

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 SPRINT NEXTEL CORPORATION

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Sprint Nextel Corporation (“Sprint”) submits these reply comments in response to the Public Notice (“*Notice*”) issued by the Federal Communications Commission (“FCC” or “Commission”) on February 15, 2013,¹ seeking comment on the Petition to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-Time Division Multiplexing (“TDM”)-Based Special Access Services, filed on November 2, 2012.²

I. INTRODUCTION AND SUMMARY

Special access services³ have long been at the heart of the country’s telecommunications infrastructure, providing the essential transmission paths that

¹ Public Notice, *Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance from Dominant Carrier Regulations of Incumbent LECs’ Non-TDM-Based Special Access Services*, 28 FCC Rcd 1280 (2013) (DA 13-232) (“*Notice*”).

² Petition of Ad Hoc Telecommunications Users Committee, BT Americas Inc., Cbeyond, Inc., Computer & Communications Industry Association, EarthLink, Inc., MegaPath Corporation, Sprint Nextel Corporation, and tw telecom inc. (collectively, “Petitioners”) to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-Based Special Access Services, WC Docket No. 05-25, RM-10593 (Nov. 2, 2012) (“*Petition*”).

³ “Special access” refers to a dedicated transmission link between two locations, regardless of the technology deployed over that link. *See, e.g., AT&T Inc. and BellSouth*

businesses and consumers rely on every day to accomplish tasks ranging from the mundane – such as making a wireless call or swiping a credit card to complete a purchase – to the exotic – such as the transfer of encrypted data or the facilitation of complicated financial transactions. Although these connections traditionally were provided using TDM-based DS1 and DS3 circuits, many are now provided using non-TDM-based services, such as Ethernet.

Both TDM- and non-TDM-based services can be provided over the same physical wires. Yet, as a result of a series of grants of forbearance,⁴ only TDM-based special access services are currently subject to dominant carrier regulation. This disparity in the treatment of similar services based solely on the technology used to carry traffic over wireline networks makes no sense and has no connection to the economics of the marketplace. To the contrary, the incumbent local exchange carriers’ (“LECs”) control

Corporation, Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 27 n.88 (2007), citing *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, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 7 (2005) (“2005 Special Access NPRM”).

⁴ See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“AT&T Forbearance Order”); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007) (“Embarq & Frontier Forbearance Order”); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) (“Qwest Forbearance Order”) (collectively, the “Forbearance Orders”); see also FCC News Release, *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law* (rel. Mar. 20, 2006) and *Verizon Petition*, WC Docket No. 04-440 (filed Dec. 20, 2004, amended Feb. 7 and Feb. 17, 2006) (“Verizon Forbearance Deemed Granted”).

over last-mile facilities affords them significant advantages over other providers of both TDM-based and non-TDM-based special access services. These advantages allow the incumbent LECs to dominate the special access marketplace to the detriment of consumers.

Because they were granted forbearance prematurely, before meaningful, facilities-based, competition was able to take root, AT&T, legacy Embarq, Frontier, legacy Qwest and Verizon (collectively, “the incumbent LECs”)⁵ have been able to exploit their control over last-mile facilities without any constraint from dominant carrier regulation.⁶ The Petition asked the Commission to address this problem by reversing the grants of forbearance and imposing appropriate dominant carrier regulation on the incumbent LECs’ provision of non-TDM-based services.⁷ The incumbent LECs responded with a series of procedural arguments aimed at convincing the Commission that, *inter alia*, (1) it lacks authority to grant the requested relief; (2) it cannot act without launching a new proceeding; and (3) it should not apply the traditional market power test the Commission has used in prior proceedings. In addition, the incumbent LECs claim that they do not enjoy market power in the marketplace for non-TDM-based services and that they

⁵ These comments also refer to AT&T, Verizon and CenturyLink as “the BOCs,” based on their roots as Bell operating companies.

⁶ In fact, Verizon is not even subject to non-dominant carrier regulation of its non-TDM-based services. *See Verizon Forbearance Deemed Granted, supra* note 4.

⁷ Verizon’s relief from non-dominant carrier regulation is the subject of a separate petition. Petition of tw telecom inc. et al. to Establish Regulatory Parity in the Provision of Non-TDM Based Broadband Transmission Services, WC Docket No. 11-188 (Oct. 4, 2011) (“tw telecom et al. Regulatory Parity Petition”); *see also* Public Notice, *Comment Sought on Petition Seeking Reverse of Forbearance Granted to Verizon Telephone Companies by Operation of Law*, 26 FCC Rcd 15683 (2011) (DA 11-1879).

compete on an equal footing with other providers of non-TDM-based special access services.

The incumbent LECs' arguments lack merit and are contrary to both the facts and the law. In fact, as explained below:

- The Commission has the authority to grant the Petition;
- The Commission can reverse the grants of forbearance and adopt new rules governing non-TDM-based special access services without issuing a new notice of proposed rulemaking ("NPRM");
- The appropriate framework for assessing the incumbent LECs' market power is the traditional market power test that the Commission and other federal agencies have used repeatedly to evaluate dominance;
- The incumbent LECs enjoy significant advantages over other providers of non-TDM-based special access services, which allow the incumbent LECs to retain market power over non-TDM-based services and to charge supra-competitive rates;
- The incumbent LECs vastly overstate the amount of competition in the marketplace for non-TDM-based services; and
- Dominant carrier regulation is needed to promote competition and to protect consumers from the incumbent LECs' abuse of their market power.

Accordingly, the Commission should grant the Petition, reverse the grants of forbearance and adopt new rules governing the incumbent LECs' provision of non-TDM-based special access services.⁸

II. DISCUSSION

A. The Incumbent LECs' Procedural Objections Lack Merit

The incumbent LECs raise a number of procedural arguments that they claim prevent the Commission from granting the Petition and taking the actions necessary to

⁸ As explained below, these new rules may be the same as the rules the Commission adopts regarding TDM-based special access services.

protect consumers and promote competition. Many of these arguments have already been addressed in the Petition. Others are simply straw men based on a fundamental mischaracterization of the Petition. Simply stated, all of these objections are meritless and should not delay the Commission from promptly reversing the grants of forbearance and applying dominant-carrier regulation to the incumbent LECs' non-TDM-based special access services.

1. **The Commission Has Ample Legal Authority to Grant the Petition**

The incumbent LECs' arguments that the Commission lacks the authority to reverse the grants of forbearance⁹ ignore the long line of precedents establishing the Commission's authority to do just that.¹⁰ Indeed, as Petitioners have explained, the Commission not only has the authority to reverse the grants of forbearance from dominant carrier regulation, it has an obligation to do so to ensure that the rates, terms and conditions for non-TDM-based services are just and reasonable and to ensure that the FCC's rules promote the pro-competitive goals of the Communications Act.¹¹

⁹ See, e.g., Opposition of CenturyLink (Apr. 16, 2013, filed Apr. 17, 2013) (redacted version) ("CenturyLink Comments") at 10-14; *but see* Comments of Verizon and Verizon Wireless at 18 (conceding that a grant of forbearance can be "overturn[ed]" if "at least one of the forbearance criteria is no longer met") ("Verizon Comments"). (Unless otherwise indicated, all Comments and Oppositions cited herein were filed in WC Docket No. 05-25 on Apr. 16, 2013.)

¹⁰ Petition at 21-24 (citing several relevant precedents and explaining that the FCC has the authority to reverse its decisions granting forbearance); *see also Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009) ("*Ad Hoc v. FCC*"); *AT&T Forbearance Order* ¶ 28 n.120; *Embarq & Frontier Forbearance Order* ¶ 27 n.113; *Qwest Forbearance Order* ¶ 31 n.127; *see also* tw telecom et al. Regulatory Parity Petition at 21-23.

¹¹ Petition at 23-24 (discussing the FCC's authority to reverse its decisions granting forbearance to AT&T, legacy Embarq, Frontier and legacy Qwest); tw telecom et al. Regulatory Parity Petition at 21-23 (demonstrating the Commission's authority to reverse the forbearance relief that was granted to Verizon by operation of law); *see also*

2. **The Commission Can Grant the Petition without Issuing a New NPRM**

Contrary to the incumbent LECs' arguments, granting the Petition does not require a new NPRM. As explained below, reversals of forbearance are not rulemakings and, therefore, do not require NPRMs. In addition, although adopting new rules governing the provision of non-TDM-based special access services does require a rulemaking proceeding, the NPRMs currently pending in this docket provide sufficient notice to satisfy the requirements of the Administrative Procedure Act ("APA").

a. Reversing Forbearance Does Not Require an NPRM

The incumbents' arguments that granting the Petition requires a new notice of proposed rulemaking have no basis in the APA or in FCC precedents.¹² As Sprint has explained, forbearance proceedings are not formal notice and comment rulemakings.¹³ It follows, therefore, that proceedings to *reverse* grants of forbearance do not require notice and comment rulemaking. Instead, proceedings related to forbearance are properly

Comments of COMPTTEL at 4-5 (explaining that the Commission has both the authority and a duty to reverse the grants of forbearance) ("COMPTTEL Comments"); Comments of the Midwest Association of Competitive Communications, Inc. at 3-4 (same) ("MACC Comments"). As both the FCC and courts have explained, the Telecommunications Act of 1996 included numerous provisions intended to promote competition in telecommunications markets. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, ¶ 499 (2011); *see also* 47 U.S.C. § 201; 47 U.S.C. § 1302(a) ("Section 706") (requiring the FCC to promote competition in the local telecommunications market).

¹² *See* CenturyLink Comments at 14-15; Comments of AT&T Inc. at 9 ("AT&T Comments"); Verizon Comments at 23.

¹³ Reply Comments of Sprint Nextel Corporation, WC Docket No. 11-188, at 7-8 (Jan. 19, 2012) ("Sprint Regulatory Parity Reply Comments").

classified as informal adjudications.¹⁴ Thus, reversing the grants of forbearance does not require a notice of proposed rulemaking.

Notwithstanding the lack of an APA provision requiring an NPRM, if the Commission prefers to reverse the grants of forbearance in the context of a rulemaking proceeding, it can rely on the one it issued in this docket in 2005, commencing a “broad examination of the regulatory framework” related to price cap LECs’ interstate special access services.¹⁵ That NPRM, which is still pending, specifically sought comment on the proper regulatory treatment of non-TDM-based special access services, including the treatment of packet-switched services, such as Ethernet.¹⁶ Non-TDM-based services have continued to be part of the focus of the special access rulemaking, even after the

¹⁴ *Id.* at 9. Alternatively, the Commission could rule on the Petition by issuing an “interpretative rule.” *Id.* at 10-11.

¹⁵ *See 2005 Special Access NPRM* ¶¶ 1, 7.

¹⁶ *Id.* ¶¶ 51-52. Although the incumbent LECs seem to believe that the forbearance grants implicitly narrowed the scope of the *2005 Special Access NPRM* (*see, e.g.,* AT&T Comments at 11 n.28), the D.C. Circuit clearly did not think that was the case. *Ad Hoc v. FCC*, 572 F.3d at 911 (indicating that the FCC would be able to reassess its forbearance decisions as part of the “ongoing Special Access Rulemaking proceeding”).

grants of forbearance that are the subject of the Petition.¹⁷ Thus, any notice requirements that might apply to the reversals of forbearance have already been met.¹⁸

b. The Commission Can Rely on the Existing Notices to Adopt New Rules Governing Non-TDM-based Special Access Services

Despite the incumbent LECs' apparent misapprehension of Petitioners' position, the Petition does not ask that the Commission simply reverse the previous grants of forbearance and reinstate the *status quo ante*.¹⁹ Reversal of forbearance is a necessary, but not sufficient, step toward rectifying the harms caused by the lack of regulation of the incumbent LECs' non-TDM-based services. The Commission took the first step in reforming its special access regime when it suspended the old pricing flexibility

¹⁷ See Public Notice, *Competition Data Requested in Special Access NPRM*, 26 FCC Rcd 14000, DA 11-1576 at 3, 5, 12-13 (2011) (seeking information on rates for and terms and conditions associated with "Packet-Switched Dedicated Services (PSDS)," including Ethernet services); see also, e.g., *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, ¶ 67 (2012) (discussing the Commission's plans to conduct an analysis of the special access market, including the market for packet-based services, to determine whether and where market power exists and to construct "targeted regulatory remedies" to address market power) ("*2012 Special Access R&O and FNPRM*").

¹⁸ AT&T, Verizon and CenturyLink all filed comments in this proceeding and therefore cannot reasonably argue that they did not have actual notice that the Commission was entertaining the Petition. Such actual notice is sufficient to meet the requirements of the APA. See, e.g., *Southern Ry. Co. v. U.S.*, 412 F. Supp. 1122, 1142 (D.D.C. 1976) (upholding a rule where parties had actual notice of the proceeding leading to the adoption of the rule); *In re AT&T, et al.*, 3 FCC Rcd 500, ¶ 16 (1988). Requiring anything more would be elevating form over substance.

¹⁹ See, e.g., Petition at 8 (asking that the Commission reverse the grants of forbearance and "establish pricing regulations . . . and service quality regulations for incumbent LEC non-TDM-based special access services").

triggers.²⁰ Issuing the recent *Report and Order* initiating a comprehensive data collection was another step in that process,²¹ and reversing the grants of forbearance will be simply another step toward accomplishing much-needed special access reform.

Contrary to the incumbent LECs' apparent assumptions, however, reversing forbearance will not necessarily lead to the mechanical re-imposition of the previously-applicable dominant carrier regulations. Instead, Petitioners have asked the Commission to adopt regulations governing the incumbent LECs' provision of non-TDM-based services.²² Thus, when the Commission issues an order reversing the grants of forbearance it should, simultaneously, adopt new rules governing the provision of non-TDM-based services by dominant providers.²³ These new rules may be similar – or even

²⁰ *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, ¶¶ 1, 14-55 and Appendix A (2012) (“*Pricing Flexibility Suspension Order*”).

²¹ *2012 Special Access R&O and FNPRM* ¶ 1.

²² The fact that the pending NPRM does not propose specific rules does not prevent the FCC from relying on that NPRM to adopt new rules governing both TDM- and non-TDM-based special access services. As the Third Circuit has stated, “the APA requires a notice to provide *either* ‘the terms or substance of the proposed rule’ *or* ‘a description of the subjects and issues involved.’” *Citizens for Health v. Leavitt*, 428 F.3d 167, 186 (3d Cir. 2005) (quoting 5 U.S.C. § 553(b)(3) (emphasis in original)). A notice that contains no rule proposals complies with the APA so long as it is “sufficient to fairly apprise interested parties of all significant subjects and issues involved . . ., whether interested parties had the opportunity to participate in the rulemaking process . . ., [and] whether the final rule was a logical outgrowth of the rulemaking proposal and record.” *NVE Inc. v. Department of Health & Human Services*, 436 F.3d 182, 191 (3d Cir. 2006) (citing *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 291 (3d Cir. 1977), *Fertilizer Inst. v. Browner*, 163 F.3d 774, 779 (3d Cir. 1998), and *Aeronautical Radio v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991)). The *Notice* pending in this proceeding plainly meets this standard.

²³ Ideally, the Commission would reverse the grants of forbearance in the same order in which it adopts new rules governing the provision of non-TDM-based special access services. Alternatively, the Commission could adopt the new rules in a companion order

identical – to the rules the Commission ultimately establishes to govern the provision of DS1 and DS3 special access services and could be adopted pursuant to the pending NPRMs issued in this docket. In addition to establishing rates for the non-TDM-based services offered by the incumbent LECs, the Commission’s new rules also should include restrictions on the terms and conditions the incumbent LECs can impose in conjunction with their special access service offerings. These topics have all been raised in at least one of the NPRMs still pending in this docket.²⁴

Even in those areas where non-TDM-based services are subject to the full panoply of pro-competitive consumer protection regulations, the rules that apply are likely to be different than the ones that apply today or that applied before the forbearance grants were issued. For example, the Commission may establish new rules for determining the rates that should apply to price-capped services.²⁵ Thus, the incumbent LECs’ concerns about the difficulties the Commission might face if it simply reversed forbearance without taking any additional action are misplaced.²⁶ In practice, the reversal of forbearance will be accomplished within the context of the Commission’s overhaul of its entire special access regime and will almost certainly be accompanied by new rules governing both

to the order reversing forbearance. In either case, the effective date of the new rules should be the same as the effective date for the reversals of forbearance.

²⁴ See *2005 Special Access NPRM*; *2012 Special Access R&O and FNPRM* ¶¶ 91-93; see also, e.g., Reply Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 17-25 (Mar. 12, 2013) (“Sprint 2013 Reply Comments”); Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 23-44 (Feb. 11, 2013) (proposing rules the Commission could adopt to curb the incumbent LECs’ anti-competitive terms and conditions) (“Sprint 2013 Comments”).

²⁵ See *2012 Special Access R&O and FNPRM* ¶¶ 85, 88; see also, e.g., Sprint’s 2013 Reply Comments at 17 n.54 (explaining that the Commission will have to reevaluate price cap rates, as there is evidence that those rates are not just and reasonable).

²⁶ See, e.g., AT&T Comments at 4.

TDM- and non-TDM-based special access services. As noted above, however, these new rules can be accomplished in the context of the NPRMs the Commission has already issued in this docket.²⁷ Thus, neither the reversal of forbearance nor the adoption of new rules for non-TMD-based special access services requires the issuance of a new NPRM.

Even if the Commission were to take a “belts-and-suspenders” approach and issue a new NPRM before reversing the grants of forbearance, that is far from an insurmountable obstacle. The Commission can simply issue an NPRM (or, more likely, a further NPRM) as part of the existing special access proceeding. If the Commission decides to take the unnecessary step of issuing an additional NPRM, it should at least ensure that the new Notice is released in a timely fashion and does not delay the FCC’s adoption of final rules governing both TDM- and non-TDM-based special access services.²⁸

²⁷ See *supra* at 7. The Commission could resolve all pending issues in a single order in which it reverses the grants of forbearance and, simultaneously, adopts new rules governing the provision of both TDM- and non-TDM-based special access services.

²⁸ AT&T erroneously claims that section 205 requires the Commission to provide a “full opportunity for hearing” before prescribing the just and reasonable charges for particular services. AT&T Comments at 16. As the Commission has explained, however, section 205 does not limit the Commission’s “authority to adopt rules to define what constitutes a just and reasonable rate for purposes of section 201.” *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 771 n.1390 (2011) (FCC 11-161) (“*2011 Connect America Fund Order*”). Moreover, even if section 205 were relevant to this proceeding, which it is not, that provision does not require a formal evidentiary hearing to set rates. *Id.* ¶ 641 (“a formal evidentiary hearing is not required under section 205” and the Commission has on “multiple occasions prescribed individual rates in notice and comment rulemaking proceedings”); *United States v. Florida East Coast Ry.*, 410 U.S. 224, 227 (1973); *AT&T v. FCC*, 572 F.2d 17, 21-23 (2d Cir. 1978); *International Settlement Rates*, Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256, ¶ 18 (1999) (explaining that the Supreme Court has held that the notice and comment provisions of section 553 of the APA satisfy the general hearing requirement of section 205).

3. **The Commission Should Evaluate the Incumbent LECs' Market Power Using the Framework it Applied in the *Qwest Phoenix Forbearance Order* and Other Proceedings**

As noted in the Petition, the traditional market power test used in the *Qwest Phoenix Forbearance Order* provides the most reliable framework for analyzing whether forbearance from dominant carrier regulation is justified pursuant to Section 10.²⁹ Indeed, as the Commission has explained, the market power analysis proposed by the Petitioners “is the precise inquiry specified in section 10(a)(1), and informs [the Commission’s] assessment of whether carriers would have the power to harm consumers by charging supracompetitive rates.”³⁰ Among other advantages, the traditional market power approach is “data-driven, economically sound, and predictable, but also reflects a forward-looking approach to competition” and is “well-designed to protect consumers, promote competition, and stimulate innovation.”³¹

a. **The Framework Used in the *Qwest Phoenix Forbearance Order* Is Appropriate for Evaluating Both TDM- and Non-TDM-based Competition**

The market power test used in the *Qwest Phoenix Forbearance Order* is neither new nor controversial. It has been used by the FCC and other federal agencies in many proceedings.³² Nonetheless, the incumbent LECs insist that the traditional market power

²⁹ See, e.g., *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, ¶ 37 (2010) (“*Qwest Phoenix Forbearance Order*”) (“[T]he Commission’s market power analysis was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions, or from acting in an anticompetitive manner.”).

³⁰ *Id.*

³¹ *Id.* ¶ 3.

³² *Id.* ¶ 1.

framework used in the *Qwest Phoenix Forbearance Order* and other proceedings does not apply to broadband services.³³ The genesis of the incumbent LECs’ objection appears to be a line in the *Qwest Phoenix Forbearance Order* suggesting that a different analysis “may apply” in proceedings involving “advanced services.”³⁴ In fact, however, there is no reason for the Commission to employ a different analysis in evaluating non-TDM services than it uses to evaluate TDM services.

As COMPTTEL notes, “[m]arket power concerns do not disappear merely because a market is evolving, particularly . . . here where [a] BOC can leverage its market power in ‘legacy’ services into the ‘emerging’ services.”³⁵ Nor should the standard for determining market power change based on the technology involved.³⁶ Thus, there is no reason to use different analytical tools to evaluate the marketplace for TDM-based services versus the marketplace for non-TDM-based services, particularly given that the non-TDM-based services at issue here are provided “to a great extent” over the same facilities as TDM-based services.³⁷ The incumbent LECs correctly point out that Section 706 of the Act requires the Commission to encourage deployment of advanced

³³ CenturyLink Comments at 4; AT&T Comments at 3-4; Verizon Comments at 28.

³⁴ *Qwest Phoenix Forbearance Order* ¶ 39. This statement is a far cry from Verizon’s misleading claim that “the *Qwest Phoenix Order* explicitly states that it does not apply to broadband services.” Verizon Comments at 28.

³⁵ COMPTTEL Comments at 8.

³⁶ *See id.* The differences in the wireline technologies used to provide various special access services do not have a material impact on market power. As COMPTTEL has noted, changes in technology are not the same as changes in market structure. COMPTTEL Comments at 7-8; *see also id.* at 8-9 (explaining that the standard for determining market power does not change based on whether the services in question are TDM-based).

³⁷ *Id.* at 7 (explaining that “a firm with market power [over TDM services] can preserve its market power over a newer service that relies to a great extent on the same existing facilities from which it derives its market power over a legacy [TDM] service”).

telecommunications capabilities.³⁸ As explained below, however, reversing the grants of forbearance will promote competition and investment in advanced services, consistent with the directives of Section 706.³⁹

b. The “SSNIP” Test the Commission Used in the *Qwest Phoenix Forbearance* and Other Proceedings Provides a Useful Indicator of Market Competition

One of the hallmarks of the traditional market power analysis is the use of the “SSNIP” test to determine which products and services belong in the same market and to

³⁸ See Verizon Comments at 28; *Qwest Phoenix Forbearance Order* ¶ 39. The incumbent LECs argue that the Commission should not apply its traditional market power analysis to non-TDM-based services because the marketplace for those services is “nascent.” See, e.g., Verizon Comments at 28-29. As COMPTTEL has explained, however, the enterprise broadband market, including Ethernet, is maturing and although these services might have been considered “‘emerging services’ at one time, that is no longer the case.” COMPTTEL Comments at 7; see also *id.* at 9-10; Stephen Lawson, PC WORLD, *As Ethernet Turns 40, Some Seek to Take It to the Cloud* (May 23, 2013), <http://www.pcworld.com/article/2039635/as-ethernet-turns-40-some-seek-to-take-it-to-the-cloud.html> (“*Ethernet Turns 40*”) (noting that Ethernet is a 40 year-old technology). For the same reason, Verizon’s reliance on *EarthLink v. FCC* is inapposite. Verizon Comments at 28-29. That decision was based in large part on the FCC’s view that the “broadband market [was] still emerging and developing.” *EarthLink v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006) (“*EarthLink*”). Moreover, the *EarthLink* decision does not prevent the FCC from applying its traditional market power analysis to evaluate competition for non-TDM-based services. The *EarthLink* court did not hold that a traditional market power analysis was inappropriate for analyzing the broadband marketplace. It simply held that the Commission’s 2004 decision not to conduct a traditional market power analysis before deciding to forbear from applying section 271’s unbundling obligations to certain broadband network elements that the Commission had previously exempted from section 251’s unbundling requirements was not arbitrary and capricious. *EarthLink* at 3, 6, 12. And even that limited holding was based on the FCC’s view that the broadband market was “still emerging and developing” – a view that might have been reasonable in 2004, but that certainly does not hold true today. Compare *EarthLink* at 9 with COMPTTEL Comments at 9-10; see also *Ethernet Turns 40* (describing Ethernet as a “nearly ubiquitous technology”).

³⁹ See section II.B.8, *infra*; 47 U.S.C. § 1302(a) (requiring the Commission to utilize “price cap regulation . . . or other regulating methods that remove barriers to infrastructure investment”).

identify relevant market participants.⁴⁰ Despite AT&T's assertions to the contrary, the test's utility is not limited only to merger proceedings.⁴¹ Even a cursory review of Commission precedent reveals at least two instances in the last few years alone in which the FCC has endorsed the use of the SSNIP test to define relevant markets and identify market participants in non-merger proceedings. Just last year, in this very proceeding, in an order discussing the incumbent LECs' dominance of the special access market, the Commission explained that a firm may be considered to be a market participant if it would be likely to enter or increase its output in response to a small but significant increase in price ("SSNIP").⁴² Similarly, in the *Qwest Phoenix Forbearance Order*, the Commission explained that the "fundamental question" in determining whether two products belong in the same market for purposes of a forbearance analysis is whether the prospect of buyer substitution to one service constrains the price of the other service.⁴³

⁴⁰ As explained below, the SSNIP test refers to the Department of Justice's method of defining product markets by identifying a product or group of products such "that a hypothetical profit-maximizing firm . . . that was the only present and future seller of those products ('hypothetical monopolist') likely would impose at least a 'small but significant and nontransitory' increase in price" ("SSNIP"). See Petition at 31; U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, § 4.1.1 (rel. Aug. 19, 2010) (defining a product market as the smallest group of products for which a hypothetical monopoly provider would be able to profitably impose a "small but significant and non-transitory" increase in price).

⁴¹ See AT&T Comments at 35 (arguing that the SSNIP test should not be used in a market power analysis except in the context of merger proceedings).

⁴² See *Pricing Flexibility Suspension Order* ¶ 99 (further noting that to be considered a potential market participant, a firm would have to be able to respond rapidly and with "direct competitive impact" and "without incurring significant sunk costs").

⁴³ *Qwest Phoenix Forbearance Order* ¶ 56 (explaining that in determining whether mobile wireless access is in the same market as wireline access, "[t]he fundamental question in a traditional product market definition exercise is whether mobile wireless access service constrains the price of wireline access service. These two services should be in the same relevant market only if the prospect of buyer substitution to mobile wireless access constrains the price of wireline access.").

The Commission employed the SSNIP test as part of that analysis.⁴⁴ These precedents, which involved special access services and evaluation of a forbearance claim, respectively, are consistent with the Petition's proposal that the FCC use the SSNIP test in determining the relevant product market and identifying market participants for purposes of deciding whether to reverse the premature grants of forbearance from dominant carrier regulation of non-TDM-based special access services.⁴⁵

Moreover, Petitioners have not suggested that the Commission must rely solely on the SSNIP test in its analysis. In fact, the Petition offers several additional criteria the Commission can examine to define the relevant product market.⁴⁶ For example, the Petition notes that the prices charged for different services can be an indicator of whether the services belong in the same product market.⁴⁷ Similarly, differences in the technical characteristics of two services may demonstrate that the services do not belong in the same market. In addition, the extent to which customers switch between two services

⁴⁴ *Id.* (using the SSNIP test to determine whether there were a sufficient number of customers who would respond to an increase in wireline service by switching to wireless service so as to render the increase in wireline price unprofitable).

⁴⁵ See Petition at 30-32.

⁴⁶ As the Petition acknowledges, although the SSNIP test yields accurate results, the Commission may not have the data it needs to apply the test successfully. Accordingly, the Petition includes other information the FCC has relied on in the past to determine whether products belong in the same market for purposes of a competition analysis. Petition at 32-33.

⁴⁷ Petition at 32; see also *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 193 (2005) (noting that significant price differences between two services indicate that services are not substitutes for one another) (“*Triennial Review Remand Order*”).

may be a good indicator of whether the services are substitutes for each other and belong in the same product market.⁴⁸

Despite the Petition's list of multiple alternative tools the Commission can use to define the relevant product market, AT&T asserts that none will produce a reliable result. AT&T begins by arguing that the SSNIP test should not be the sole test for determining the relevant market(s). In the very next sentence, however, AT&T complains about the other criteria the Commission has used to determine whether products belong in the same market.⁴⁹ Apparently, AT&T would prefer that the Commission ignore the factors that the FCC, other regulators and courts have consistently used to define markets and identify market participants. Instead, AT&T favors an approach that would mask its market power by defining the relevant product market to include a wide array of services that do not compete with AT&T's non-TDM-based special access services.

For example, AT&T argues that fixed wireless and hybrid fiber coaxial ("HFC")-based "best-efforts" services are substitutes for non-TDM-based special access services,⁵⁰ despite the well-documented performance differences that prevent customers from using fixed wireless and HFC-based services to replace fiber-based dedicated services.⁵¹ At

⁴⁸ See Petition at 32-33; *Triennial Review Remand Order* ¶ 193.

⁴⁹ See AT&T Comments at 35-36 (criticizing both the SSNIP test and the other alternatives suggested in the Petition).

⁵⁰ See *id.* at 37-39.

⁵¹ For example, unlike special access services, HFC-based "best efforts" services are not dedicated to the exclusive use of one customer and do not offer bandwidth and performance guarantees, while fixed wireless services suffer from technical limitations, such as line-of-sight requirements and restrictive propagation characteristic that prevent fixed wireless from replacing wireline special access services on a widespread basis. See, e.g., Sprint 2013 Reply Comments at 10-13 (explaining why fixed wireless and HFC-based cable offerings are not suitable substitutes for dedicated offerings provided over fiber); see also, e.g., Susan M. Gately and Helen E. Golding, S.M. Gately Consulting

bottom, AT&T's position appears to be that the FCC should disregard the sound, well-established economic and legal principles the agency has used in the past to define relevant product markets and instead rely on AT&T's baseless, self-serving characterization of the relevant market.⁵² The Commission should reject that argument summarily.

c. The Petition's Approach to Defining Relevant Geographic Markets is Consistent with Commission Precedent

CenturyLink and AT&T also challenge the Petition's proposal for determining the relevant geographic markets for non-TDM based services.⁵³ These objections are surprising, given that the approach proposed in the Petition is based on well-established Commission precedents that define the relevant geographic markets for a channel termination as an individual building and for channel mileage as a specific point-to-point route.⁵⁴ Consistent with Commission practice, the Petition proposes that for administrative convenience, the Commission should aggregate locations with similar characteristics into larger geographic areas and base its analysis – and subsequent regulations – on the characteristics of those larger areas.⁵⁵

LLC, *The Benefits of a Competitive Business Broadband Market*, at 8-9 (April 2013), <http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf> (explaining that “best efforts” Internet access services are not substitutes for business broadband services) (“SMGC Business Broadband Paper”).

⁵² See, e.g., AT&T Comments at 37 (claiming, without support, that “[i]t is clear that business customers view competition from cable and fixed wireless providers as ‘reasonable substitutes’” for non-TDM-based dedicated services).

⁵³ CenturyLink Comments at 20 n.62; AT&T Comments at 48.

⁵⁴ As explained in the Petition, because of the way non-TDM-based special access services are typically offered, the relevant geographic market for these services should be each customer location. Petition at 36.

⁵⁵ Petition at 36-37.

Despite AT&T's suggestion to the contrary, the Petitioners' proposal to employ a traditional means of defining and aggregating geographic markets is entirely consistent with the relief sought in the Petition.⁵⁶ As noted above, the Commission can and should aggregate customer locations that share similar levels of competition for purposes of administrative ease. Given that the original forbearance orders were based on a suspect analysis,⁵⁷ the safest course would be for the Commission to reverse those blanket grants of forbearance but, at the same time, provide the incumbent LECs with relief from dominant carrier regulations for those products and in those areas where they face sufficient competition to constrain their pricing and practices regarding non-TDM-based special access services.

For lower capacity services, there is virtually no variation in competition across geographic markets: The incumbent LECs' nearly ubiquitous last-mile networks make them the only carriers that can provide such services economically.⁵⁸ Accordingly, when the Commission reverses the premature grants of forbearance, it should simultaneously subject lower capacity non-TDM-based special access services to dominant carrier regulation nationwide, based on the fact that meaningful facilities-based competition for those services simply is not economically viable.⁵⁹

⁵⁶ AT&T Comments at 48.

⁵⁷ See Petition at 25-28.

⁵⁸ See Petition at 36 (explaining that certain low-capacity, non-TDM-based special access services "do not . . . yield sufficient revenues to justify competitive deployment of loop facilities in any geographic area"); see also, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 249 (2003).

⁵⁹ See Petition at 36.

For higher capacity services, the Commission should target its regulation to areas where there is market failure. Thus, the Commission’s order reversing forbearance should include a framework for ensuring that it applies regulations tailored to the competitive conditions it finds exist for particular services in specific geographic markets pursuant to its market power analysis. For example, a more relaxed form of regulation may be appropriate for specific higher capacity non-TDM-based special access services offered in certain areas where the Commission finds that the incumbent LECs are subject to effective competition.⁶⁰ Thus, the order reversing forbearance should include new rules governing the incumbent LECs’ provision of non-TDM-based special access services – and those rules should distinguish between areas where the Commission finds the incumbent LECs remain dominant⁶¹ and areas where the Commission finds that sufficient competition exists to constrain the incumbent LECs’ rates and practices for specific high-capacity services.

4. **CenturyLink’s “Reliance” Claims Should Not Prevent the Commission from Granting the Petition**

Given the weakness of its position, CenturyLink resorts to arguing that granting the Petition would “disrupt” CenturyLink’s reliance on the forbearance it was granted.⁶²

⁶⁰ As noted above, the regulatory regime that would apply to non-TDM-based special access services is likely to be similar, if not identical, to the new regime the Commission adopts to replace the pricing flexibility rules that apply to TDM-based special access services. *See* section II.A.2.b, *supra*.

⁶¹ These rules would be the same as the rules governing lower-capacity non-TDM-based services and would likely be based on the price cap regulation that currently applies to special access services that are not subject to forbearance and for which the incumbent LECs have not been granted pricing flexibility. *See supra* note 25 (explaining that the Commission will have to reevaluate price cap rates as part of its reform of the special access rules).

⁶² CenturyLink Comments at 31.

Even more dramatically, CenturyLink claims that granting the Petition would “call into question all prior forbearance relief.”⁶³ It is not clear, however, what reliance interests would be undermined by a decision to reverse the grants of forbearance.

Although CenturyLink points to “individually-negotiated” agreements it has entered into with customers in the years since it was granted forbearance,⁶⁴ those agreements will not be affected by a reversal of forbearance unless they include unjust or unreasonable rates, terms or conditions.⁶⁵ Nor would reversing forbearance undermine any investment decisions CenturyLink might have made over the past few years based on a reasonable reliance on its forbearance relief.⁶⁶ When CenturyLink entered into agreements and made its investment decisions it knew, or should have known, that the forbearance relief it had been granted would not remain in place if CenturyLink could not meet the criteria established by Section 10.⁶⁷ CenturyLink cannot reasonably expect the

⁶³ *Id.* at 35.

⁶⁴ *Id.* at 31.

⁶⁵ Even after the *Forbearance Orders*, CenturyLink remained subject to the requirements of section 201, prohibiting carriers from imposing unjust or unreasonable rates, terms and conditions. 47 U.S.C. § 201(b). If the rates, terms and conditions in the CenturyLink agreements are just and reasonable, they should be unaffected by the reversal of forbearance. And to the extent that they are unjust and unreasonable, they are already unlawful today.

⁶⁶ CenturyLink Comments at 32-33.

⁶⁷ See *Ad Hoc v. FCC*, 572 F.3d at 911 (stating that the *Forbearance Orders* were not “chiseled in marble” and could be reversed in the “ongoing Special Access Rulemaking proceeding”); 47 U.S.C. § 160(a)(1)-(3) (“Section 10”); see also Petition at 9 (explaining the three-part test for obtaining forbearance relief); *id.* at 24 (explaining that the Commission must reverse forbearance if it finds that one or more of the Section 10(a) criteria is not met); Verizon Comments at 18 (a grant of forbearance can be overturned if at least one of the forbearance criteria is no longer met). If CenturyLink made investment decisions based on the assumption that it would be able to charge supra-competitive rates, then it does not have a reasonable reliance interest in avoiding the re-imposition of dominant carrier regulation that would prevent CenturyLink from continuing to exploit its customers by charging inflated rates.

Commission to deny the Petition in order to preserve the company's "right" to charge unjust and unreasonable rates.⁶⁸ To the contrary, CenturyLink's ability to charge such rates unconstrained by dominant carrier regulation is the very reason that the Commission needs to reverse the grants of forbearance.

CenturyLink's asserted "reliance interest" should not and cannot bar the Commission from re-applying dominant carrier regulation to meet its statutory obligation to protect consumers and competition. As the Supreme Court recently observed, when the FCC decides to change a policy that has "engendered serious reliance interests," it is only required to provide a "more detailed justification" than would be needed if it were creating a new policy.⁶⁹ In this case, the Commission can satisfy that obligation by explaining that, despite its earlier predictions of emerging competition in the provision of non-TDM-based special access services, the incumbent LECs remain dominant in the provision of those services and that dominant carrier regulation, therefore, is needed to promote competition and protect customers from anti-competitive behavior by the incumbents.

⁶⁸ In areas where CenturyLink is subject to effective competition, it should be able to avoid price cap regulation and maintain the rates it has agreed to as part of the arrangements it discusses in its comments. *See supra* at 19-20. If, on the other hand, CenturyLink has been abusing its market power by charging customers supra-competitive rates, then dominant carrier regulation is warranted – even if the overcharges were used to subsidize the costs of other services offered by CenturyLink. *See CenturyLink Comments* at 34 (noting that CenturyLink "sometimes uses the fiber facilities it builds to a wireless cell site to reduce the cost of upgrading its network plant in a nearby residential neighborhood," effectively using its wireless backhaul customers to subsidize its residential services).

⁶⁹ *FCC v. Fox Televisions Stations*, 556 U.S. 502, 515 (2009).

B. The Incumbent LECs Remain Dominant in the Provision of Non-TDM-Based Services

The incumbent LECs contend that dominant carrier regulation of non-TDM-based services is unnecessary, claiming that: the market for Ethernet services is competitive; the incumbent LECs are not dominant in the provision of these services; they have no advantage over newer entrants in deploying non-TDM-based services; and dominant carrier regulation would retard broadband deployment. As explained below, none of these claims can withstand scrutiny.

1. The Incumbent LECs' Market Power is Evidenced by Their Ability to Charge Supra-Competitive Rates for Non-TDM-based Services

The incumbent LECs' claims that they are no longer dominant in the provision of Ethernet services are contradicted by data in the record and in the public domain. In addition to anecdotal evidence from market participants regarding the lack of competition,⁷⁰ there are also "hard data" demonstrating the incumbent LECs' market power over non-TDM-based services.

For example, COMPTTEL has submitted an analysis, prepared by the ETC Group ("ETC"), showing that the Bell operating companies ("BOCs") prices for enterprise broadband services "far exceed the Commission's just and reasonable standard."⁷¹

ETC's analysis shows that the BOCs' prices for Ethernet services they offer in relatively

⁷⁰ See Comments of Level 3 Communications, LLC at 3 (noting that for "many locations and routes, there simply is no alternative to the ILEC for high speed special access services, regardless of the technology deployed") ("Level 3 Comments").

⁷¹ COMPTTEL Comments at 3; ETC Group, *Evaluating the Just and Reasonableness of BOC Ethernet Offerings*, at 1 (Apr. 2013), appended to COMPTTEL Comments as Attachment A ("ETC Report"). ETC's analysis focused on AT&T and CenturyLink. See ETC Report at 3 (explaining that Verizon does not publish the information needed to include Verizon's prices in the analysis).

densely populated urban and suburban markets are “exponentially higher than the rates for comparable service offered by smaller carriers in rural areas.”⁷² In some cases, the BOCs’ prices are more than *ten times* higher than the rates contained in the NECA tariff governing the rural carriers’ prices.⁷³ What is even more remarkable is that the rural carriers are able to offer significantly lower rates while facing higher costs than the BOCs.⁷⁴

These price discrepancies belie claims that the marketplace for non-TDM-based services is competitive. To the contrary, the BOCs’ “unjust and unreasonable rates indicate market failure.”⁷⁵ The Commission should address this market failure by reversing the premature grants of forbearance and by subjecting the price cap LECs to effective rate regulation designed to protect consumers and promote competition.

2. **The Incumbent LECs Vastly Overestimate the Amount of Competition in the Marketplace for Non-TDM-based Services**

The incumbent LECs attempt to minimize their market power by flooding the Commission with statistics they claim provide evidence of meaningful competition.⁷⁶ No amount of statistics about “route miles”⁷⁷ or quotes from competitive providers’ P.R.

⁷² ETC Report at 1; COMPTTEL Comments at 3 (explaining that the analysis “shows BOC prices [are] dramatically higher than comparable services from rural carriers”).

⁷³ See, e.g., ETC Report at 5.

⁷⁴ *Id.* at 1; see *2011 Connect America Fund Order* ¶ 55; see also COMPTTEL Comments at 10 (noting that the BOCs enjoy “significantly greater economies of scale and scope” than do the smaller rural carriers considered in the analysis).

⁷⁵ COMPTTEL Comments at 10.

⁷⁶ See, e.g., Verizon Comments, Appendix A.

⁷⁷ See, e.g., Verizon Comments at 11-12.

materials⁷⁸ can change the fact that “AT&T continues to dominate the U.S. Ethernet services market,”⁷⁹ however. Nor can the incumbent LECs’ escape the reality that AT&T and Verizon have been able to “maintain their dominant status”⁸⁰ as the two largest providers of non-TDM-based services in the country for several years,⁸¹ and “will likely remain the two largest Ethernet players for the foreseeable future.”⁸² In addition, CenturyLink is “[n]ot far behind” AT&T and Verizon⁸³ and is making up ground on the two larger BOCs. Indeed, CenturyLink is the “fastest growing provider” of Ethernet services nationwide.⁸⁴ Moreover, as significant as the BOCs’ market shares are on a

⁷⁸ See, e.g., Verizon Comments, Appendix A at 26 (quoting Integra Telecom’s claim that it is “one of the largest facilities-based providers of communication and networking services in the western United States”).

⁷⁹ Sean Buckley, FIERCE TELECOM, *AT&T Leads U.S. Ethernet Sales, Vertical Systems Group Says* (Aug. 13, 2012), <http://www.fiercetelecom.com/story/att-leads-us-ethernet-sales-vertical-systems-group-says/2012-08-13>; see also, e.g., FIERCE TELECOM, *Year in Review 2012: AT&T’s Multibillion-Dollar Network Bet* (Dec. 21, 2012), <http://www.fiercetelecom.com/special-reports/year-review-2012-atts-multibillion-dollar-network-bet> (noting that AT&T is “still a dominant wireline operator”) (“*AT&T’s Multibillion-Dollar Network Bet*”).

⁸⁰ Sean Buckley, FIERCE TELECOM, *AT&T, Verizon Ethernet Growth Driven by IP VPN, Cloud Services* (Jan. 30, 2013), <http://www.fiercetelecom.com/story/att-verizon-ethernet-growth-driven-ip-vpn-cloud-services/2013-01-30#ixzz2RaycZxrB>.

⁸¹ *Vertical Systems Group: 2012 U.S. Incumbent Carrier Business Ethernet LEADERBOARD* (Feb. 28, 2013), http://verticalsystems.com/prarticles-2013/stat-flash-YE_2012_US_IncumbentCarrier_Leaderboard.html (“AT&T and Verizon have been successful in providing Ethernet services to their large enterprise network customers, thereby maintaining the top two U.S. Ethernet Leaderboard positions for several years running.”) (“*Vertical Systems 2012 U.S. Incumbent Carrier Business Ethernet LEADERBOARD*”).

⁸² Sean Buckley, FIERCE TELECOM, *CenturyLink, Windstream, Other Incumbents Rise to the Ethernet Occasion* (Mar. 26, 2013), <http://www.fiercetelecom.com/special-reports/centurylink-windstream-other-incumbents-rise-ethernet-occasion>.

⁸³ *Id.*

⁸⁴ *Vertical Systems 2012 U.S. Incumbent Carrier Business Ethernet LEADERBOARD*, *supra* note 81.

nationwide basis, each of the three almost certainly enjoys even higher shares of the markets within its respective home region, where its advantages are greatest. Thus, for example, while CenturyLink may be “only” the fourth largest provider of Ethernet nationwide,⁸⁵ it is likely the most significant Ethernet provider within its service area.

The statistics cited by the incumbent LECs also omit key facts that provide important context for their claims about competition. For example, while some competitors may serve thousands of buildings, as the incumbent LECs claim, those locations represent only a small fraction of the millions of buildings nationwide, most of which are served only by the incumbent LECs.⁸⁶ Thus, the number of locations served by even the largest competitive providers is dwarfed by the number of buildings served by the incumbent LECs.

The incumbent LECs’ analysis also appears to focus on retail services, ignoring the fact that competitive providers “still have to use the ILEC’s last mile facilities to serve” many locations.⁸⁷ For example, Verizon describes Sprint as “a major provider of Ethernet” services,⁸⁸ even though Sprint relies on special access services (or wholesale

⁸⁵ CenturyLink Comments at 36; *Vertical Systems Group: 2012 U.S. Business Ethernet LEADERBOARD* (Jan. 29, 2013), http://www.verticalsystems.com/prarticles-2013/stat-flash-YE_2012_US_Leaderboard.html (“*Vertical Systems 2012 U.S. Business Ethernet LEADERBOARD*”).

⁸⁶ According to one estimate, there are approximately five million commercial buildings in the United States. Center for Sustainable Systems, University of Michigan, *Commercial Buildings Factsheet*, http://css.snre.umich.edu/css_doc/CSS05-05.pdf (viewed May 31, 2013); see also U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, at 630, Table 1006, “Commercial Buildings – Summary: 2003” (indicating that there were over 4.6 million commercial buildings – excluding shopping malls – in the U.S. in 2003).

⁸⁷ *AT&T’s Multibillion-Dollar Network Bet*, *supra* note 79.

⁸⁸ Verizon Comments, Appendix A at 12.

Ethernet services) from the incumbent LECs to provide its retail services.⁸⁹ Thus, true facilities-based competition is much more limited than the incumbent LECs want to admit.⁹⁰

In addition, the incumbents have adopted a misleadingly expansive view of the competitive alternatives available in the marketplace for business broadband services by, for example, including HFC-based “best-efforts” services and fixed wireless services in their analysis.⁹¹ As explained above, however, neither fixed wireless services nor HFC-based “best efforts” services present effective substitutes for Ethernet services.⁹²

Similarly, the incumbent LECs persist in mischaracterizing Sprint’s Network Vision project, twisting the facts to try to make them fit their preferred narrative.⁹³ As Sprint has explained, Network Vision was a unique initiative that is unlikely to be duplicated by another Ethernet customer. Sprint was able to attract bidders due to the

⁸⁹ In addition, Verizon’s description of Sprint as a “major provider” is even more perplexing given that Sprint is not even one of the sixteen largest providers of Ethernet. *See Vertical Systems 2012 U.S. Business Ethernet LEADERBOARD*, *supra* note 85.

⁹⁰ AT&T might be right that there would be no need for regulation of a separate wholesale market if there were “full facilities-based competition for the relevant *retail* services.” AT&T Comments at 39, quoting *Qwest Phoenix Forbearance Order* ¶ 94. The fact remains, however, that there is relatively little facilities-based competition in the retail market. As explained above, the BOCs’ claims of competition are wildly overstated. Even among the competitors cited by the BOCs, it is unclear how many of them are truly facilities-based. *See, e.g., AT&T’s Multibillion-Dollar Network Bet*. Indeed, the Commission has explicitly stated that the “[l]ack of appropriate wholesale access to packet-based facilities . . . serves as a constraint on competition in broadband services.” COMPTTEL Comments at 9, quoting FCC, “Connecting America: The National Broadband Plan,” at 65 n.70 (rel. March 16, 2010), <http://download.broadband.gov/plan/national-broadband-plan.pdf> (“National Broadband Plan”).

⁹¹ *See, e.g., CenturyLink Comments* at 28; AT&T Comments at 8.

⁹² *See supra* at 17 & note 51; *see also Sprint 2013 Reply Comments* at 10-13.

⁹³ *See, e.g., AT&T Comments* at 31-32.

scope of the project and because of the terms it was willing to offer.⁹⁴ Few, if any, customers will have the demand necessary to attract similar interest.⁹⁵ Further, as has been documented previously, existing special access service arrangements with the incumbent LECs contain a variety of terms and conditions – including penalty clauses for customers that reduce their demand – that effectively deter customers from migrating their services to new entrants.⁹⁶ Even if a customer had enough demand to generate interest approximating what Sprint was able to attract, that customer would likely be unwilling to pay the penalties associated with moving so many circuits and such a large percentage of their demand from the incumbent LEC.⁹⁷

Moreover, it is not clear that the rates Sprint was able to obtain as part of Network Vision were as low as those that would prevail in a truly competitive market. Even in locations where Sprint chose a provider other than the incumbent LEC, that only indicates that there was an alternative provider that was willing to offer service. If the only competition was between the incumbent and one alternative provider, that would not necessarily be enough to drive prices to truly competitive levels. Indeed, given that the incumbent LECs offer uniform prices across broad geographic areas and do not negotiate individual prices for specific locations, a competitor bidding against only the incumbent

⁹⁴ Network Vision involved connections to thousands of macro cell sites. Most of these connections were for a similar capacity – typically 100 Mbps – and all were used to provide backhaul for Sprint’s wireless services. None of this has much bearing on customers’ ability to obtain varying capacities of non-TDM-based services to individual building locations for purposes of providing businesses with landline services in competition with the incumbent LECs.

⁹⁵ See Letter from Paul Margie, Wiltshire & Grannis, Counsel for Sprint, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25, at 5-6 (Sept. 26, 2012).

⁹⁶ See, e.g., Level 3 Comments at 4-5; COMPTTEL Comments at 8.

⁹⁷ See Sprint 2013 Reply Comments at 19-20.

would know the price to beat and could target its bid to be lower than the incumbent LEC's price, while still keeping its rates significantly above its marginal cost of providing service.

Even disregarding the incumbent LECs' practice of engaging in area-wide pricing, there is little reason to believe that the presence of one additional provider is enough to drive prices to competitive levels. Meaningful competition generally requires more than two competitors – a fact reinforced by an economic analysis by Dr. Stanley Besen showing that competitive pricing is unlikely to occur in a market with only two substantial competitors.⁹⁸ Thus, contrary to the incumbent LECs' assertions, the fact that Sprint was able to find a second provider willing to offer service at specific locations does not show that there is effective competition for Ethernet services.

3. The Incumbent LECs' Dominance Is Rooted in the Advantages They Enjoy as a Result of Their Legacy Monopolies over Last-Mile Facilities

The BOCs' dominance in the provision of non-TDM-based services is not unexpected given the overwhelming advantages they enjoy over potential competitors. Although the incumbent LECs argue that all Ethernet providers are on an equal footing,⁹⁹ the fact remains that AT&T and the other incumbent LECs enjoy the same advantages in the provision of non-TDM-based services as in the provision of TDM-based services.¹⁰⁰

⁹⁸ Declaration of Stanley M. Besen, attached to Letter from Counsel for Cbeyond, TDS Metrocom, PAETEC, One Communications, and tw telecom to Marlene H. Dortch, FCC Secretary, WC Docket Nos. 08-24 & 08-49 (Apr. 23, 2009).

⁹⁹ *See, e.g.*, AT&T Comments at 6 (claiming that “[t]here are no ‘incumbent’ Ethernet providers. Rather, all providers have developed and deployed these services from scratch.”); CenturyLink Comments at 40-41.

¹⁰⁰ COMPTTEL Comments at 8; *see* Declaration of Joseph Gillan on behalf of the California Association of Competitive Telecommunications Companies (“CALTEL”), attached to Additional Comments and Analysis of CALTEL Regarding Backhaul and

Indeed, “[f]rom an economic perspective, the barriers preventing CLECs from building last-mile Ethernet loops are identical to the barriers that affect any other last-mile facilities”;¹⁰¹ “[n]othing about the change in transmission technology (from TDM to packetized) fundamentally alters the economic barriers and market conditions that relate to last-mile facilities.”¹⁰²

As MACC has explained, the incumbent LECs’ dominance is predicated, in large part, on their monopoly control over last-mile facilities serving business customers.¹⁰³ These facilities, which “cannot be efficiently replicated by competitors in most locations,”¹⁰⁴ can be used to provide both TDM and non-TDM-based wireline services. Thus, the incumbent LECs “have enduring market power with respect to local transmission facilities and services”¹⁰⁵ and “there is no reason to expect that the legacy

Merger Conditions, *Acquisition by AT&T of T-Mobile USA and its Effect on California Ratepayers and the California Economy*, California PUC Investigation 11-06-009 (Aug. 22, 2011) (redacted version) (“Gillan Decl.”).

¹⁰¹ SMGC Business Broadband Paper at 13 n.25; *see also* Lee L. Selwyn, *The Non-duplicability of Wholesale Ethernet Services*, prepared on behalf of MTS Allstream (March 2009), [http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix3.pdf/\\$FILE/crtc-2008-117-MTS-Appendix3.pdf](http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix3.pdf/$FILE/crtc-2008-117-MTS-Appendix3.pdf).

¹⁰² SMGC Business Broadband Paper at 11; *see also* Gillan Decl. at 3 (“It is the physical layer – i.e., the fiber or copper transmission facility – that defines supply choice, not the format of the digital media stream.”); Comments of the New Jersey Division of Rate Counsel at 9 (urging the FCC to “reject [the] ILECs’ frequent attempts to confuse changes in *technology* with changes in *market structure*”) (emphasis in original) (“NJ DRC Comments”).

¹⁰³ MACC Comments at 6; *see also* *Verizon v. FCC*, 535 U.S. 467, 490 (2002) (noting that a new entrant cannot compete effectively against an incumbent LEC “without coming close to replicating the incumbent’s entire existing network, the most costly and difficult part of which would be laying down the ‘last mile’”).

¹⁰⁴ SMGC Business Broadband Paper at 3, 9-10; *see also* National Broadband Plan at 47 (recognizing that “it is not economically or practically feasible for competitors to build facilities” in all areas or to all locations).

¹⁰⁵ SMGC Business Broadband Paper at 3.

providers' market power in the provision of Ethernet local transmission services would be any less than [their market power over services involving] older technologies (*e.g.*, DS1 and DS3 service).”¹⁰⁶ The incumbent LECs, therefore, enjoy “an unmistakable advantage” in both TDM and non-TDM based services by virtue of their “legacy monopol[ies].”¹⁰⁷

In addition to leveraging the benefits inherent in their extensive legacy networks, the incumbent LECs also are able to exploit their market power over TDM-based special access services to capture demand for non-TDM-based services.¹⁰⁸ As COMPTTEL has explained, the incumbent LECs are able to use terms and conditions in their tariffs and contracts to leverage their market power over DS1 and DS3 services to achieve and preserve market power over Ethernet services.¹⁰⁹ The incumbent LECs employ a variety of strategies to limit their customers' ability to choose alternative providers of Ethernet

¹⁰⁶ *Id.*; Gillan Decl. at 7 (noting the similarities between market shares for DS1 and Ethernet backhaul services and explaining that the similarities are not surprising given that “[t]he fundamental product is dedicated capacity, with Ethernet and DS1 increments notable for the formatting of the media stream, but little difference at the physical layer (*i.e.*, the actual transmission medium, such as fiber or copper).”).

¹⁰⁷ Gillan Decl. at 8 (explaining that the incumbent LECs' “ubiquitous transport network[s]” provide them an advantage not only in “traditional” offerings, such as TDM-based services, but also with regard to packet-based services, such as Ethernet, “that can benefit from a shared physical layer of rights-of-ways, poles, conduit and transmission facilities”).

¹⁰⁸ *See* COMPTTEL Comments at 7 (explaining that a firm with market power over TDM-based services can preserve its market power over non-TDM-based services given that the non-TDM-based services rely “to a great extent on the same existing facilities from which [the incumbent LECs] derive[] [their] market power over” TDM-based services).

¹⁰⁹ *See id.* at 8.

services, including tying the purchase of non-TDM-based services to purchases of legacy TDM-based services.¹¹⁰

4. **There Is No Reason to Believe that the Incumbent LECs' Dominance Will Diminish over Time Absent Pro-Competitive Safeguards**

In an apparent effort to gloss over the competitive realities of today's marketplace, Verizon urges the Commission to take a "forward-looking view" of the market.¹¹¹ A forward-looking analysis would not help the incumbent LECs, however. Indeed, if the Commission were to engage in a realistic "forward-looking view" it almost certainly would conclude that the incumbents' market power will only increase over time.

History has shown that innovation in the telecommunications industry tends to come from competitive providers and new entrants. History also has shown, however, that as new products achieve commercial success, the incumbent LECs grow quickly by exploiting both their nearly ubiquitous networks and their extensive financial resources. For example, it was competitive providers who first rolled out DSL services to customers. The BOCs introduced their own DSL services only in response to high-speed

¹¹⁰ See Level 3 Comments at 4-5 (discussing various contracting and tariffing strategies the incumbent LECs employ to limit customers' ability to choose competitive providers of Ethernet services); COMPTTEL Comments at 8 (citing CALTEL's explanation of the way AT&T is able to use tying arrangements and other contracting strategies to leverage its market power over DSL services to achieve similar market power over Ethernet services); Gillan Decl. at 9-10 (explaining that AT&T's "combination of its ubiquitous network and its contracting strategy to effectively tie the lease of emerging (i.e., Ethernet) services to legacy volume commitments enable AT&T to extend its traditional market power into the future").

¹¹¹ Verizon Comments at 18. It would be understandable if the Commission were to decline Verizon's invitation to base its analysis on speculation about future competition. As the New Jersey Division of Rate Counsel notes, there has been a "clear history of predictive judgment mis-gauging the extent of competition that would actually occur in the special access markets." NJ DRC Comments at 7. Indeed, as the Commission itself has found, its past predictions of competition "have not been borne out by subsequent developments." *Qwest Phoenix Forbearance Order* ¶ 34.

offerings from competitors. Within a short period of time, however, the incumbent LECs were providing over 90% of all ADSL lines, thereby demonstrating their ability to deploy services rapidly and attract customers quickly once they decide to focus on a particular service or product.¹¹² Similarly, dedicated Ethernet services, VoIP and cloud-based services “were all developed and introduced to the business market by CLECs” but “[w]here the CLECs have led, the legacy providers . . . have followed,” as competitors’ innovations have once again spurred the incumbent LECs to respond with their own non-TDM-based offerings, with predictable results.¹¹³

Although the BOCs may have been reluctant to invest too heavily in Ethernet at first for fear of cannibalizing their TDM-based services, they have already begun to demonstrate their ability to exploit their vast networks and resources to dominate the marketplace for non-TDM-based services. Perhaps the best example of this phenomenon is AT&T’s recently announced “Project VIP,” which starkly demonstrates the gulf between the BOCs and their competitors. Although Project VIP includes several different aspects, the one most relevant to this proceeding relates to AT&T’s Ethernet offerings;¹¹⁴ specifically, its proposal “to reach an additional one million business customer locations” by the end of 2015, with a focus on multi-tenant business buildings

¹¹² See Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, *High-Speed Services for Internet Access: Subscriberhip as of December 31, 2000* (Aug. 2001), http://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0801.pdf.

¹¹³ SMGC Business Broadband Paper at ii.

¹¹⁴ As Fierce Telecom explained, “[s]ince AT&T is the dominant U.S. Ethernet and VPN service player, it makes sense that Project VIP includes” an Ethernet component. *AT&T’s Multibillion-Dollar Network Bet*, *supra* note 79.

in AT&T's wireline service area.¹¹⁵ As part of Project VIP, AT&T is deploying fiber to 55,000 additional buildings over the next two and a half years.¹¹⁶ By way of comparison, tw telecom – which the incumbent LECs claim is the largest competitive provider of Ethernet services in the country – has only approximately 18,000 buildings connected to its fiber network.¹¹⁷ And, despite its intense focus on growing its Ethernet business, the most new buildings tw telecom has ever managed to add to its network in a single year is 2,510.¹¹⁸ At that rate, it would take tw telecom over 20 years to add 55,000 new buildings to its network. AT&T, on the other hand, can add that many new buildings in the span of just a few years once it decides to devote its attention and resources to non-TDM-based services; in this case, as one part of a multi-pronged strategy aimed at enhancing and expanding its wireline network. Moreover, AT&T's investments in Project VIP appear to be merely a prelude to even greater growth, as AT&T is simply “laying [the] foundation to deliver higher speed IP services such as . . . Ethernet to an even larger customer base.”¹¹⁹ These plans belie any claims that AT&T does not enjoy insurmountable advantages over potential competitors or that its market power will

¹¹⁵ AT&T Press Release, *AT&T to Invest \$14 Billion to Significantly Expand Wireless and Wireline Broadband Networks, Support Future IP Data Growth and New Services* (Nov. 7, 2012) (“Fiber deployment expected to reach 1 million additional business customer locations, covering 50 percent of multi-tenant office buildings in AT&T's wireline service area by year-end 2015”), <http://www.att.com/gen/press-room?pid=23506&cdvn=news&newsarticleid=35661&mapcode=corporate|consumer>.

¹¹⁶ See Transcript, *AT&T Inc. at JPMorgan Global Technology, Media and Telecom Conference*, FD (FAIR DISCLOSURE) WIRE, at 3 (May 15, 2013).

¹¹⁷ tw telecom inc., Annual Report (Form 10-K), at 4 (Feb. 15, 2013), <http://www.sec.gov/Archives/edgar/data/1057758/000105775813000008/twtc201210-k.htm>.

¹¹⁸ *Id.* at 32 (Statements of Operations Data, Fiber connected buildings on-net).

¹¹⁹ Sean Buckley, FIERCE TELECOM, *AT&T to Extend Wireline IP Network to 57M Customer Locations* (Nov. 7 2012), <http://www.fiercetelecom.com/story/att-extend-wireline-ip-network-57m-customer-locations/2012-11-07>.

diminish over time. Instead, AT&T's actions only serve to emphasize that a "forward-looking" view of the marketplace would have to recognize that the incumbent LECs' reach and dominance will continue to grow as they start focusing more of their resources on non-TDM-based services.

AT&T's assertion that "[e]veryone had to develop and deploy these 'next generation' broadband services from scratch" rings hollow in the face of Project VIP and of the numerous advantages the incumbent LECs possess as they continue to grow their Ethernet businesses.¹²⁰ The most obvious advantage the incumbent LECs have is their nearly ubiquitous facilities that extend to virtually every location within their service areas. It is much easier to convert these facilities from TDM to non-TDM than it is to deploy new facilities "from scratch."¹²¹ In addition to the costs new entrants must incur to purchase fiber and dig trenches, they must also contend with building access and rights-of-way issues that the incumbent LECs do not face.¹²² Even in those few locations

¹²⁰ AT&T Comments at 27.

¹²¹ See, e.g., Declaration of Bridger M. Mitchell, CRA International, ¶¶ 32-34 (Aug. 8, 2007), appended as Attachment 2 to Comments of Sprint Nextel Corporation, WC Docket No. 05-25 (Aug. 8, 2007) ("CRA Decl."); Reply Comments of WorldCom, Inc., CC Docket No. 01-338, at 49 (July 17, 2002) (explaining that "[t]he incumbent LEC's ability to extend lines from existing plant enables it to take advantage of the economies of scale" that provide it with its greatest advantage over newer competitors) ("WorldCom UNE Reply Comments"). Dr. Bridger Mitchell has explained, "special access services are supplied under conditions of economies of scale and scope . . . [which] provide the supplier who achieves greater aggregate demand in a geographic market with a significant advantage over competitors with lesser demand. BOCs enjoy economies of scale by aggregating the demands of customers located along a route. In addition, they achieve economies of scope on high-capacity transport facilities by combining" traffic from various services. CRA Decl. ¶ 33.

¹²² See, e.g., *Building Access Issues Presented in the UNE Triennial Review* at 2-3, attached to Letter from Ruth Milkman, Counsel for WorldCom, to Marlene Dortch, FCC Secretary, CC Docket No. 01-338 (Oct. 25, 2002) (explaining that the incumbent LECs' networks dwarf those of competitive carriers – reaching far more locations than those of

– such as new buildings or developments – where the incumbents have not deployed facilities already, they still have advantages over newer entrants based on their existing plant and their economies of scale and scope.¹²³

5. The Incumbent LECs Continue to Overstate the Extent of Potential Competition

The Commission should be wary of the incumbent LECs’ claims of “potential” competition.¹²⁴ Although there may be some providers that have the facilities and the means to reach particular buildings in specific areas, the Commission should not rely on AT&T’s unsubstantiated arguments that there is sufficient potential competition to constrain the incumbent LECs’ market power. Indeed, given the inaccuracy of previous predictions of future competition, the Commission should be extremely reluctant to base a finding of non-dominance on the promise of potential competition.¹²⁵ At a minimum, any reliance on potential competition should be based on concrete facts about where alternative providers have facilities and should reflect the costs involved in extending those facilities to new locations – costs that include not only the labor and materials

competitors – and describing the difficulties competitive carriers face in gaining access to buildings where they do not already have facilities).

¹²³ As WorldCom explained years ago in response to previous BOC claims regarding “green field” situations, even a “new residential or commercial area, unless it is located on some remote island . . . is not truly a green field, but is likely to be located near existing plant of the incumbent LEC.” WorldCom UNE Reply Comments at 49. *See also, e.g.*, COMPTTEL Comments at 8 (discussing the “indisputable advantages of [the incumbent LECs’] legacy network footprint[s]”); *Legal Issues Presented in the UNE Triennial Review* at 5-6, attached to Letter from Ruth Milkman, Counsel for WorldCom, to Marlene Dortch, FCC Secretary, CC Docket No. 01-338 (Oct. 23, 2002) (explaining that real green field investment for the incumbent LECs is “extremely rare” given the scope of their existing networks).

¹²⁴ *See* AT&T Comments at 43-45.

¹²⁵ *See Qwest Phoenix Forbearance Order* ¶¶ 33-36; *Pricing Flexibility Suspension Order* ¶ 1 (explaining that the existing pricing flexibility rules “are not working as predicted”); *see also id.* ¶ 3.

involved in digging trenches and deploying fiber,¹²⁶ but also the costs associated with negotiating rights-of-way and building access. As CRA has explained, the premise that being close to fiber is sufficient to ensure effective competition “is highly questionable” at best.¹²⁷

6. The Data the Commission is Collecting in this Proceeding Will Further Support a Finding of Dominance

To the extent the Commission does not find the data currently in the record sufficient to support a finding that the incumbent LECs remain dominant in the provision of non-TDM-based services, it can rely on the mandatory data request to supplement the evidence already in the record. Sprint is confident that the data being collected will support the Petitioners’ arguments about the state of the market. The Commission can also obtain any additional data it needs from the incumbent LECs. Not only do the incumbent LECs tend to have the most complete data – their position as the primary providers of both retail and wholesale services to end users and to other carriers, as well as large purchasers of special access and wholesale Ethernet services, affords them unparalleled access to information about the marketplace – they also impose non-

¹²⁶ See *supra* at 35; see also, e.g., CRA Decl. ¶¶ 33 (noting that the “[f]ixed costs of trenching and laying cable, combined with lower unit costs of both higher-capacity fiber and electronics, provide . . . a significant cost advantage” to carriers that are able to achieve greater aggregate demand than their competitors).

¹²⁷ Declaration of Bridger M. Mitchell and John R. Woodbury, CRA International, ¶ 78 (July 26, 2005), appended as Attachment 1 to the Reply Comments of Nextel Communications, Inc., WC Docket No. 05-25 (July 29, 2005) (“[M]ere proximity to CLEC fiber fails to account for the frequently substantial costs of connecting data loops to the existing CLEC facilities.”); see also, e.g., Declaration of Steven Sachs, Nextel, ¶ 9, appended as Attachment 2 to the Reply Comments of Nextel Communications, Inc., WC Docket No. 05-25 (July 29, 2005) (explaining that “the costs associated with the new construction needed to connect a cell site to a competitive carrier’s ring are substantial”).

disclosure requirements on many of their customers that prevent other carriers from sharing information with the Commission.

7. **The Incumbent LECs' Dominance Has Harmed Consumers**

The record also demonstrates how the lack of competition for non-TDM-based services harms American businesses and consumers. As BT has pointed out, competition in the United Kingdom has driven broadband prices in that country down to the point that they are the lowest “among major countries.”¹²⁸ The United States, by contrast, generally has the highest prices for Ethernet services among the countries covered in BT’s analysis – which include Canada and most “major” European countries.¹²⁹ These high prices are directly attributable to the lack of competition in the U.S. market.¹³⁰ Adopting more pro-competitive policies would deliver “real benefits for consumers . . . [and] real GDP growth” in this country, similar to that experienced in the U.K.¹³¹

¹²⁸ See BT Americas, Inc., *UK – Residential and Business Consumer Benefits of Addressing Leased Line Access Bottlenecks*, at 7 (Oct. 2012), attached as Appendix B to Letter from Matthew Jones, Counsel for BT Americas, to Marlene Dortch, FCC Secretary, WC Docket No. 05-25 (May 2, 2013) (redacted version) (“BT Americas May 2 *Ex Parte*”).

¹²⁹ See BT Americas, Inc., *International Comparisons and Impacts on Global Enterprises*, at 4 (Apr. 2013), attached as Appendix A to BT Americas May 2 *Ex Parte* (showing that prices in the U.S. are consistently higher than those in other countries for 10M, 100M and 1G Metro Ethernet services.); see also BT Americas May 2 *Ex Parte*, Appendix B at 3; *id.* at 8 (showing that prices for “superfast broadband” in the United States are significantly higher than in “major” European countries and are nearly four times higher than the price for the comparable services in the U.K.).

¹³⁰ See BT Americas May 2 *Ex Parte*, Appendix B at 6-7 (explaining that the low prices in the U.K. are attributable to the competition generated by the high number of national broadband providers).

¹³¹ See *id.* at 2.

8. **Appropriate Regulation of Dominant Carriers Will Promote Competition and Enhance Consumer Welfare**

Predictably, the incumbent LECs continue to perpetuate their old canards that the adoption of pro-competitive safeguards will inhibit investment in advanced services, such as Ethernet. These arguments ignore the harms being caused to competition – and therefore, to consumers – as a result of the incumbent LECs’ ability to exploit their market power free of any meaningful regulatory or competitive constraints.¹³² Indeed, as the NJ DRC and NASUCA have noted, what makes the incumbent LECs’ baseless claims that new rules could harm broadband deployment “[p]articularly galling . . . is the fact that the ILECs’ special access terms and conditions actually thwart rather than spur” the deployment of IP-based broadband networks.¹³³ These claims are supported by an economic report recently submitted to the FCC showing that “investment and job creation in the telecommunications sector has lagged behind the economy as a whole” since the FCC began scaling back its pro-competition policies and regulations.¹³⁴

Thus, the BOCs have it exactly wrong: “because they remain dominant providers of non-TDM-based special access services,” the lack of dominant carrier regulation allows the BOCs to “harm or otherwise impede competition.”¹³⁵ Accordingly, far from

¹³² See, e.g., MACC Comments at 2 (“competition and competitive pricing are being harmed by the unreasonably high prices and anticompetitive conduct of Verizon” and the other price cap LECs).

¹³³ NJ DRC Comments at 10, quoting Reply Comments of the National Association of State Utility Consumer Advocates (“NASUCA”) and the New Jersey Division of Rate Counsel, WC Docket No. 05-25, at 9 (March 12, 2013).

¹³⁴ SMGC Business Broadband Paper at iii. By contrast, the report finds that the FCC’s earlier pro-competition policies spurred investment in telecommunications as “capital investment in the telecom sector grew at two and a half times the rate of investment growth throughout the rest of the economy.” *Id.* at ii.

¹³⁵ MACC Comments at 2.

inhibiting investment as the BOCs claim, the re-imposition of dominant carrier regulation will, in fact, lead to increased investment in, and competition for, advanced services, thereby advancing the goals of Section 706.¹³⁶ Similarly, while tariffing might be inconvenient for the incumbent LECs, it provides significant benefits for customers and for competition, as long as incumbents continue to dominate the marketplace for non-TDM-based services. At a minimum, tariffing improves transparency, making it easier for the Commission (and customers) to detect anticompetitive terms and conditions.¹³⁷ Moreover, tariffing allows for more effective control of the prices charged by dominant carriers that could otherwise exploit their market power to impose supra-competitive rates on their customers.

¹³⁶ *Id.* at 7.

¹³⁷ *See* Level 3 Comments at 4-5.

III. CONCLUSION

For all the reasons discussed above, the Commission should grant the Petition and reverse the forbearance from dominant carrier regulation of non-TDM-based special access services it previously granted to AT&T, legacy Embarq, Frontier, legacy Qwest and Verizon and adopt new rules governing dominant carriers' provision of those services.

Respectfully submitted,
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