant harm every passing day and every passing month

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<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (2012) (“*FNPRM*”).

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to American businesses and consumers. At the same time, the absence of effective price regulations governing incumbent LEC DS1, DS3, and lower-capacity Ethernet special access services leaves incumbent LECs free to charge supra-competitive prices that again cause significant harms to businesses and consumer welfare generally.

The solutions to the related problems of exclusionary, lock-up purchase arrangements and insufficient rate regulation are well understood and explained fully by the Joint Commenters and others in the initial round of comments. *First*, the Commission must act quickly to adopt regulations that prevent incumbent LECs from using their DS<sub>n</sub> special access purchase arrangements to impede competition and slow the transition to Ethernet services. It should do so by, among other things, (1) prohibiting incumbent LECs from conditioning the availability of circuit portability and other benefits on a customer's commitment to purchase more than a defined percentage (*e.g.*, 50 percent) of the customer's historic spend, and (2) ensuring that incumbent LECs recover customer-specific sunk costs associated with providing special access services in a manner that does not harm competition (*e.g.*, by requiring that incumbent LEC charges for recovery of such costs are cost-based and prohibiting early termination penalties for circuit-specific term plans that exceed the level of unrecovered customer-specific sunk costs).

*Second*, the Commission should conduct a comprehensive market power analysis of the special access market (including TDM-based and non-TDM-based services) to identify the relevant product and geographic markets in which the incumbent LECs have market power and to establish appropriate rate regulation. The most straightforward means of conducting this analysis is by applying the Commission's established market power test in combination with benchmarks for reasonable rates. Alternatively, however, the Commission could rely on panel regressions if it can overcome the significant challenges associated with such an undertaking.

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There is widespread support in the initial comments for both of these solutions (*i.e.*, immediate action to address incumbent LEC exclusionary purchase arrangements and conducting a comprehensive market power analysis for the purpose of adopting appropriately targeted price regulation). As expected, however, the incumbent LECs again seek to persuade the Commission not to address the problems in this market. None of their arguments have merit.

To begin with, the incumbent LECs repeat their discredited justifications for their exclusionary purchase arrangements. They claim that the purchase arrangements are “voluntary,” but the arrangements are of course not voluntary at all because incumbent LECs own the only last mile facilities to many locations and purchasers cannot afford to pay the incumbent LECs’ exorbitant rates that would apply if they did not agree to the purchase arrangements. The available data confirm that incumbent LECs very rarely sell special access services on a month-to-month basis. The incumbent LECs also claim that conditioning benefits such as circuit portability on a commitment to purchase a percentage of historic demand makes sense because such commitments yield lower costs for incumbent LECs, but it is the total volume purchased, not a percentage of historic volumes, that could (at least in theory) yield economies of scale.

The incumbent LECs also argue, unpersuasively, that the Commission need not conduct a market power analysis of the special access market. For example, the incumbent LECs again assert that demand for DS1 and DS3 special access services is fast disappearing, obviating the need for the Commission to assess incumbent LEC market power in the provision of these services. But the data in this proceeding demonstrates that, as of 2010, the combined revenues of AT&T, Verizon, CenturyLink, and FairPoint for DS1 and DS3 special access services exceeded \$12 billion. There is no basis for concluding that the volume of these services sold by incumbent

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LECs has diminished enough in the past two years to justify ignoring them. This is especially so because the incumbent LECs' exclusionary purchase plans leave purchasers no choice but to continue to buy large volumes of DS1 and DS3 services even if they would rather purchase Ethernet special access services.

The incumbent LECs' attempts to characterize the relevant markets for special access as competitive fare no better. The incumbents simply cannot explain away the fact that they continue to own the only last-mile connection to the vast majority of commercial buildings in the country. The incumbents' reliance on competitive services offered by cable companies is unpersuasive because cable companies' dedicated service offerings are limited in geographic scope, and cable "best efforts" services are not a substitute for incumbent LEC special access services. The incumbent LECs' reliance on competitive services offered by fixed wireless providers is unpersuasive because such offerings represent a tiny fringe in the relevant markets. And the incumbent LECs' reliance on competitive services provided via Ethernet-over-copper technology is unpersuasive because copper is not suitable for providing Ethernet in many locations, and incumbent LECs are actively seeking to eliminate copper in the locations where it is viable.

In addition, the incumbents again try to persuade the Commission that it should ignore their high market shares because market share data is "static." But the Commission rejected this precise argument in the *Phoenix MSA Forbearance Order*, and it should do so again here. Market share remains an important component in a comprehensive market power analysis.

Finally, AT&T's attempt to recast this proceeding as narrowly focused on reforming pricing flexibility triggers for DS1 and DS3 services is easily dismissed. In the 2005 NPRM that initiated the instant proceeding, the Commission expressly stated that this proceeding

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encompasses the entire regulatory framework for price cap incumbent LEC special access services, including reforming price caps themselves. The Commission also stated in that NPRM that this proceeding encompasses packet-mode special access services. Since then, the Commission has twice requested information from purchasers and providers of packet-mode special access services, and it included those services in the mandatory data request it recently adopted. AT&T is therefore wrong when it asserts that this proceeding should focus only on revamping pricing flexibility triggers for DS1 and DS3 services.

**II. THE COMMISSION SHOULD ACT NOW TO PROHIBIT THE EXCLUSIONARY TERMS AND CONDITIONS IN INCUMBENT LEC SPECIAL ACCESS PURCHASE ARRANGEMENTS.**

The Commission faces a key decision in this proceeding. It can either (1) begin to promote competition in the market for special access services now by promptly adopting rules that prohibit the patently unreasonable terms and conditions in incumbent LEC purchase arrangements, or (2) delay action for as long as it takes to obtain approval of the data request under the Paperwork Reduction Act, collect information from every industry participant, scrub and analyze that data, and adopt a final order—a process that could well take longer than anticipated due to the incumbent LECs' inevitable delay tactics. Given the evidence in the record that incumbent LEC exclusionary purchase arrangements are stifling competition, delaying the adoption of Ethernet, and almost certainly causing prices for special access services to be higher than would be the case in the absence of the purchase arrangements, the Commission's decision should be a simple one. The Commission should act now to adopt rules that would prevent exclusionary purchase arrangements from continuing to harm American businesses and consumers. Indeed, the incumbent LECs' failure to provide a meaningful defense

of their exclusionary purchase arrangements only confirms that the Commission can and should act now to rein in the harmful effects of such arrangements.

**A. The Record in this Proceeding Clearly Demonstrates the Need for Commission Action.**

As the Joint Commenters explained in their initial comments, the record in this proceeding fully demonstrates that incumbent LECs (1) possess overwhelming market shares in the facilities-based provision of DS1 and DS3 special access services,<sup>2</sup> and (2) exploit their position in these markets to induce customers to enter into purchase arrangements that contain anticompetitive terms and conditions.<sup>3</sup> Commenters—except of course for the incumbent LECs themselves—widely agree that these facts are sufficient to support Commission action now. For example, XO urges the Commission to provide “immediate relief” because “price cap LEC terms and conditions for special access services remain unjust and unreasonable and are deleterious to full marketplace competition.”<sup>4</sup> Similarly, Sprint stresses the need for the Commission to act “as soon as possible, even as it continues to evaluate pricing and competition in the special access marketplace.”<sup>5</sup>

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<sup>2</sup> See Joint Commenters Comments at 14-20. All references to “Comments” are to those filed on February 11, 2013 in WC Docket No. 05-25 *et al.*, unless otherwise indicated.

<sup>3</sup> See *id.* at 20-36.

<sup>4</sup> XO Comments at 20; see also TelePacific Comments at 12 (“The record fully demonstrates that the Commission’s price cap and pricing-flexibility rules have not prevented the BOCs from imposing anticompetitive and unreasonable terms and conditions on the purchase of special access services.”).

<sup>5</sup> Sprint Comments at iii; see also Level 3 Comments at 7-8 (“The Commission does not need a further data gathering effort to know that in the vast majority of locations, the ILEC is the only company that has deployed facilities capable of providing special access service, giving it market power.”).

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The incumbent LECs offer no basis for delaying adoption of regulations designed to stop the harmful effects of exclusionary purchase arrangements. For example, Verizon argues that it is “premature” for the Commission to even analyze the terms and conditions of the incumbent LECs’ special access purchase arrangements.<sup>6</sup> This position clearly lacks merit. Incumbent LECs are currently classified as dominant in the provision of special access services,<sup>7</sup> and the Commission has collected data in this proceeding that supports this classification.<sup>8</sup> Moreover, even if the Commission declines to formally reaffirm its finding that incumbent LECs possess market power in the provision of DS1 and DS3 special access services, commenters widely agree that the Commission has the authority under Section 201(b) of the Communications Act of 1934<sup>9</sup> to declare incumbent LEC exclusionary purchase arrangements unreasonable.<sup>10</sup> As Level 3 explains in its separate comments, the Commission has frequently prohibited unreasonable conduct by service providers even when it has not found those providers to be dominant in the

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<sup>6</sup> Verizon Comments at 28-29.

<sup>7</sup> *See generally Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990).

<sup>8</sup> *See* Joint Commenters’ Comments at 14-19 (outlining data in the record that supports the conclusion that incumbent LECs possess market power in the provision of DS1 and DS3 special access services).

<sup>9</sup> 47 U.S.C. § 201(b). The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (“Communications Act” or “Act”), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

<sup>10</sup> *See* Level 3 Comments at 5-8; *see also* Sprint at 38 (“The Commission should declare terms and conditions that interfere with a purchaser’s ability to switch special access circuits from an incumbent with market power to a competitive provider to be unjust and unreasonable under Section 201 of the Communications Act.”); XO Comments at 9 (“[T]hese terms and conditions are unjust and unreasonable in violation of Section 201(b) of the Act.”); TelePacific Comments at 18 (“The lock-up commitments . . . violate Section 201(b) and therefore, the Commission should address these anticompetitive practices and take the necessary actions.”).

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relevant product market.<sup>11</sup> Regardless of how the Commission opts to address this issue, it is critical that incumbent LECs not be permitted to continue their harmful practices as this eight-year proceeding moves forward.

**B. Incumbent LECs Have Failed to Provide a Meaningful Defense of Their Special Access Purchase Arrangements.**

In their initial comments, the Joint Commenters provided a detailed description of the manner in which incumbent LEC exclusionary purchase arrangements (1) effectively require competitors to purchase a large proportion of their special access demand from incumbent LECs<sup>12</sup> and (2) tie the sale of services that are subject to competitive supply to the sale of services that are not subject to competitive supply.<sup>13</sup> A number of other commenters submitted additional record evidence supporting these conclusions.<sup>14</sup> In contrast, incumbent LECs provided no new information regarding their special access purchase arrangements, opting instead to rely on the same unsubstantiated talking points they have used for years.

*First*, incumbent LECs assure the Commission that it need not be concerned with the terms and conditions of any of their special access purchase arrangements because the arrangements are entirely voluntary. In so doing, the incumbent LECs ask the Commission to disregard marketplace realities. Purchasers often have no choice but to purchase special access

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<sup>11</sup> See Level 3 Comments at 5-7 (providing examples of FCC action to prohibit unreasonable conduct by non-dominant service providers). Level 3 further explains that while “[t]he use of demand lock-up arrangements by [incumbent LECs] is unjust and unreasonable . . . , the use of term and volume contracts by non-ILEC wholesale providers has no anti-competitive effects, because there are no locations at which the non-ILEC is the only provider.” *Id.* at 8.

<sup>12</sup> See Joint Commenters Comments at 20-30.

<sup>13</sup> See *id.* at 30-33.

<sup>14</sup> See, e.g., XO Comments at 8-17 & Exhibit 2, Declaration of John T. Dobbins; Sprint Comments at 23-37; TelePacific Comments at 12-18.

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services from incumbent LECs because, as the Joint Commenters demonstrated in their initial comments, incumbent LECs own the only last-mile facility to the vast majority of commercial locations in the country.<sup>15</sup> And because the incumbent LECs' month-to-month rates are generally cost-prohibitive, purchasers are effectively forced to enter into exclusionary purchase arrangements.

For example, although CenturyLink correctly points out that “customers can elect month-to-month and circuit-by-circuit options,” it fails to mention that the cost-prohibitive rates associated with these “options” prevent nearly all of its customers from selecting them.<sup>16</sup> The available data powerfully supports this point. According to CenturyLink’s own data, DS1s and DS3s sold at month-to-month rates accounted for only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] or [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent of CenturyLink’s [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] total revenue from the sale of DS1s and DS3s in 2010.<sup>17</sup> The remaining [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent of this revenue was associated with sales to customers who agreed to term- and volume-based commitments even though these commitments require the customer to sacrifice a significant degree of flexibility. Thus, while these commitments may be technically “voluntary,” purchasers of special access services clearly have very strong incentives to avoid incumbent LECs’ undiscounted rates.

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<sup>15</sup> See Joint Commenters Comments at 14-20.

<sup>16</sup> CenturyLink Comments at 40.

<sup>17</sup> See CenturyLink Revised Response to Second Voluntary Data Request, Response to Question III.B.1, WC Dkt. No. 05-25 *et al.* (filed Dec. 22, 2011).

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Furthermore, as the Joint Commenters explained in their initial comments, if a competitor wishes to serve a large number of retail customers at viable rates, it often has no choice but to commit to purchasing a very large percentage of its wholesale special access inputs from incumbent LECs in order to receive circuit portability.<sup>18</sup> AT&T claims that it “has documented examples of large customers that purchase [only] a small portion of circuits under an AT&T portability plan pursuant to volume commitments.”<sup>19</sup> However, AT&T cites only one such example—[**BEGIN HIGHLY CONFIDENTIAL**] [REDACTED] [**END HIGHLY CONFIDENTIAL**]  
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[REDACTED] [**END HIGHLY CONFIDENTIAL**] This fact fully refutes AT&T’s argument.

*Second*, the incumbent LECs fail to offer a reasonable justification for conditioning circuit portability and other “benefits” on a customer’s commitment to maintain a very high percentage of its historic purchase volume in service with the incumbent LEC. For instance, under CenturyLink’s Regional Commitment Plan, a customer is required to maintain 95 percent

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<sup>18</sup> See Joint Commenters Comments at 24-26.

<sup>19</sup> AT&T Comments at 42 n.151.

<sup>20</sup> Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 *et al.*, at 13 (filed Aug. 8, 2012).

<sup>21</sup> See [**BEGIN HIGHLY CONFIDENTIAL**] [REDACTED]  
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of its historic purchase volume in service with CenturyLink in order to obtain circuit portability and a 22 percent discount off of CenturyLink’s monthly recurring charges.<sup>22</sup> CenturyLink claims that this volume commitment is justified because customer commitments to historic purchase volumes yield economies of scale.<sup>23</sup> But CenturyLink does not, and cannot, explain *how* the percentage commitment yields economies of scale. For example, CenturyLink cannot explain why its purported economies of scale are in any way tied to the percentage of a customer’s historic purchase volume that it keeps in service rather than the *total* quantity of circuits that the customer purchases.<sup>24</sup> Nor can it explain why selling a given customer a quantity of DS1s in one location (*e.g.*, Minnesota) and another quantity of DS1s a distant state in the legacy Qwest territory (*e.g.*, Arizona) results in any cost savings whatsoever.<sup>25</sup>

Similarly, Verizon asserts that “greater certainty and predictability” afforded by its large, percentage-based volume commitments “are what make it possible for Verizon to offer additional benefits such as circuit portability.”<sup>26</sup> But Verizon offers zero evidence to support this assertion. For example, it provides no data to show why 85, 90, and 92 percent (the volume

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<sup>22</sup> See Qwest Corporation, Tariff F.C.C. No. 1 § 7.1.3(B)(1).

<sup>23</sup> See CenturyLink Comments at 42.

<sup>24</sup> As Drs. Stanley Besen and Bridger Mitchell—two leading experts in competition and pricing in the telecommunications industry—explain in a paper that the Joint Commenters filed with their initial comments, “[t]o the extent that there are economies of scale in the provision of special access, those economies are more likely to depend on the *number* of circuits purchased by a customer than on the *percentage* of the customer’s historic purchases that these circuits represent.” Joint Commenters Comments, Besen & Mitchell Paper ¶ 41.

<sup>25</sup> See *id.* ¶ 42 (“It is highly unlikely, to say the least, that an ILEC’s costs in providing special access to a particular customer in one of its service areas are affected to any significant degree by the amount of special access services that it provides to that customer in another area.”).

<sup>26</sup> Verizon Comments at 31.

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commitments required under Verizon’s Commitment Discount Plan and Verizon’s National Discount Plan) are the volume commitments that allow Verizon to offset the cost of providing circuit portability.<sup>27</sup> Verizon’s claim is especially puzzling because Verizon *is* able to offer circuit portability under the Term Volume Plan in Verizon West territory *without* requiring a customer to agree to a large, percentage-based volume commitment.<sup>28</sup> Verizon does not attempt to explain this inconsistency.

**C. The Commission Should Adopt the Joint Commenters’ Proposals For Diminishing the Harmful Effects of Incumbent LEC Exclusionary Purchase Arrangements.**

In their initial comments, the Joint Commenters outlined a set of targeted proposals formulated by Drs. Besen and Mitchell that would diminish the harmful effects of incumbent LEC exclusionary purchase arrangements.<sup>29</sup> These proposals are designed to promote competition in the market for special access services while at the same time ensuring that incumbent LECs retain the ability to recover their costs, earn a reasonable return on their investments, and offer their customers a wide variety of pricing options. The record reflects broad support for these (or similar) proposals. For instance, a number of commenters agree that the Commission should prohibit incumbent LECs from conditioning circuit portability or other benefits on a customer’s commitment to maintain more than a certain percentage (such as 50

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<sup>27</sup> Verizon also offers no explanation as to why volume commitments based on a percentage of a customer’s historic purchase volume yield greater certainty and predictability than volume commitments based on a fixed number of circuits. *See* Letter from Thomas Jones and Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 *et al.*, 2-4 (filed Aug. 21, 2012) (rebutting Verizon’s justifications for these volume commitments).

<sup>28</sup> *See* Verizon Telephone Companies, Tariff F.C.C. No. 14 § 5.6.14.

<sup>29</sup> *See* Joint Commenters Comments at 42-47.

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percent) of its historic purchase volume in service with the incumbent LEC.<sup>30</sup> XO explains that “this sort of remedy creates the prospect that the price cap LECs will begin to experience competitive pressures to lower their rates and soften their other terms and conditions, making the price cap LECs (eventually) a more attractive choice rather than simply an effective prison, as they are today.”<sup>31</sup>

In addition, Sprint agrees that the Commission should prohibit incumbent LECs from charging early termination fees (“ETFs”) that exceed the actual customer-specific, sunk costs associated with providing a special access service.<sup>32</sup> Sprint states that “incumbent LECs should not be permitted to recover in ETFs costs that were sunk long before a particular customer purchased access to a circuit, such as the cost of deploying facilities to a building many decades before the current special access customer took residence.”<sup>33</sup> The Joint Commenters’ proposal would prevent this unjust outcome.<sup>34</sup>

As the Joint Commenters have explained, the benefits of these proposals, such as an increased level of competitive entry, will likely take years to develop. It is therefore critical that the Commission act now to allow this long and important process to begin.

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<sup>30</sup> See XO Comments at 17-20; Sprint Comments at 39-41; TelePacific Comments at 18.

<sup>31</sup> XO Comments at 18.

<sup>32</sup> Sprint Comments at 42.

<sup>33</sup> *Id.*

<sup>34</sup> See Joint Commenters’ Comments at 44-46.

**III. THERE IS NO BASIS FOR INCUMBENT LEC ASSERTIONS THAT THE FCC NEED NOT ADDRESS MARKET POWER IN THE PROVISION OF SPECIAL ACCESS SERVICES.**

In their comments, the incumbent LECs set forth a number of arguments designed to downplay the need for Commission action in this proceeding. Each of these arguments lacks merit.

**A. The Demand for DS1 and DS3 Special Access Services Remains Substantial and Worthy of the Commission’s Attention.**

For years, incumbent LECs have told the Commission that it need not address the rates, terms and conditions for TDM-based special access services because of declining demand for these services.<sup>35</sup> The incumbent LECs have done so even as they have continued to generate enormous revenues from the sale of these services and even as they have continued to impose purchase arrangements on customers that effectively force the customers to continue to purchase TDM-based services. In its most recent repackaging of the argument, AT&T assures the Commission that “[t]here is no need to assemble an enormous cannonade to shoot at targets that are receding into the distance.”<sup>36</sup> Yet as the Commission recently acknowledged, in 2010 (the most recent year for which the Commission has data), AT&T, Verizon, CenturyLink, and FairPoint reported that their combined revenues from the sale of DS1 and DS3 special access

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<sup>35</sup> See, e.g., AT&T Reply Comments, WC Dkt. No. 05-25 *et al.*, at 2 (filed Feb. 24, 2010) (“[T]he industry remains mired in a seemingly endless debate about the rates and terms for the price cap LECs’ legacy copper, TDM, DS<sub>n</sub>-level facilities which are being rapidly replaced by this wave of broadband investment.”); AT&T Comments, WC Dkt. No. 05-25 *et al.*, at 13 (filed Jan. 19, 2010) (“[T]he Commission must seriously ask itself whether it makes sense to mount a major agency effort to impose new regulations on the ILECs’ legacy DS<sub>n</sub>-level special access services, when all of the available evidence indicates that those services are going the way of the dodo[.]”).

<sup>36</sup> AT&T Comments at 10.

services exceeded \$12 billion.<sup>37</sup> AT&T alone generated [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] from the sale of DS1s and DS3s that year.<sup>38</sup> There is no reason to believe that sales of these services have dropped so precipitously in the past two years that the Commission could justify ignoring this huge market.

Incumbent LECs attempt to divert attention away from these services by focusing on the “evolving” nature of the special access market.<sup>39</sup> It is, of course, true that a large and increasing number of customers are demanding packet-mode services, largely due to years of innovation and investment by competitive LECs.<sup>40</sup> But despite this trend, the revenues that incumbent

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<sup>37</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd. 10557, ¶ 2 (2012) (“Pricing Flexibility Suspension Order”). Sprint has estimated that the market for DSn-based special access services totals \$18 billion. *See id.* at ¶ 2 n.2 (citing Letter from Charles W. McKee, Vice President – Government Affairs, Federal and State Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, WT Dkt. No. 02-55 at 2 (filed May 29, 2012)).

<sup>38</sup> *See* [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

<sup>39</sup> *See, e.g.*, Verizon Comments at 4-19.

<sup>40</sup> *See, e.g.*, Letter from Thomas Jones, Counsel for Cbeyond, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 *et al.*, at 2 (filed Nov. 2, 2012) (highlighting recent deployments of various packet-mode services by competitors); Comments of Cbeyond, Inc., Integra Telecom, Inc., MegaPath, Inc., Covad Communications Company and tw telecom inc., WC Dkt. No. 10-188, at 4-16 (filed Oct. 15, 2010) (describing how competitors are providing innovative IP-based services to businesses of all sizes); Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51, at 3-4 (filed Dec. 22, 2009) (describing the benefits that U.S. businesses, hospitals, universities, and community anchor institutions have received from tw telecom’s aggressive deployment of Ethernet services). Competitive LECs’ efforts have prompted incumbent LECs to invest in the provision of packet-mode services as well. *See* Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory and Chief Privacy Officer, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Jan. 14, 2013) (“CLECs are leading providers of Ethernet

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LECs derive from the sale of DS1 and DS3 services still dwarf their revenues from the sale of packet-mode services such as Ethernet. In 2010, AT&T’s revenues from the sale of packet-mode services totaled only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL], less than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent of its DS1 and DS3 revenues that year.<sup>41</sup>

It is extremely unlikely that these proportions have changed significantly since 2010 because, among other things, the incumbent LECs’ own special access purchase arrangements lock in their revenues from the sale of TDM-based services by preventing customers from upgrading to packet-mode services. For example, as the Joint Commenters have explained, under the terms of many incumbent LEC purchase arrangements, if a competitor were to cease purchasing the incumbent LEC’s DS1 and DS3 special access services at the competitor’s retail customer locations and begin purchasing the incumbent LEC’s Ethernet services to these locations instead, the customer would incur significant shortfall penalties.<sup>42</sup> The transition to packet-mode technology, like all technology transitions, is a gradual process, but the incumbent LECs’ purchase arrangements are slowing it to a crawl. The market for DS1 and DS3 special access services therefore remains worthy of the Commission’s attention, and the Commission should disregard incumbent LECs’ self-serving suggestions to the contrary.

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services, and ILECs have ‘respond[ed] with further investments in their own Ethernet offerings.’”) (internal citation omitted).

<sup>41</sup> See [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

<sup>42</sup> See Joint Commenters Comments at 41-42.

**B. Incumbent LECs Continue to Exaggerate the Extent of Competition in the Market for Special Access Services.**

The incumbent LECs go to great lengths to characterize the market for special access services as a model of competition. Despite their efforts, none of their arguments call into question the single most important fact in this proceeding—incumbent LECs own the only last-mile facility to the vast majority of businesses in the country.

*First*, Verizon and CenturyLink cite a litany of statistics regarding the number of buildings to which competitors and cable companies have deployed last-mile facilities.<sup>43</sup> The statistics they cite indicate that competitors' facilities reach a combined total of approximately 49,000 commercial locations in the country.<sup>44</sup> Even if this number of locations served is accurate, it significantly overstates the total number of locations served by competitive fiber because multiple competitors often deploy last-mile facilities to the same location. In contrast, incumbent LECs serve virtually every commercial building in the United States. For the untold millions of American businesses at the millions of locations to which the incumbent LECs own the only last-mile facility, any existing deployment of competitive fiber is utterly irrelevant.

In addition, incumbent LECs exaggerate the extent of competitive deployment of last-mile facilities by touting the total number of *fiber route miles* in competitors' networks.<sup>45</sup> Of course, many of these statistics include fiber facilities that competitors have deployed in their

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<sup>43</sup> See Verizon Comments at 12-14; CenturyLink Comments at 20-23.

<sup>44</sup> Verizon and CenturyLink claim that tw telecom serves 17,000 buildings, XO serves 3,300 buildings, Level 3 serves 8,000 buildings, Cox serves 20,000 buildings, and Cbeyond serves 1,000 buildings. See Verizon Comments at 12-14; CenturyLink Comments at 20-23.

<sup>45</sup> See CenturyLink Comments at 21-22; see also Verizon Comments at 22 (touting the number of fiber route miles in cable providers' networks).

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long-haul networks. This deployment has no bearing on the level of competition in the market for local transmission services generally and last-mile services in particular.

*Second*, incumbent LECs overstate the extent to which cable companies provide services that compete with incumbent LEC special access offerings. For instance, CenturyLink cites an Insight Research study to demonstrate cable companies’ “commercial services” revenue totals, but the study makes clear that these totals include a wide range of services (including web hosting services and video services) that are not substitutes for special access services.<sup>46</sup> CenturyLink also fails to mention that one of the main conclusions of this study is that cable companies face “major challenges” in their efforts to compete in the business services market.<sup>47</sup> According to the study, “[t]elcos will staunchly defend their existing base in the next five years and limit cable operators to small players in a big industry.”<sup>48</sup> Indeed, when the FCC has assessed actual marketplace data, it has found that cable companies do *not* provide a level of competition that is sufficient to discipline incumbent LECs’ rates, terms and conditions for special access services. Even in the Phoenix MSA—which Qwest chose as the basis of a petition for forbearance presumably based on the belief that the MSA was subject to more intermodal competition than any other area in the Qwest territory—the Commission found that there was insufficient competition from Cox to warrant forbearance from Qwest’s obligation to provide

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<sup>46</sup> See Insight Research Corp., *Cable TV Enterprise Services: 2012-2017*, Executive Summary, at 8 (Sept. 2012), available at <http://www.insight-corp.com/reports/enterprise12.asp>.

<sup>47</sup> *Id.* at 4. See also *id.* at 5-7.

<sup>48</sup> *Id.* at 6. Insight also describes cable companies’ immature operations support and business support systems and their inability to sustain recent levels of capital expenditure as potential challenges. See *id.*

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wholesale access to its last-mile facilities to commercial locations.<sup>49</sup> Moreover, the Commission found that even at the limited number of commercial locations to which Cox had deployed last-mile facilities, it rarely offered access to these facilities as wholesale inputs to competitors.<sup>50</sup>

*Third*, incumbent LECs continue to insist that “best efforts” services (such as cable modem services) are substitutes for dedicated special access services.<sup>51</sup> As the Joint Commenters have explained, however, overwhelming marketplace evidence contradicts this position.<sup>52</sup> Indeed, the Ad Hoc Telecommunications Users Committee—a coalition of businesses that purchase between two and three billion dollars worth of communications products and services each year—calls the incumbent LECs’ position a “bizarre notion” and states that “[a] passing familiarity with the nature and history of special access services is sufficient to de-bunk this idea.”<sup>53</sup> A number of additional commenters have supplemented the record on this issue with accounts of their own experiences with best efforts services. For example, XO explains that, because best efforts services do not offer the level of service quality associated with dedicated special access services, best efforts services “typically do not appeal to XO’s customers, other carriers, mid-sized and large businesses, and enterprises.”<sup>54</sup> Similarly,

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<sup>49</sup> See *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 88 (2010) (“*Phoenix MSA Forbearance Order*”), *aff’d by Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012).

<sup>50</sup> See *id.* ¶ 71.

<sup>51</sup> See AT&T at 1-2; Verizon at 23.

<sup>52</sup> See Joint Commenters Comments at 50-57; see also Declaration of Kevin F. Brand of Behalf of EarthLink, Inc. (attached as Appendix D to Joint Commenters Comments).

<sup>53</sup> Ad Hoc Comments at 2; *id.* at ii.

<sup>54</sup> Declaration of James A Anderson, ¶ 10 (attached as Exhibit 1 to XO Comments).

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Sprint explains that best efforts services are unsuitable as wholesale inputs for its core wireless and wireline service offerings.<sup>55</sup>

*Fourth*, incumbent LECs overstate the extent to which fixed wireless service providers offer services that can act as substitutes for incumbent LEC special access services.<sup>56</sup> The shortcomings of fixed wireless services, which include line-of-sight restrictions and limited range, have been well documented.<sup>57</sup> In 2009, the National Regulatory Research Institute found that, in part because of these shortcomings, fixed wireless services had only a “fringe effect” on the special access marketplace.<sup>58</sup> AT&T claims (as it did back in 2007) that fixed wireless services have “*exploded*” in popularity, but it fails to provide any evidence to support this proposition.<sup>59</sup> Verizon purports to offer a list of companies that provide fixed wireless services,

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<sup>55</sup> See Declaration of Paul Schieber, ¶ 4 (attached as to Attachment A to Sprint Comments) (“While best efforts services can be used for some communications needs (such as consumer WiFi hotspots, or femtocells or other microcells that can offload data in small areas), these services cannot substitute for dedicated special access services that Sprint uses for its core wireless and wireline service offerings.”).

<sup>56</sup> See Verizon Comments at 24-26; CenturyLink Comments at 28-29.

<sup>57</sup> See, e.g., NoChokePoints Coalition, *Delivering on the Promise of Broadband* at 10-11, attached to Letter from Paul Margie, Counsel for Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, at 10-11 (filed Nov. 24, 2010); Letter from Joshua M. Bobeck, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC (filed May 28, 2010); NoChokePoints Coalition, Reply Comments, WC Dkt. No. 05-25 *et al.*, at 32-35 (filed Feb. 24, 2010).

<sup>58</sup> P. Blum, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, Revised Edition, at 52 (first issued Jan. 21, 2009). NRRI also noted that one fixed wireless service provider, FiberTower, “anticipate[d] outsourced fixed wireless backhaul to increase from 1% of a \$3 billion market in 2006 to 5% of a \$10 billion market in 2011.” *Id.* FiberTower declared bankruptcy in 2012. *Comments Invited on Application of FiberTower Corporation to Discontinue Domestic Telecommunications Services*, Public Notice, 28 FCC Rcd. 161 (2013) (“*FiberTower Discontinuance Public Notice*”).

<sup>59</sup> AT&T Comments at 18; *cf* Declaration of Parley C. Casto, ¶ 5 (attached to AT&T Supplemental Comments, WC Dkt. No. 05-25 *et al.*, (filed Aug. 8, 2007)) (“At the same time intermodal competition, particularly from cable and broadband wireless providers, has exploded

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but it includes both companies that do not provide fixed wireless services at all and companies that provide such services to only a very small number of locations.<sup>60</sup> It is also significant that FiberTower, which incumbent LECs have repeatedly characterized as the leading provider of fixed wireless backhaul services in the country, is now in bankruptcy, apparently because it could not sustain a business competing with wireline alternatives.<sup>61</sup> The Commission should reject the incumbent LECs' make-weight attempts to manufacture the appearance of competition from fixed wireless services.

*Fifth*, incumbent LECs argue that the Commission should account for competitors that provide Ethernet-over-copper ("EoC") services over unbundled copper loops purchased from the incumbent LECs.<sup>62</sup> It is well established that many business customer locations cannot be served via copper loops.<sup>63</sup> This is due to a range of factors. In some locations, the copper has been eliminated, in other locations the conditions (*e.g.*, the loop is too long or is damaged) preclude

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for DS1 and higher capacity services in remote and dense areas alike, thus further intensifying competition for private line/special access services in all areas.").

<sup>60</sup> See Verizon Comments at 24. Verizon claims that FiberTech provides fixed wireless services but cites only a website in which FiberTech explains that it provides fiber-based backhaul services to mobile wireless providers. See *id.* (citing FiberTech Networks, *Wireless Backhaul*, <http://www.fibertech.com/carrier/wireless-services/wireless-backhaul/index.cfm> (last visited Mar. 12, 2013)). Verizon also touts competition from Business Only Broadband, a company that has only 60 transmission sites and serves three markets. See Business Only Broadband, *Network Overview*, [http://www.bobbroadband.com/network\\_overview.php](http://www.bobbroadband.com/network_overview.php) (last visited Mar. 12, 2013).

<sup>61</sup> See *FiberTower Discontinuance Public Notice*.

<sup>62</sup> See, *e.g.*, CenturyLink at 29-32.

<sup>63</sup> See Cbeyond, Inc. Petition for Expedited Rulemaking, WC Dkt. No. 09-223, at 18 (filed Nov. 16, 2009) ("Competitors can rely on unbundled conditioned copper loops and EFMC technology to provide high-bandwidth (*e.g.*, 10 Mbps, sometimes more) services and applications to small business customers, but they can do so in only a minority of customer locations."); see also *id.* at 18-20.

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reliance on the copper to provide Ethernet, and in yet other locations the customer demands a service (*e.g.*, capacity in excess of 100 Mbps) that cannot be provisioned via copper.

Moreover, incumbent LECs are currently attempting to reduce competitors' ability to offer services via copper even further by seeking the elimination of the remaining copper loops and the few regulations governing those facilities. For example, in its petition requesting that the Commission begin a proceeding regarding the TDM-to-IP transition, AT&T asked the Commission for relief from Section 214 discontinuance obligations and its obligation under Section 251(c)(3) to provide unbundled access to the narrowband capabilities of hybrid loops.<sup>64</sup> In AT&T's view, elimination of these "outdated" requirements will force competitors to abandon "their antiquated reliance on 20<sup>th</sup>-century ILEC networks."<sup>65</sup> For its part, Verizon has informed investors that it is seeking to "kill the copper,"<sup>66</sup> and explained to the Commission that it should not interfere with this process simply to allow "third parties to continue to be able to purchase unbundled copper loops that they then use to provide Ethernet[.]"<sup>67</sup> Incumbent LECs cannot credibly ask the Commission to rely on competition from EoC services in its market analysis in this proceeding while they simultaneously seek to eliminate competitors' ability to provide these services.

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<sup>64</sup> See AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Dkt. No. 12-353, at 11-20 (filed Nov. 7, 2012).

<sup>65</sup> AT&T Comments, GN Dkt. No. 12-353, at 6 (filed Jan. 28, 2013).

<sup>66</sup> Transcript, Verizon at Guggenheim Securities Symposium, at 8 (June 21, 2012), *available at* [http://www.media-alliance.org/downloads/Verizon\\_Kill\\_Copper.pdf](http://www.media-alliance.org/downloads/Verizon_Kill_Copper.pdf).

<sup>67</sup> Verizon Reply Comments, GN Dkt. No. 12-353, at 14-15 (filed Feb. 25, 2013).

**C. The Commission Should Reject Incumbent LEC Proposals to Ignore Market Shares and Rely Heavily on Potential Competition.**

Presumably anticipating that the Commission will confirm its previous findings that incumbent LECs retain control over very large shares of the special access market, the incumbent LECs argue that the Commission should ignore any market share data because it is “static.”<sup>68</sup> This position is in direct conflict with Commission precedent. In the *Phoenix MSA Forbearance Order*, the Commission “disagree[d]” with Verizon and other incumbent LECs that “argue[d] against consideration of market shares, claiming they are ‘backwards looking.’”<sup>69</sup> The Commission explained that “[m]arket shares provide a useful snapshot of current market conditions. Moreover, such data, when combined with data on trends in market shares and data on entry conditions, provides insight into how competition may evolve in the near future.”<sup>70</sup> Incumbent LECs have provided no reason why the Commission should depart from this precedent here.

Furthermore, incumbent LECs urge the Commission to rely heavily on sources of “prospective” or “potential” competition in determining the proper regulatory framework for special access services. They point to a number instances in which the Commission has provided regulatory relief on this basis in the past.<sup>71</sup> However, in virtually every one of the instances that the incumbent LECs cite, the competition that the Commission predicted never actually developed. For example, Verizon suggests that the Commission should follow an analysis

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<sup>68</sup> See, e.g., Verizon Comments at 6.

<sup>69</sup> *Phoenix MSA Forbearance Order*, 25 FCC Rcd. at ¶ 42 n.143.

<sup>70</sup> *Id.*

<sup>71</sup> See Verizon at 20; CenturyLink at 13-14.

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similar to the one it used when it relied on potential competition to grant Qwest forbearance from unbundling obligations in the Omaha MSA.<sup>72</sup> Verizon does not mention, however, that the Commission later determined that its predictions in that Order “[had] not been borne out by subsequent developments.”<sup>73</sup> As the Joint Commenters have explained, there is no reason to think that the Commission would be any more accurate in predicting future entry now than has been the case in past proceedings.

There are, of course, ways that the Commission can be “forward looking” while still ensuring that its analysis is methodologically sound. For example, the Joint Commenters have proposed that the Commission consider any facilities that *can* be used to provide a given service in its analysis of the market for that service even if such facilities are not *currently* being used to offer that service.<sup>74</sup> For example, if a provider owns a last-mile fiber connection to a given location but does not yet offer Ethernet services over that connection, the provider should nonetheless be considered a competitor in the market for Ethernet services at that location. This approach would ensure that the Commission’s analysis considers potential competition from sources that could readily provide the relevant service in the near future.

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<sup>72</sup> Verizon Comments n.63.

<sup>73</sup> *Phoenix MSA Forbearance Order* ¶ 34; see also Joint Commenters Comments at 77-78.

<sup>74</sup> Joint Commenters Comments at 8, 65-66.

**D. The Commission Should Reject AT&T’s Attempt to Recast This Proceeding as One Solely Concerned with the Reform of Pricing Flexibility Triggers for DS1 and DS3 Special Access Services.**

In its comments, AT&T urges the Commission to use its one-time market analysis exclusively for the purpose of “produc[ing] an administrable test for pricing flexibility.”<sup>75</sup> For several reasons, the Commission should reject AT&T’s attempt to narrow the scope of the instant proceeding in this manner.

*First*, this rulemaking proceeding has never been limited to reform of the pricing flexibility triggers for incumbent LECs’ DSn-based services. It has always encompassed reform not only of the Commission’s pricing flexibility rules but also its price cap rules for special access services. As the Commission has explained, when it opened this proceeding in 2005, it “initiated a broad examination of what regulatory framework to apply to price cap LECs’ interstate special access services following the expiration of the CALLS plan,”<sup>76</sup> and sought comment on “traditional price cap issues” as well as the special access pricing flexibility rules.<sup>77</sup> Consistent with this “broad examination,” in 2009, the Bureau again requested comment on the effectiveness of both “the current price cap and pricing flexibility rules” in ensuring just and

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<sup>75</sup> AT&T Comments at 2; *see also id.* at 10 (asserting that “the primary task at hand . . . is to reestablish workable, easily administrable pricing flexibility triggers”); *id.* at 19-20 (claiming that a “‘multi-faceted market analysis’ . . . would be unnecessary, costly, and unlikely in the end to help the Commission design an administrable test for pricing flexibility”) (quoting *FNPRM* ¶ 68).

<sup>76</sup> *FNPRM* ¶ 8 (emphasis added); *see also Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd. 13352, at 1 (2007).

<sup>77</sup> *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶ 4 (2005) (“2005 Special Access NPRM”).

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reasonable rates, terms, and conditions for special access services.<sup>78</sup> And in the instant *FNPRM*, the Commission expressly contemplates “modifying or updating [its] price cap rules.”<sup>79</sup>

Moreover, this proceeding has never been limited to regulation of DS<sub>n</sub>-based services. In the 2005 *Special Access NPRM*, the Commission explicitly sought comment on “the proper regulatory treatment of [packet-switched] services,” including “whether such services should be included in price caps today.”<sup>80</sup> Since then, the Commission has twice requested data on packet-mode special access services<sup>81</sup> and it plans to do so again in the mandatory data request.<sup>82</sup> The Commission has also sought comment in this docket on a petition to reapply dominant carrier regulation to packet-mode special access services.<sup>83</sup>

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<sup>78</sup> *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd. 13638 at 2, 5-6 (2009).

<sup>79</sup> *FNPRM* ¶ 88.

<sup>80</sup> 2005 *Special Access NPRM* ¶ 52.

<sup>81</sup> See *Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd. 14000, Question III.B.1.1 (2011) (requesting data on incumbent LEC revenues from the sale of packet-mode special access services); *id.* at Question III.C.5 (requesting data on competitive LEC revenues from the sale of packet-mode special access services); *id.* at Question III.D.1, Question 3.D.3.k, Question III.D.4.1 (requesting data from purchasers of packet-mode special access services); *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd. 15146, Question III.B (2010) (requesting data from all providers other than incumbent LECs regarding all special access connections, regardless of technology); *id.* at Question III.E (requesting data from incumbent LECs regarding all special access connections, regardless of technology); see also *Clarification of Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd. 17693 (2010) (“The definition of Connection focuses on the underlying facility – not the nature of the services provided over that facility.”).

<sup>82</sup> See *FNPRM*, Appendix A.

<sup>83</sup> *Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance From Dominant Carrier Regulations of Incumbent LECs’ Non-TDM-Based Special Access Services*, Public Notice, WC Dkt. No. 05-25, RM-10593, DA 13-232 (rel. Feb. 15, 2013).

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*Second*, narrowing the scope of the proceeding as AT&T suggests would be inconsistent with the Commission’s obligation to ensure that incumbent LECs’ rates for *all* special access services are just, reasonable, and not unjustly or unreasonably discriminatory under Sections 201(b) and 202(a) of the Act.<sup>84</sup> This obligation encompasses DSN-based special access services subject to price caps. The Commission adjusted those price caps in the *CALLS Order* but never revisited the issue after expiration of the *CALLS* plan.<sup>85</sup> The Commission’s obligation to ensure just and reasonable rates also applies to Ethernet and other packet-mode special access services. Those services were deregulated pursuant to a flawed and unreliable “abbreviated analysis” that the Commission has since abandoned.<sup>86</sup> And the Commission’s obligation also applies fully to DSN-based special access services in Phase II price flex areas. The Commission removed price cap regulation in those areas pursuant to pricing flexibility triggers that the FCC itself has concluded fail to accurately measure competition in the relevant area.<sup>87</sup>

*Third*, AT&T’s own statements belie its claims that this proceeding is limited to revision of the pricing flexibility triggers. For example, AT&T has explained at length the methodology

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<sup>84</sup> 47 U.S.C. § 201(b); *id.* § 202(a).

<sup>85</sup> *See Special Access NPRM* ¶ 131 (promising to “adopt[] an order prior to July 1, 2005 that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the Commission considers the record in this proceeding”). The Commission never adopted such an order.

<sup>86</sup> *See* Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 24-30 (filed Nov. 2, 2012) (“Ad Hoc *et al.* Petition to Reverse Forbearance”).

<sup>87</sup> *See Pricing Flexibility Suspension Order* ¶¶ 22-75.

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the Commission should use to “analyz[e] the effectiveness of the price cap rules.”<sup>88</sup> There would be no reason for AT&T to do so if potential reform of those rules was outside the scope of this proceeding. In addition, AT&T’s past comments contradict its suggestions that this proceeding is limited to DSn-based services. If that were the case, AT&T would not have repeatedly called for deregulation of packet-mode special access services in this proceeding.<sup>89</sup>

In sum, AT&T is clearly wrong when it alleges that the Commission will “expand the substantive scope of this proceeding considerably” if it “conduct[s] a ‘one-time, multi-faceted market analysis of the special access market designed to determine where and when special access prices are just and reasonable.’”<sup>90</sup> As virtually all commenters have argued, the Commission should proceed with its plan to conduct a robust market analysis and establish an appropriate regulatory regime to govern the rates, terms, and conditions on which incumbent LECs offer special access services.<sup>91</sup> The market analysis and resulting regulatory regime should address both DSn-based and packet-mode special access services.<sup>92</sup>

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<sup>88</sup> See Comments of AT&T Inc., WC Dkt. No. 05-25, at 5 (filed Jan. 19, 2010); see also *id.* at 9-12 & 55-57.

<sup>89</sup> See, e.g., AT&T Supplemental Comments, WC Dkt. No. 05-25 *et al.*, at 25 (filed Aug. 8, 2007) (“Accordingly, as AT&T and others demonstrated in 2005, the only sensible response to this track record is to take additional steps down the path of progressive deregulation. The Commission should immediately deregulate all OCn and packet-based services . . .”).

<sup>90</sup> AT&T Comments at 4 (quoting *FNPRM* ¶ 67).

<sup>91</sup> See Ad Hoc Comments at 13 (“Developing a replacement for the failed pricing flexibility regime is an appropriate secondary goal for the Commission’s market analysis. The Commission’s primary goal should be an immediate identification of the areas in which its failed policies have resulted in premature deregulation and excessive rates, so that customers in those locations can obtain essential services (including DS-1, DS-3, Ethernet, and other packet-mode services) at just and reasonable rates from carriers who face neither actual nor potential competition that is sufficient to discipline their pricing behavior.”); Sprint Comments at 10 (“[T]he Commission can rely on its market power analysis to identify the areas where dominant carrier regulation remains necessary and can formulate rules designed to prevent the incumbent

#### IV. CONCLUSION

For the foregoing reasons, the Commission should take the actions recommended herein by the Joint Commenters.

Respectfully submitted,

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LECs from exploiting their market power in those areas.”); XO Comments at 3 (“In the end, the use of [the one-time market analysis] ‘will help the Commission determine whether any market participants have market power,’ as well as helping it ‘determine the sources of such market power, the likely extent to which it is sustainable over time, and how to construct (where required) targeted regulatory remedies.’”) (quoting *FNPRM* ¶ 12).

<sup>92</sup> See, e.g., Ad Hoc Comments at 10 (“The Commission must . . . structure its analysis in this docket to ensure that the particular transmission protocol that carriers may choose to use on non-competitive loop plant does not cloud its economic and policy analysis. . . . Whether traffic is transmitted over copper or fiber, using legacy TDM transmission protocols or over those same facilities using packet-mode transmission protocols, the relevant metric for the Commission’s analysis is competition for the provision of the facility.”); TelePacific Comments at 7 (“TelePacific believes that the Commission could determine all services that such enterprise customers view as substitutable by not limiting the analysis to TDM-based services.”).

**CERTIFICATE OF SERVICE**

I, Matthew Jones, hereby certify that on this day, March 12, 2013, I caused to be served via Certified Mail and e-mail a copy of the foregoing Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, with the recipient party's highly confidential information unredacted:

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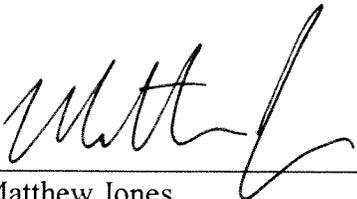
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