



91200 G STREET, NW, SUITE 350 PH: 202.296.6650
WASHINGTON, DC 20005 FX: 202.296.7585

April 2, 2014

VIA ECFS

EX PARTE

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

Re: *Technology Transitions, GN Docket No. 13-5; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353; Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92; 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; Petition for Declaratory Ruling That tw telecom inc. Has the Right to Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act, as Amended, for the Transmission and Routing of tw telecom's Facilities-Based VoIP Services and IP-in-the-Middle Voice Services, WC Docket No. 11-119; Business Broadband Marketplace, WC Docket No. 10-188; Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Docket No. 09-223; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, RM-11358; Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25; Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), WC Docket No. 01-338; SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 03-235; Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 03-260; BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 04-48*

Dear Ms. Dortch:

In his statement on the Commission's recent *Technology Transitions Order and FNPRM*,¹ Chairman Wheeler stated that the agency seeks to create "a managerial framework that

¹ *Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition; Connect America Fund et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, FCC 14-5 (2014) ("*Technology Transitions Order and FNPRM*").

will chart the process by which [it] will decide the large-scale legal, regulatory and policy issues arising from the IP transition[.]”² COMPTTEL therefore submits this letter in the above-referenced dockets to propose such a framework. This managerial framework will help the Commission not only resolve the relevant and long outstanding legal and policy issues, but also establish the preconditions for robust competition, innovation, and investment in the provision of voice and broadband services to America’s businesses.³

COMPTTEL applauds the Commission for its commitment to ensuring that competition, consumer protection, and other important statutory values endure as the agency promotes the ongoing transition from legacy technologies to IP and other forms of packet-based technologies.⁴ As the Commission has recognized, “[c]ompetition is a core value of the Act” and much of the competition that exists in the business market today can be traced to the market-opening (Section 251) and bedrock consumer protection (Sections 201 and 202) provisions of the statute.⁵ As discussed in Part I below, however, the Commission’s failure to adopt and enforce technology-neutral wholesale policies threatens the ability of competitive carriers to obtain last-mile access and interconnection on just and reasonable rates, terms, and conditions—and thus jeopardizes competition in the business broadband market.⁶ It is critically important that the Commission reform its wholesale policies as soon as possible in order to reach its goal of preserving and promoting competition during and after the technology transitions. In particular, the Commission should take the steps outlined in Part II below to achieve the robust competition it envisioned years ago.

I. The Absence of a Technology-Neutral Framework for Wholesale Access to Key Inputs from Incumbent LECs Threatens Competition, Innovation, and Investment in Business Broadband.

Competitive carriers have been driving the transition to IP and packet-based technologies for more than a decade. Indeed, COMPTTEL members were among the first to invest in all-IP networks and introduce managed VoIP services to businesses.⁷ Competitive carriers were also

² *Id.*, Statement of Chairman Thomas E. Wheeler, at 2.

³ This proposed framework is intended to address issues arising from the TDM-to-IP transition that affect competitive carriers serving retail business customers. The framework does not attempt to address issues arising from the ongoing technology transitions that may affect residential customers.

⁴ *Id.* ¶ 9.

⁵ *Id.* ¶ 58.

⁶ The Commission appears to recognize this fact in the *Technology Transitions Order and FNPRM*. See *id.* ¶ 59 (stating that, where incumbent LECs propose service-based experiments that would involve the replacement of existing wholesale inputs with IP, packet-based wholesale inputs, the incumbent LEC must “ensure that comparable [IP, packet-based] services are available during the experiment at equivalent prices, terms, and conditions”) (emphasis added).

⁷ See, e.g., The Broadband Coalition, *Broadband Innovators: Driving the Network Forward*, at 5 (July 2013), available at <http://thebroadbandcoalition.com/storage/Driving%20The%20Network%20Forward%20->

among the first to develop the innovative, “must have” packet-based broadband (*e.g.*, Ethernet and MPLS) services that American businesses use today. As competitive carriers have explained, these packet-based services have enabled businesses of all sizes and across all industries to, among other things, (1) simplify their networks and prioritize key traffic and applications; (2) transport critical business data securely and reliably among multiple office, branch, store, or campus locations; (3) support high-bandwidth applications at a lower cost; and (4) scale bandwidth as their businesses grow.⁸

And competitors continue to innovate. Competitive carriers are now introducing packet-based services that, for example, allow businesses to dynamically allocate bandwidth based on users’ current needs and provide very high-capacity connections to meet the demands of the most sophisticated enterprise customers.⁹ Competitive carriers have also been leading the deployment of Ethernet-over-copper services to small and medium-sized businesses (“SMBs”) in the many areas of the country where fiber is not available.¹⁰ Ethernet-over-Copper services allow these customers to cost-effectively realize many of the same efficiencies of Ethernet technology as larger enterprise customers using Ethernet services provisioned over fiber. In addition, competitive carriers are using packet-based services to deliver cloud services that allow these SMBs—the growth engines of our economy—to increase their productivity and reduce IT costs.¹¹

Competitors’ aggressive deployment of packet-based broadband services to American businesses has spurred investment by all providers of business broadband—non-incumbents and incumbents alike. As AT&T has conceded, competition from competitive carriers in the

[%20PRINT.pdf](#); Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 *et al.*, Attachment, at 3 (filed Dec. 13, 2013) (“COMPTTEL Dec. 13, 2013 Letter”); *see also id.* (“As of December 2012, in the business market, competitors have *nearly ten times* the number of VoIP lines as ILECs.”) (emphasis in original).

⁸ *See, e.g.*, 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).

⁹ *See* Letter from Jerry James, CEO, COMPTTEL, *et al.*, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51 *et al.*, at 2 & nn.1-2 (filed Nov. 2, 2012) (“COMPTTEL *et al.* Nov. 2, 2012 Letter”).

¹⁰ *See, e.g.*, Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5 *et al.*, Attachment, at 3 (filed Feb. 25, 2013) (stating that MegaPath has the largest CLEC Ethernet-over-Copper footprint in the U.S.); Comments of COMPTTEL, GN Dkt. No. 12-353, RM-11358, at 3-8 (filed Mar. 5, 2013) (“COMPTTEL Mar. 5, 2013 Comments”).

¹¹ *See, e.g.*, COMPTTEL *et al.* Nov. 2, 2012 Letter at 2 & n.3; EarthLink Business, Whitepaper, *Small and Mid-market Business Achieve Tremendous Benefit From Cloud Services*, available at <http://www.earthlinkbusiness.com/about-us/whitepaper-cloud-services.xea> (last visited Mar. 10, 2014).

provision of packet-based services has spurred incumbent LECs to invest in their own packet-based networks and offerings.¹²

But while these benefits are very significant, they will largely disappear if the Commission fails to reform its policies governing wholesale access to incumbent LEC inputs. The existing rules governing access to incumbent LEC last-mile facilities and interconnection are incoherent, and they pose a grave threat to the future of competition. As the FCC staff recognized in the National Broadband Plan,

the FCC's current regulatory approach is a hodgepodge of wholesale access rights and pricing mechanisms that were developed without the benefit of a consistent, rigorous analytical framework. Similar network functionalities are regulated differently, based on the technology used. Therefore, while networks generally have been converging to integrated, packet-mode, largely-IP networks, regulatory policy regarding wholesale access has followed the opposite trajectory.¹³

In particular, current unbundling and special access rules apply to incumbent LECs' legacy TDM-based networks and copper facilities, but generally do not apply to incumbent LECs' packet-based and fiber facilities.¹⁴ Therefore, as incumbent LECs replace their legacy

¹² 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 services, and ILECs have '*respond[ed] with further investments in their own Ethernet offerings.*'") (emphasis added) (internal citation omitted).

¹³ FCC, *Connecting America: The National Broadband Plan*, at 47 (rel. Mar. 16, 2010) ("National Broadband Plan").

¹⁴ See, e.g., Petition of Ad Hoc Telecommunications Users Committee *et al.* to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25 at 9-18 (filed Nov. 2, 2012) ("Ad Hoc *et al.* Petition to Reverse Forbearance") (discussing the FCC inaction that resulted in complete deregulation of Verizon's packet-based special access services and the *Orders* that resulted in forbearance from dominant carrier regulation of several other incumbent LECs' packet-based special access services); see also Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3), WC Dkt. No. 09-223, at 6-10 (filed Nov. 16, 2009) ("Cbeyond Petition for Rulemaking") (discussing the *Orders* that resulted in the Commission's existing unbundling framework). The Commission eliminated dominant carrier regulation of incumbent LECs' packet-based special access services as well as unbundled access to certain fiber loops and the packetized capabilities of hybrid loops in part because competitive carriers could rely on the continued availability of TDM-based loops to provide broadband services. See, e.g., Reply Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. No. 10-90 *et al.*, at 13-15 & nn.38, 42 (filed May 23, 2011) ("Cbeyond *et al.* May 23, 2011 Reply Comments"). When TDM-based networks are replaced with packet-based networks, however, the Commission will no longer be able to justify deregulation of packet-based facilities on that basis. In addition, as competitive carriers have demonstrated, none of the other bases for the Commission's decisions to deregulate packet-based

facilities with packet-based and fiber facilities, competitive carriers will lose access to the last-mile facilities that have enabled them to further drive deployment of packet-based broadband services to American businesses. And, as the FCC has recognized, it is pure fantasy to suggest that competitive carriers could somehow replace these last-mile inputs by constructing fiber networks that duplicate the incumbents' ubiquitous networks.¹⁵

Moreover, the FCC has failed to confirm that its interconnection rules apply to IP interconnection, and the largest incumbent LECs argue that IP-based voice services are somehow "information services" and have interpreted the FCC's current interconnection rules to apply only to IP-based voice services if those services are classified as "telecommunications services."¹⁶ Thus, as incumbent LECs transition their networks to packet-based services, competitive carriers will lose access to interconnection on reasonable rates, terms, and conditions without Commission intervention.

Absent access to last-mile facilities and interconnection on reasonable rates, terms, and conditions, competitive carriers would likely be unable to serve most of the business customer locations they serve today. Hundreds of thousands of American businesses would lose their service provider and/or would be forced to pay higher prices. This is because, while competitive carriers have been constructing their own fiber networks wherever it is economically and operationally feasible, the overwhelming majority of competition in the business broadband market comes from competitive carriers that rely substantially on last-mile inputs from the incumbent LEC.¹⁷ As Windstream has explained, "[d]espite investing billions of dollars in recent years to expand and upgrade its incumbent (ILEC) and competitive (CLEC) local

last-mile facilities have proven to be true. *See, e.g.,* Cbeyond Petition for Rulemaking at 14-20; Ad Hoc *et al.* Petition to Reverse Forbearance at 26-27 & 41-60.

¹⁵ *See, e.g.,* National Broadband Plan at 47 ("Because of the economics of scale, scope and density that characterize telecommunications networks, . . . it is not economically or practically feasible for competitors to build facilities in all geographic areas."); *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, ¶¶ 84, 90 (2010) (finding that competitive carriers continue to face extensive economic and operational barriers to the construction of last-mile facilities).

¹⁶ *See, e.g.,* Comments of AT&T, WC Dkt. Nos. 10-90 *et al.*, at 47-48 (filed Feb. 24, 2012) (arguing that only telecommunications carriers are "eligible to invoke Section 251 interconnection rights with circuit-switched ILECs"); Comments of Verizon, WC Dkt. Nos. 10-90 *et al.*, at 27-29 (filed Feb. 24, 2012) (asserting that the interconnection provisions of Sections 251(a) and (c) of the Act "all apply only to telecommunications carriers").

¹⁷ Indeed, all of the available evidence demonstrates that incumbent LECs retain an extremely high share of the last-mile connections to commercial buildings in the U.S. (*see, e.g.,* Ad Hoc *et al.* Petition to Reverse Forbearance at 42-46), and COMPTTEL believes the data submitted in response to the Commission's proposed special access information collection will confirm this fact. For this reason, the purportedly high levels of competition in the markets for mobile wireless services and residential phone, video, and Internet access services cannot justify elimination of the last-mile access and interconnection policies that competitors rely on to serve business broadband customers.

exchange areas, Windstream’s substantial CLEC operations still rely on AT&T’s ILEC facilities for last-mile access to serve customers in AT&T operating territories.”¹⁸ In addition, without the ability to interconnect their networks with those of incumbent LECs on reasonable rates, terms, and conditions, competitive carriers will be unable to retain existing voice customers or attract new ones.¹⁹

Without last-mile access and interconnection—the building blocks of competition—on reasonable rates, terms, and conditions, competitive carriers will be forced to decrease investment and innovation in business broadband. And incumbent LECs will in turn reduce their own investment in business broadband.²⁰ In short, there will be less competition, less innovation, and less investment throughout the business broadband marketplace.

II. The Commission Should Adopt Long Overdue Reform of Its Wholesale Policies to Promote Robust Competition in the Business Broadband Market During and After the IP Transition.

To prevent the harms discussed above, the Commission must take prompt action to update its wholesale policies for a packet-based environment. Indeed, in 2010, in the National Broadband Plan, the FCC staff recognized the critical role that last-mile access and interconnection policies play in ensuring retail business competition,²¹ and made a number of

¹⁸ COMPTTEL Dec. 13, 2013 Letter, Attachment, at 10.

¹⁹ As the Commission has recognized, “[i]nterconnection among communications networks is critical” given that a provider of voice services must be able to interconnect its network with those of other providers in order to attract subscribers. See *Connect America Fund; A National Broadband Plan for Our Future*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, ¶ 1336 (2011) (“*ICC Transformation Order and FNPRM*”) (explaining that “telephone service to an individual subscriber becomes more valuable to that subscriber as the number of other people he or she can reach using the telephone increases”).

²⁰ The history since the adoption of the Telecommunications Act of 1996 demonstrates that investment by competitive carriers and incumbent LECs declines in the absence of market-opening regulations and policies. As economists at Economics and Technology, Inc. have found, “competition unfriendly” policies between 2002 and 2007 resulted in less broadband investment by both competitive LECs and incumbent LECs and fewer jobs in the telecommunications sector during that period than during the period of “competition friendly” policies between 1996 and 2001. See Susan M. Gately *et al.*, Economics and Technology, Inc., *Regulation, Investment and Jobs: How Regulation of Wholesale Markets Can Stimulate Private Sector Broadband Investment and Create Jobs*, at 1-3 & 6-11 (February 2010) (*attached to Letter from Harold J. Feld, Legal Director, Public Knowledge, et al., to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 09-51 et al.* (filed Feb. 12, 2010)).

²¹ See National Broadband Plan at 47 (“Ensuring robust competition not only for American households but also for American businesses requires particular attention to the role of wholesale markets, through which providers of broadband services secure critical inputs from one another. Because of the economics of scale, scope and density that characterize telecommunications networks, well functioning wholesale markets can help foster retail competition, as it is not economically or practically feasible for competitors to build facilities in all geographic areas. Therefore, the national’s regulatory policies for wholesale access affect the competitiveness of

recommendations to reform the current hodgepodge of FCC wholesale regulations. The National Broadband Plan recommended, among other things, that the Commission (1) undertake a comprehensive review of its wholesale regulations and “develop a coherent and effective framework . . . to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers”;²² (2) ensure that rates, terms, and conditions for both TDM-based and packet-based special access services are just and reasonable;²³ (3) clarify statutory rights and obligations regarding interconnection, including IP interconnection;²⁴ and (4) “ensure appropriate balance in [the Commission’s] copper retirement policies.”²⁵ Yet, *four years later*, the FCC has achieved *none* of these objectives. Given the dire consequences for competition and consumer welfare in the business broadband market, the Commission cannot afford to delay reform of its last-mile access and interconnection policies any longer. Instead, the Commission should take the steps described below. And it should do so on an aggressive timetable with clearly established milestones. Only then will the Commission achieve the “robust competition” envisioned in the National Broadband Plan.²⁶

A. *Last-Mile Access*

First, in the second quarter of 2014, the Wireline Competition Bureau (“Bureau”) should begin the process of comprehensively reforming its last-mile access policies by gathering the data requested in the Commission’s special access information collection (following approval of the proposed collection by the Office of Management and Budget, which is currently pending). This timeframe is consistent with that in the Bureau’s recent *Public Notice* in the special access rulemaking proceeding.²⁷

Second, if the Commission determines that it must issue a supplemental Notice of Proposed Rulemaking before it can reverse the prior grants of forbearance from dominant carrier regulation of packet-based special access services and apply new regulations governing such services (as some incumbents have suggested),²⁸ the Commission should release such a supplemental NPRM during the second quarter of 2014.

markets for retail broadband services provided to small businesses, mobile customers, and enterprise customers.”).

²² *Id.* at 48 (Recommendation 4.7).

²³ *Id.* (Recommendation 4.8).

²⁴ *Id.* at 49 (Recommendation 4.10).

²⁵ *Id.* at 48 (Recommendation 4.9).

²⁶ *Id.* at 47.

²⁷ *See Comment Deadlines Extended in Special Access Proceeding*, Public Notice, DA 14-302, at 2 (2014) (“*Public Notice*”).

²⁸ *See* Comments of AT&T Inc., WC Dkt. No. 05-25, at 9-20 (filed Apr. 16, 2013); Comments of Verizon and Verizon Wireless, WC Dkt. No. 05-25, at 18-20 (filed Apr. 16, 2013). As a number of competitive carriers have explained, however, no such supplemental NPRM is required. *See, e.g.,* Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom,

Third, in the third quarter of 2014, the Commission should adopt regulations to prevent the harmful effects of incumbent LECs' exclusionary, lock-up special access discount plans. The Commission need not and should not wait until it has concluded the special access information collection and analysis in order to take this action. Indeed, the agency already has substantial record evidence to address this legal and policy issue, and there is broad agreement among competitive carriers and mobile wireless carriers that the agency must act as soon as possible.²⁹ As numerous carriers have explained, the terms and conditions in incumbent LECs' volume/term "discount" plans are patently unreasonable, and they stifle competition.³⁰ Moreover, they impede the transition to fiber and packet-based networks by, among other things, (1) restricting large carrier customers' ability to migrate from TDM-based to packet-based special access services,³¹ and (2) reducing the extent to which non-incumbents can construct fiber last-mile connections to businesses.³² Accordingly, the Commission should promptly

WC Dkt. No. 05-25, at 15-27 (filed May 31, 2013); Reply Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 6-12 (filed May 31, 2013).

²⁹ *See, e.g.*, Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at iii (filed Feb. 11, 2013) ("Sprint Feb. 11, 2013 Comments"); Comments of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc., at 42-47 (filed Feb. 11, 2013) ("Cbeyond *et al.* Feb. 11, 2013 Comments"); Comments of XO Communications, LLC, WC Dkt. No. 05-25, at 20 (filed Feb. 11, 2013) ("XO Feb. 11, 2013 Comments").

³⁰ *See, e.g.*, Comments of TelePacific Communications, WC Dkt. No. 05-25, at 12-18 (filed Feb. 11, 2013) ("TelePacific Feb. 11, 2013 Comments"); Sprint Comments at 23-38; Cbeyond *et al.* Feb. 11, 2013 Comments at 11-42; XO Feb. 11, 2013 Comments at 8-17.

³¹ *See, e.g.*, Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 20-22 (filed Apr. 11, 2012) (describing how various incumbent LEC discount plans impose shortfall penalties that prevent customers from upgrading DSn services to Ethernet services); Letter from Michael J. Mooney, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 21 (filed Feb. 22, 2012) (explaining that the upgrade provisions in Verizon's special access tariffs do not allow Level 3 to upgrade DSn services to Ethernet services without incurring substantial early termination fees, and that the technology migration provisions in those tariffs are subject to a number of restrictions that limit their utility (*e.g.*, length-of-commitment requirements, bandwidth requirements, revenue-test requirements, terminating location requirements, timing requirements, and notification requirements)); XO Feb. 11, 2013 Comments at 13 ("XO has only a limited ability, for example, under its special access commitment plans with Verizon and AT&T to move TDM circuits to Verizon Ethernet platforms to meet the increasing demand and have the Ethernet purchases count against its volume commitments.").

³² *See, e.g.*, Letter from Michael J. Mooney, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 5 (filed Jun. 27, 2012) ("Level 3 would construct fiber to many more buildings that are near its network, if AT&T's (and the other price cap LECs') lock up arrangements did not hinder it from doing so. Level 3 is forced to sit out more often than it would like not because it wants to, but because if it did incur the expense to build to these buildings, its prospective, large customers would be unable to buy more than a

establish rules that prohibit these unreasonable and anticompetitive terms and conditions.³³

Fourth, after analyzing the facilities, pricing, and other data gathered in the special access information collection, the Commission should take the following actions in the second quarter of 2015: (1) identify the relevant product and geographic markets in which the incumbent LECs have market power in the provision of TDM-based and packet-based services,³⁴ and (2) adopt comprehensive reform of the rates, terms, and conditions on which incumbent LECs must offer access to TDM-based and packet-based last-mile facilities in the product and geographic markets in which they have market power.³⁵ In conducting its market analysis, the Commission should define the relevant product markets based on various bandwidth levels to account for the lower and mid-capacity dedicated services often demanded by SMBs. The Commission should also exclude “best efforts” broadband Internet access services from its analysis.³⁶ In all events, the regulations the Commission adopts must ensure that incumbent LECs provide wholesale access to their last-mile facilities on just and reasonable rates, terms, and conditions during and after the transition away from legacy TDM-based special access inputs and unbundled network elements.

Throughout this process, the Commission should consider additional actions to address competitive carriers’ inability to obtain access to last-mile facilities, including packet-based facilities, on just and reasonable rates, terms, and conditions that could be taken without conducting an extensive mandatory information collection. For example, the Commission could act on the long-pending petition for rulemaking filed by Cbeyond, Inc.³⁷ There, Cbeyond requested that the Commission adopt rules requiring incumbent LECs to provide unbundled access to their packet-based last-mile facilities.³⁸ The Commission could do this by conducting

fraction of their demand from Level 3 as they are already locked in to buying from AT&T and the other price cap LECs instead.”).

³³ See, e.g., Cbeyond *et al.* Feb. 11, 2013 Comments at 42-47 (proposing specific rules); see also Sprint Feb. 11, 2013 Comments at 39-42 (supporting similar rules); XO Feb. 11, 2013 Comments at 17-20 (same); TelePacific Feb. 11, 2013 Comments at 18 (same).

³⁴ The Commission should conduct this analysis using the traditional market power framework. See, e.g., *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd. 10557, ¶¶ 87-101 (2012) (holding that a “market analysis” based on the DOJ-FTC Horizontal Merger Guidelines—which includes a “forward-looking” and “multi-faceted assessment of competition that considers a variety of factors,” including actual and potential competition—“is in line with current approaches to competition policy” and will “provide analytical precision” in determining whether a given market is competitive).

³⁵ It is worth pointing out that in the event the Commission’s proposed information collection is not approved, the agency has ample record evidence in the special access rulemaking proceeding to conduct comprehensive special access reform.

³⁶ See, e.g., Cbeyond *et al.* Feb. 11, 2013 Comments at 50-57 (detailing record evidence demonstrating that purchasers of dedicated services generally do not view “best efforts” broadband Internet access services as viable substitutes).

³⁷ See generally Cbeyond Petition for Rulemaking.

³⁸ See *id.*; see also Reply Comments of Cbeyond, Inc., WC Dkt. No. 09-223 (filed Feb. 22, 2010) (explaining that competitive carriers are impaired without unbundled access to packet-based

an analysis to determine when competitive carriers are “impair[ed]” under Section 251(d)(2) of the Act³⁹ without access to packet-based loops at various levels of bandwidth. The agency can undertake such an analysis without conducting a mandatory data collection.⁴⁰ In addition, the Commission could reverse the forbearance granted to the Bell Operating Companies from the independent obligation to provide unbundled access to packet-based last-mile facilities and other so-called checklist items under Section 271 of the Act.⁴¹

B. Copper Loop Retirement

While it is conducting the special access proceeding, and in all events as soon as possible, the Commission should suspend its existing copper retirement rules and update those rules to promote the continued availability of innovative and affordable Ethernet-over-Copper services to SMBs. The Commission’s current rules allow incumbent LECs to remove copper loops even where they are being used or could be used by a competitive carrier to provide service.⁴² In other words, this policy gives incumbent LECs uneconomic and anti-competitive incentives to retire copper before the end of its useful life.⁴³ Therefore, as many competitive carriers have explained in the Commission’s copper retirement docket, the Commission should reform its current rules to preserve competitors’ access to this valuable input.⁴⁴ The Commission should,

loops and that effective regulation of incumbent LEC last-mile facilities will promote competition and spur, not deter, investment in the provision of business broadband services).

³⁹ 47 U.S.C. § 251(d)(2).

⁴⁰ The Commission took this approach in the *TRRO*. See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 (2005) (“*TRRO*”), *aff’d*, *Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁴¹ See generally *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd. 21496 (2004).

⁴² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, n.847 (2003) (subsequent history omitted).

⁴³ See, e.g., Comments of Midwest Association of Competitive Communications, Inc., RM-11358, GN Dkt. No. 12-353, at 8 (filed Mar. 5, 2013) (“*MACC Mar. 5, 2013 Comments*”); Comments of XO Communications and Broadview Networks, GN Dkt. No. 12-353, RM-11358, at 11-12 (filed Mar. 5, 2013) (“*XO and Broadview Mar. 5, 2013 Comments*”).

⁴⁴ See generally Letter from Eric J. Branfman, Counsel for TelePacific, ACN, Level 3, TDM Metrocom, and TDI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-188, GN Dkt. Nos. 09-51, 12-353 & 13-5, RM-11358 (filed Jan. 25, 2013) (“*TelePacific et al. Proposal*”); *MACC Comments*; *XO and Broadview Comments*; Comments of EarthLink, Integra and tw telecom, RM 11-358, GN Dkt. No. 12-353 (filed Mar. 5, 2013) (“*EarthLink et al. Mar. 5, 2013*”).

among other things, prohibit incumbent LECs from removing, disabling, or failing to maintain copper unless the Commission makes an affirmative finding that such action is in the public interest, and such public interest standard should ensure the availability of functionally equivalent comparable wholesale services at equivalent prices, terms and conditions.⁴⁵ The Commission has ample record evidence to adopt such changes⁴⁶ and therefore should do so by the third quarter of this year. This action would help address, at least to some extent, competitors' current inability to obtain access to incumbent LECs' packet-based loops on reasonable rates, terms, and conditions.

C. VoIP Interconnection

As soon as possible and no later than the end of 2014, the Commission should clarify that incumbent LECs have a duty to provide IP interconnection for the exchange of facilities-based (or "managed") voice traffic (hereinafter "VoIP interconnection") under Section 251(c)(2) of the Act.⁴⁷ In the *ICC Transformation Order and FNPRM*, the Commission held that it "expect[ed] all carriers to negotiate in good faith" in response to requests for VoIP interconnection and "expect[ed] such good faith negotiations to result in [VoIP] interconnection agreements."⁴⁸ Nearly two-and-a-half years later, those expectations have not been met. Indeed, the vast majority of non-incumbent LECs—including competitive carriers, cable operators, and wireless carriers—have been unable to obtain VoIP interconnection agreements with the largest

Comments"); Comments of MegaPath Corporation, RM 11-358, GN Dkt. No. 12-353 (filed Mar. 5, 2013) ("MegaPath Mar. 5, 2013 Comments"); COMPTTEL Mar. 5, 2013 Comments.

⁴⁵ See *TelePacific et al.* Proposal at 20-23 (proposing specific changes to the Commission's copper retirement rules to preserve and promote affordable broadband over copper); see also *XO and Broadview* Mar. 5, 2013 Comments at 12-16 (supporting *TelePacific et al.* proposal); *EarthLink et al.* Mar. 5, 2013 Comments at 8-9 (same); *MegaPath* Mar. 5, 2013 Comments at 2 (same).

⁴⁶ See *id.*; see also COMPTTEL Mar. 5, 2013 Comments at 2 ("The record is replete with evidence regarding the technological advancements that have transformed copper into the nation's most ubiquitous broadband infrastructure and, importantly, a source of affordable broadband to consumers. The record shows that the consumers most impacted by the elimination of copper are small and medium size businesses. Collectively, the record amply demonstrates that the cost of providing competitive broadband services to small and medium size businesses could increase dramatically if the Commission does not revisit its rules.").

⁴⁷ See 47 U.S.C. § 251(c)(2) (requiring incumbent LECs, other than those subject to certain exemptions or suspensions pursuant to 47 U.S.C. § 251(f), to provide requesting telecommunications carriers with interconnection "at any technically feasible point" "for the transmission and routing of telephone exchange service and exchange access"). There is no question that VoIP interconnection is technically feasible, and the industry is continuing to develop technical standards for VoIP interconnection. See, e.g., Press Release, ATIS and SIP Forum, *ATIS and SIP Forum Launch Joint Task Force on IP-NNI*, Jan. 8, 2014, available at <http://www.atis.org/PRESS/pressreleases2014/010814.asp>.

⁴⁸ *ICC Transformation Order and FNPRM* ¶ 1011.

incumbent LECs.⁴⁹ Nor do Verizon's recent efforts to enter into "commercial" VoIP interconnection agreements with a select handful of favored VoIP providers⁵⁰ demonstrate that incumbent LECs have a business incentive to voluntarily provide VoIP interconnection at reasonable rates, terms, and conditions. As the Commission has found, "incumbent LECs have no economic incentive . . . to provide potential competitors with opportunities to interconnect with" their networks and consequently, "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."⁵¹ Thus, absent Commission action, incumbent LECs will continue to impede competition as well as the transition to all-IP networks.

It follows that the Commission should make clear that incumbent LECs (1) have an enforceable duty to provide VoIP interconnection under Section 251(c)(2); and (2) are therefore subject to the negotiation and arbitration provisions of Sections 251 and 252 of the Act.⁵² There is widespread support for this action among competitive carriers, cable operators, wireless carriers, public interest groups, and state commissions.⁵³ The agency also has ample support in the statute, in FCC precedent, and in the record to make such a clarification. In fact, the Commission has already found that the interconnection requirements of the Act are technology neutral⁵⁴ and expressly held that "the interconnection obligations set forth in Section 251(c)(2) apply to packet-switched services as well as circuit-switched services."⁵⁵ Competitive carriers have also explained in detail that Section 251(c)(2) applies to VoIP interconnection because facilities-based or managed VoIP service is a "telephone exchange service," "exchange access"

⁴⁹ See, e.g., Reply Comments of Cbeyond, EarthLink, Integra, Level 3, and tw telecom, GN Dkt. No. 13-5, at 15-16 (filed Aug. 7, 2013) (citing comments filed by Cbeyond, Sprint, Peerless, T-Mobile, and Cablevision) ("Cbeyond *et al.* Aug. 7, 2013 Reply Comments").

⁵⁰ See Rebuttal Testimony of Eugene J. Spinelli *et al.* on Behalf of Verizon New England Inc., Massachusetts Department of Telecommunications and Cable No. 13-6, at 4 (filed Feb. 5, 2014) (stating that Verizon has "entered into IP VoIP interconnection agreements" with Comcast, Vonage, Broadvox, InterMetro, Bandwidth.com and Millicorp).

⁵¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and CMRS Providers*, First Report and Order, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

⁵² 47 U.S.C. §§ 251(c)(1), 252.

⁵³ See, e.g., Cbeyond *et al.* Aug. 7, 2013 Reply Comments n.10.

⁵⁴ See *ICC Transformation Order and FNPRM* ¶¶ 1011, 1381.

⁵⁵ See Comments of Cablevision Systems Corporation and Charter Communications, Inc., WC Dkt. No. 11-119, at 5 (filed Aug. 15, 2011) ("Cablevision and Charter Aug. 15, 2011 Comments") (quoting *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, 15 FCC Rcd. 385, ¶ 22 (1999), *remanded on other grounds*, *WorldCom, Inc. v. FCC*, 246 F.3d 690 (D.C. Cir. 2001)); see also *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, ¶ 48 (1998) (holding that the interconnection obligations of Section 251(c)(2) "apply to incumbents' packet-switched telecommunications networks and the telecommunications services offered over them").

service, and “telecommunications service” under the Act.⁵⁶ And the incumbent LECs’ various arguments against a statutory clarification have been refuted at length in the record.⁵⁷ Moreover, at least one state commission (the Michigan Public Service Commission) has already held that incumbent LECs’ Section 251(c)(2) interconnection duty includes VoIP interconnection.⁵⁸ The Commission should promptly make the same finding on a national basis.⁵⁹

It is crucial that the Commission enforce the interconnection provisions of the Act and further the statutory goals of competition and nondiscrimination underlying the Section 251/252 framework.⁶⁰ As discussed in Part I above, competitive carriers have been at the forefront of the IP transition, investing in IP networks, and offering IP-based services to businesses for well over a decade. In fact, some of COMPTEL’s members have all-IP networks. But incumbent LECs have been forcing competitors to needlessly

⁵⁶ See, e.g., *Cbeyond et al.* May 23, 2011 Reply Comments at 7-10; see also *Cablevision and Charter* Aug. 15, 2011 Comments at 7-13 (explaining that the Commission need not address whether facilities-based VoIP service is a telecommunications service in order to clarify that Section 251(c)(2) applies to VoIP interconnection and discussing several legal bases on which the Commission can make such a clarification, including (1) facilities-based VoIP service is a “telephone exchange service” and “exchange access” service; and (2) irrespective of whether the *requesting carrier* is providing telephone exchange service and exchange access service, the *ILEC* is providing those services).

⁵⁷ See, e.g., *Cbeyond et al.* Aug. 7, 2013 Reply Comments at 7-15 (refuting incumbent LECs’ claims that market forces alone will ensure that competitors can obtain VoIP interconnection agreements); Letter from Howard J. Symons, Counsel, Cablevision Systems Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 10-90 *et al.*, at 2-5 (filed Oct. 20, 2011) (refuting incumbent LECs’ arguments that the corporate affiliates through which they operate their IP networks and provide IP services are not subject to the interconnection obligations of Section 251(c)(2)).

⁵⁸ *In the matter of petition of Sprint Spectrum L.P. for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish interconnection agreements with Michigan Bell Telephone Company, d/b/a AT&T Michigan*, Order, Michigan Public Service Commission Case No. U-17349, at 7 (Dec. 6, 2013); see also *In the matter of the joint submission of Sprint Spectrum L.P. and Michigan Bell Telephone Company, d/b/a AT&T Michigan, for approval of an interconnection agreement*, Michigan Public Service Commission Case No. U-17569, at 3-4 (Mar. 18, 2014).

⁵⁹ If the Commission seeks to further accelerate the IP transition, it could also oversee a negotiation of a model agreement between competitive carriers and an RBOC which, in accordance with Section 252 of the Act, could be submitted to the States for approval and made available for other requesting carriers to opt-into or use as a template for negotiations under the Act.

⁶⁰ See, e.g., *Local Competition Order* ¶ 1321 (finding that allowing requesting carriers to obtain interconnection “on an expedited basis” will “ensure competition occurs as quickly and efficiently as possible”); *id.* ¶ 167 (holding that “requiring filing of all interconnection agreements best promotes Congress’s stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms”).

convert their VoIP traffic to TDM format for purposes of traffic exchange, thereby increasing competitors' costs of providing service. Consumers' realization of the efficiencies and other benefits of IP technology hinges on competitive carriers' ability to obtain VoIP interconnection with incumbent LECs on just, reasonable, and nondiscriminatory rates, terms, and conditions under Section 251(c)(2). In addition, enforcement of the requirements under Section 252 of the Act that VoIP interconnection agreements be publicly filed with state commissions⁶¹ and available for adoption or opt-in by other requesting carriers⁶² prevents incumbent LECs from favoring some competitors over others, saves all carriers time and money, and ultimately benefits consumers by making it easier for carriers to focus on their core business of providing innovative and affordable IP-based services.

Please do not hesitate to contact us if you have any questions about this submission.

Respectfully submitted,

/s/Angie Kronenberg

Angie Kronenberg
Karen Reidy

cc: Chairman Wheeler
Commissioner Clyburn
Commissioner Rosenworcel
Commissioner Pai
Commissioner O'Rielly
Jonathan Sallet
Julie Veach

⁶¹ 47 U.S.C. § 252(e).

⁶² *Id.* § 252(i).