



The voice of mid-size communications companies

February 19, 2016

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

**Re: *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, WC Docket No. 05-25, RM-10593***

Dear Ms. Dortch:

In accordance with the *Special Access Data Collection Protective Order*<sup>1</sup> in WC Docket No. 05-25 and RM-10593; the *Special Access Modified Protective Order*<sup>2</sup> and the *Special Access Second Protective Order*<sup>3</sup> in WC Docket No. 05-25 and RM-10593; and the *Technology Transitions Protective Order*<sup>4</sup> and the *Technology Transitions Second Protective Order*<sup>5</sup> in GN Docket Nos. 13-5 and 12-353 (collectively, the “Protective Orders”), ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) hereby submits the **Redacted** version of its reply comments in the above-referenced proceedings.

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<sup>1</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Order and Data Collection Protective Order, DA 14-1424 (rel. Oct. 1, 2014).*

<sup>2</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593, Modified Protective Order, DA 10-2075 (rel. Oct. 28, 2010).*

<sup>3</sup> *In the Matter of Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Second Protective Order, WC Docket No. 05-25, RM-10593, DA 10-2419 (rel. Dec. 27, 2010).*

<sup>4</sup> *In the Matter of Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket Nos. 13-5 and 12-353, Protective Order, DA 14-272 (rel. Feb. 27, 2014).*

<sup>5</sup> *In the Matter of Technology Transitions; AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket Nos. 13-5 and 12-353, Second Protective Order, DA 14-273 (rel. Feb. 27, 2014).*

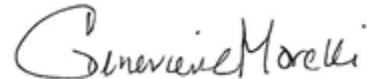
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Ms. Marlene H. Dortch  
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Pursuant to the Protective Orders, ITTA submitted in paper form the original of its Highly Confidential reply comments for filing, and provided two hard copies of its Highly Confidential reply comments under separate cover to Christopher Koves.

Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

A handwritten signature in cursive script that reads "Genevieve Morelli". The signature is written in black ink and is positioned above the printed name and title.

Genevieve Morelli  
President

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**REPLY COMMENTS OF  
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES**

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**February 19, 2016**

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	)	

REPLY COMMENTS OF  
ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) hereby submits its reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Further Notice of Proposed Rulemaking (“*FNPRM*”) seeking comment on potential changes to the FCC’s pricing flexibility rules based on its analysis of the comprehensive data collection conducted in the above-captioned proceedings.<sup>6</sup>

**I. INTRODUCTION AND SUMMARY**

The 2013 data collection demonstrates that the high-capacity transmission marketplace is vibrantly competitive and that Congress’ goal in enacting the 1996 Act – to facilitate meaningful long-term competition from non-ILEC providers through deployment of their own facilities – has been met. Existing competitive providers have consolidated and grown stronger while new entrants, especially the cable operators, have stormed into the marketplace. There is every

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<sup>6</sup> See *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*, WC Docket No. 05-24, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-153, 27 FCC Rcd 16138, ¶¶ 80-90 (rel. Dec. 18, 2012) (“*FNPRM*”).

indication that the marketplace is functioning well as the industry transitions to IP-enabled platforms. By all accounts, a highly competitive business broadband marketplace has emerged just as Congress envisioned.

Despite evidence that the market for high-capacity services is one of the most dynamic and competitive sectors of the communications industry, CLECs maintain that there is insufficient competition to discipline ILEC prices and that the FCC must impose expansive regulations on ILECs to ensure CLECs are able to compete. As demonstrated below, however, the CLECs' claims, which rely extensively on a flawed analysis that employs an unreasonable standard for assessing the presence of competition, are unfounded. A more accurate analysis, that takes into account all forms of high-capacity services utilized by special access customers as well as the CLECs' ability to leverage their sunk facilities to expand service on an economic basis, confirms that the marketplace failure CLECs claim exists does not and that no additional regulation is needed. To the contrary, the record makes clear that the Commission should not only avoid rescinding relief in MSAs currently subject to pricing flexibility, but also that it should extend Phase II relief to all MSAs currently subject to Phase I rules. Going forward, the Commission must adopt a framework that properly accounts for both actual and potential competition and lifts regulation where there are indicia of sufficient demand to warrant competitive provision of services.

## **II. THE CLECS' PROPOSED STANDARD FOR EVALUATING COMPETITION IN THE SPECIAL ACCESS MARKET IS FUNDAMENTALLY FLAWED**

The CLECs have erroneously concluded that the special access marketplace is not competitive in the vast majority of areas based on econometric analyses that employ an unreasonable standard for effective competition that is virtually impossible to meet. Specifically, several CLEC economists claim that "the appropriate geographic market for analyzing special

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access channel termination is the building location”<sup>7</sup> and that several suppliers “likely [ ] four – and certainly more than two” – in each location “are needed to give a competitive outcome in the special access markets under consideration in this proceeding.”<sup>8</sup> Similarly, another CLEC economist suggests that the appropriate geographic market should be defined as “service to each customer location served by a dedicated connection – whether a specific office suite within a building, a particular cell tower, or the location of the channel term or local transport facility sought by a CLEC,”<sup>9</sup> and that “only the in-building presence of at least three non-ILEC dedicated services competitors with their own last mile fiber facilities” (i.e., at least four facilities-based providers) should be considered sufficient to prevent ILECs from setting prices above competitive levels.<sup>10</sup>

This proposed construct for evaluating the presence of competition in the special access market is fundamentally flawed for at least two reasons. First, setting the necessary level of market participation at four or more providers virtually guarantees that the special access market will *never* be subject to effective competition. It simply is not reasonable or necessary to expect that the market would consistently support four providers with last-mile facilities in every geographic market when the provision of business broadband and other communications services, particularly over wireline facilities, requires such significant investment in network

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<sup>7</sup> Declaration of Stanley M. Besen and Bridger M. Mitchell, Attached to Comments of Sprint Corporation, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“Besen/Mitchell Declaration”), at ¶ 19.

<sup>8</sup> *Id.* at ¶ 47.

<sup>9</sup> Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“Baker Declaration”), at ¶ 35.

<sup>10</sup> Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“Windstream Comments”), at 101.

infrastructure to reach the last mile. Indeed, according to the CLECs' faulty analysis, only \*\*\*

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\*\*\* of buildings nationwide have three or more competitors.<sup>11</sup> Thus, under the standard contrived by the CLECs, the special access market likely would remain uncompetitive in perpetuity.

The CLECs' suggestion that even markets with two facilities-based providers are unlikely to perform competitively is likewise problematic.<sup>12</sup> In an analogous setting with significant upfront and comparatively low marginal costs – the cable context – far fewer than four providers are necessary to establish effective competition. Under the 1992 Cable Act, a cable operator can obtain relief from rate regulation when it faces competition from a DBS provider, a municipal system, or a local exchange carrier.<sup>13</sup> When the competitor is a DBS provider, the threshold for establishing effective competition is met when the provider serves 15 percent of the households in a franchise area.<sup>14</sup> When the competitor is a municipal provider, the

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<sup>11</sup> Besen/Mitchell Declaration at ¶ 26.

<sup>12</sup> See Baker Declaration at ¶ 48.

<sup>13</sup> The 1992 Cable Act defines four types of effective competition, three of which are relevant here: (1) competing provider effective competition, which is present if the franchise area is (i) served by at least two unaffiliated MVPDs each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (ii) the number of household subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area; (2) municipal provider effective competition, which is present if an MVPD operated by the franchising authority offers video programming to at least 50 percent of the households in the relevant franchise area; and (3) local exchange carrier effective competition, which generally is present if a local exchange carrier or its affiliate offers video programming services that are comparable to the video programming services offered by the unaffiliated cable operator in the franchise area directly to subscribers by any means (other than direct-to-home satellite services). 47 U.S.C. § 543(1)(1); 47 C.F.R. § 76.905(b).

<sup>14</sup> 47 U.S.C. § 543(1)(1)(B); 47 C.F.R. § 76.905(b)(2).



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threshold is met when the provider serves 50 percent of households in the franchise area.<sup>15</sup> And when the competitor is a local exchange carrier, its mere presence in the relevant market is satisfactory for a finding of effective competition, regardless of its market share.<sup>16</sup> In other words, there are multiple ways cable providers can demonstrate the presence of effective competition – each of which contemplates only two providers – raising serious questions (which the CLECs fail to answer) as to why a much higher benchmark is necessary to establish effective competition in the special access market.

Second, by failing to take into account sunk investment near locations with special access demand, the analysis conceals the true extent of CLEC competition and completely overlooks how the special access market really works. As Compass Lexecon explains, “investment in facilities required to deliver service is an especially informative measure of competition,” because, among other things, such “durable commitments” reflect sunk investments, “ensur[ing] that the provider has an economic incentive to service the market in the short run and over the longer run.”<sup>17</sup> More importantly, because “the reach of an embedded network can extend beyond the location of its current connections to serve additional customers in the immediate vicinity,” sunk investment also facilitates expansion of the provider’s service area with minimal additional cost.<sup>18</sup>

The underlying theory of the pricing flexibility rules recognizes that it is not necessary for a competitor to have a connection to every building in an area for that competitor to constrain

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<sup>15</sup> 47 U.S.C. § 543(l)(1)(C); 47 C.F.R. § 76.905(b)(3).

<sup>16</sup> 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4).

<sup>17</sup> Mark Israel, Daniel Rubinfeld & Glenn Woroch, “Competitive Analysis of the FCC’s Special Access Data Collection,” WC Docket No. 05-25, (filed Jan. 27, 2016) (“Compass Lexecon Analysis”), at 6-7.

<sup>18</sup> *Id.* at 10.

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ILEC prices in that area.<sup>19</sup> Special access competition does not occur only among providers that already have an existing connection to a building because additional providers with the ability to deploy a connection – based on, for example, a large fiber ring or transport facilities that are near the building – also vigorously compete for the business of the building’s special access customers. Therefore, as the Department of Justice has found, special access competition from CLECs constrains ILEC prices in any building that is sufficiently near, but not necessarily already connected to, their sunk network facilities.<sup>20</sup>

Competitors deploy networks that are within reach of all or most of the concentrated demand within a given metropolitan area. The competitor will then market its service broadly throughout the geographic area, and it will provide service to customers on demand, where it believes it is likely to earn a profit from doing so. The economic consideration is not limited solely to the revenues from the customer at hand, at a given building or location, but may also consider the economic opportunities from adjacent locations within that same vicinity.

A competitor with facilities in a census block generally can economically serve any establishment within that census block by extending “laterals” from its existing plant to the new location. As Compass Lexecon observes, laterals connecting points within a census block are relatively inexpensive to deploy:

The bulk of the cost in providing service... lies in the deployment of the core fiber network, including the cost of rights of way for the network routes. In comparison, once a core network is in place, extending laterals requires a

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<sup>19</sup> See *id.*, Section II.B. See also Declaration of Dennis W. Carlton and Hal S. Sider, ¶¶ 28-30, attached as Exh. A to Comments of AT&T Inc., WC Docket No. 05-25 (filed Jan. 19, 2010).

<sup>20</sup> See, e.g., *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 41-42, 46 & nn. 111-14 (2007) (describing and adopting “screens” employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building).

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significantly smaller capital expenditure per unit of bandwidth, making this a relatively low-cost expansion. As a result, providers with nearby facilities impose an effective competitive constraint on ILEC special access services even if they are not yet actively serving a particular location because they can and do compete for those customers.<sup>21</sup>

In this way, “the dynamics of the competitive marketplace ensure that the benefits of competition redound to all customers in an area where competitive facilities have been deployed, not just those who are located within a certain distance of a network, or that offer a certain level of revenues.”<sup>22</sup> Once facilities have been deployed to a location, they can typically be used to serve many adjacent locations at a much lower marginal cost.<sup>23</sup> For example, after Zayo signed a deal in December 2015 to provide backhaul services to “over 500 towers” in Atlanta, it announced that it would “leverage its expanded Atlanta network to provide lit and dark fiber services to other enterprises and carrier customers.”<sup>24</sup> Similarly, Windstream has explained that it can reduce special access costs in Charlotte, “[b]y spending less than \$200,000 . . . [to] create a meshed network around the five existing network rings it has in place and build laterals off those rings to build last mile access.”<sup>25</sup>

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<sup>21</sup> Compass Lexecon Analysis at 10.

<sup>22</sup> Comments of Verizon, WC Docket No. 05-24, RM-10593 (filed Jan. 27, 2016) (“Verizon Comments”), at 22.

<sup>23</sup> See, e.g., Simon Flannery & Lisa Lam, Morgan Stanley, Level 3 Communications, Inc. 3Q13 Preview: Enterprise Growth and Ongoing Cost Initiatives Are Key Focuses (Oct. 28, 2013), at 3 (observing that because Level 3 already has extensive fiber networks in place, “the cost [for Level 3] to add fiber to a new building is fairly low relative to [its] peers.”).

<sup>24</sup> Zayo Press Release, *Zayo to Significantly Expand Fiber-to-the-Tower Footprint in Atlanta*, <http://www.zayo.com/news/zayo-to-significantly-expand-fiber-to-the-tower-footprint-in-atlanta/> (Dec. 2, 2015).

<sup>25</sup> Sean Buckley, *Windstream’s Thomas: We See an Opportunity to Reduce \$1B in Special Access Spending*, Fierce Telecom (Sept. 18, 2015), [http://www.fiercetelecom.com/story/windstreams-thomas-we-see-opportunity-reduce-1b-special-access-spending/2015-09-18?utm\\_medium=nl&utm\\_source=internal](http://www.fiercetelecom.com/story/windstreams-thomas-we-see-opportunity-reduce-1b-special-access-spending/2015-09-18?utm_medium=nl&utm_source=internal). According to Windstream

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The fact that CLECs highlight not only the buildings they have “on net,” but also the buildings that are “near net,” signals to potential customers their ability to extend their networks to acquire new customers where demand warrants it. For example, Level 3, which “markets *Dedicated Services* nationwide” to enterprise customers,<sup>26</sup> has reported “[o]ver 1000,000 enterprise buildings” “within 500 ft.” of its U.S. network.<sup>27</sup> Likewise, FPL FiberNet claims “over 1,700 on-net buildings, approximately 700 free-standing towers, and tens of thousands [of] near net locations” in its service footprint.<sup>28</sup> Another CLEC, Lightower, describes its “network footprint” as “essentially from Maine to Virginia and also Chicago.”<sup>29</sup>

Thus, the analysis conducted by Compass Lexecon used census block as the measure for competition based on the sound premise that a competitor that has deployed to a small corner of a census block is generally able to compete for the establishments that demand special access in the rest of the census block as well. While census blocks are slightly less granular than a location-based definition for geographic market, they are still very granular – about three-quarters of them are less than approximately 0.08 square miles and half are less than roughly 0.02 square miles.<sup>30</sup> Therefore, even if a competitor had deployed services to just one corner of a

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CEO Tony Thomas, Windstream will “replicate this several ways in five markets,” and will “be accelerating that effort in 2016.” *Id.*

<sup>26</sup> Level 3 II.D.1 Response.

<sup>27</sup> Level 3 Communications, 2011 Annual Meeting of Stockholders, Presentation (May 19, 2011), at 3, [http://files.shareholder.com/downloads/LVLT/2168870475x0x469486/f0c304e5-b9ea-4c17-a9b6-bd3a8088c521/Level%203%20Communications%20Annual%20Meeting\\_May%202011\\_FINAL.pdf](http://files.shareholder.com/downloads/LVLT/2168870475x0x469486/f0c304e5-b9ea-4c17-a9b6-bd3a8088c521/Level%203%20Communications%20Annual%20Meeting_May%202011_FINAL.pdf).

<sup>28</sup> FPL FiberNet, *Capacity*, <http://www.fplfibernet.com/capacity.shtml>.

<sup>29</sup> LTS Buyer (Lightower) II.D.1 Response.

<sup>30</sup> *See* Compass Lexecon Analysis, Section II.B.

census block with special access demand, it could still compete for customers in a large portion of the census block.

Here, the data show that even in 2013, competitors had deployed sunk facilities in census blocks serving the majority of special access demand in a significant number of MSAs. Both the Commission and the D.C. Circuit have recognized that there is no legal or economic justification for retaining price cap regulation in a geographic area where competitors have deployed sunk facilities capable of providing service to that area.<sup>31</sup> Therefore, as discussed in more detail below, there is no basis for re-regulating ILECs in any area currently subject to Phase I or Phase II pricing flexibility.

### **III. THE COMMISSION’S ANALYSIS MUST ACCOUNT FOR ALL FORMS OF ACTUAL AND POTENTIAL COMPETITION**

Another shortcoming of the CLECs’ analysis is that it does not reflect the significant inroads made by cable providers and other competitors in the past two decades, much less the past two years, in the market for high-capacity services. Given the intense and growing competition in this space, the absence of this data is extremely problematic. The Commission’s assessment should include all forms of high-capacity services that customers are using to meet their needs, including not only legacy TDM-based special access services but also Ethernet

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<sup>31</sup> See, e.g., *Pricing Flexibility Order*, ¶ 80 (“Once multiple rivals have entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary. . . . If a competitive LEC has made a substantial sunk investment in equipment, that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market.”); *WorldCom*, 238 F.3d at 458-59 (“the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed,” because “that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market”). See also *Pricing Flexibility Order*, ¶ 155 (recognizing that special access customers are “sophisticated purchasers of telecommunications services, fully capable of finding competitive alternatives where they exist and determining which competitor can best meet their needs”).

services and best-efforts broadband services offered by cable.<sup>32</sup> As the Commission and the courts have concluded, bedrock principles of competitive analysis require the agency to consider all substitutes for high-capacity services, including intermodal alternatives.<sup>33</sup> When the Commission properly takes into account the full range of competitive alternatives, “it should be clear that ILECs provide TDM-based special access services within a broader high-capacity transmission marketplace in which they are steadily losing market share to other providers.”<sup>34</sup>

**A. Best Efforts Business Broadband Services**

The Commission must take into account best efforts business class broadband services that cable operators provide. Such services are widely available and are marketed by providers as a substitute to traditional special access and other high-capacity services. Moreover, best efforts broadband services are increasingly viewed by customers, particularly small businesses, as a viable substitute for special access services.

Due to the ubiquitous nature of incumbent cable networks, cable broadband services are the most widely available and used form of broadband in the United States.<sup>35</sup> The National Broadband Map shows that cable broadband services are available to approximately 89% of the population, and data from NCTA indicates that such services are available to 93% of households

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<sup>32</sup> The Commission also should consider technologies such as fixed wireless service, which many providers utilize as an economical alternative to fiber to service enterprise customers of all sizes. *See, e.g.*, Verizon Comments at 46-51.

<sup>33</sup> *See, e.g.*, Comments of CenturyLink, WC Docket No. 05-25 (filed Feb. 11, 2013), at 12-13 (citing Areeda & Hovenkapm, Antitrust Law 369, ¶ 562 (3d ed. 2007)). [See n. 29 of CTL comments for full cite.]

<sup>34</sup> Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“CenturyLink Comments”), at 13-14.

<sup>35</sup> NCTA, *Broadband by the Numbers*, <https://www.ncta.com/broadband-by-the-numbers> (“As the nation’s largest broadband provider, cable’s fiber-rich networks are available to 93 percent of U.S. homes.”).

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nationwide. According to industry analysts, cable broadband networks pass more than three quarters of small and medium business customers in the U.S.<sup>36</sup> The widespread availability of best efforts broadband to business customers was further confirmed by recent studies. A third-party study of the Atlanta metro area found that cable broadband services were available to four-fifth of businesses in that area based on where cable companies have already signed up customers.<sup>37</sup> A similar study of the Albany, Boston, Philadelphia, Virginia Beach, and Washington, DC metropolitan areas found that cable could provide broadband to more than three-quarters of businesses in those cities.<sup>38</sup>

Cable providers market best efforts business broadband services as competitive alternatives to special access, especially lower-end services like DS1. Comcast, for example, states that “[w]ith speeds 64x faster than T1, advanced security, and dedicated national support, Business Internet provides the bandwidth, reliability and scalability your organization needs to help you be more competitive and successful.”<sup>39</sup> Similarly, Charter states that “[c]oax solutions are the best value for companies that do not regularly transfer large files or data. Coax provides significantly greater throughput than DSL, and is more affordable than T1.”<sup>40</sup>

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<sup>36</sup> Alan Breznick, Heavy Reading, Presentation to The Future of Cable Business Services 2014 (Dec. 2, 2014) (“Cable industry’s HFC lines already passed more than three quarters of SMBs in the U.S.”).

<sup>37</sup> See *Ex Parte* Letter from Patrick S. Brogan, USTelecom, to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, Attachment, Arthur Menko, *Methodology for Identifying Local Competitive Commercial Infrastructure: Cable Modem High Capacity Services* (Oct. 16, 2015), at 1.

<sup>38</sup> Letter from Maggie McReady, Verizon, to Marlene Dortch, FCC, WC Docket No. 05-25, RM-10593, Attachment A, December 18, 2015 Declaration of Arthur Menko (Jan. 14, 2016).

<sup>39</sup> Comcast Corporation, *Business Internet for Branch Offices*, <http://business.comcast.com/ethernet/products/internet-for-branch-offices>.

<sup>40</sup> Charter Business, *Fiber or Coaxial: Which One Is Best for Your Business* (2013), at 3, <https://business.spectrum.com/mediacontent/pdfs/wp-fiber-or-coax.pdf>.

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CLECs try to distinguish best efforts business broadband services from special access services to support their argument that best efforts services should be excluded from the special access product market.<sup>41</sup> According to CLECs, “[b]est efforts broadband is excluded because it lacks service quality features – particularly availability, reliability, customer support, and security – required by most dedicated services retail customers” and “may also lack the dedicated bandwidth (in both directions) those customers require.”<sup>42</sup>

Although best efforts broadband differs in some respects from traditional special access, these differences are not critical for many customers, and are diminishing over time. For example, Comcast recently launched Ethernet @Home, delivered over its hybrid fiber-coax network. Ethernet @Home provides employees that work from home with a secure private link to their corporate network. Like traditional dedicated services, Ethernet @Home is backed by a service level agreement and is available for a variety of Ethernet services at symmetric bandwidth speeds up to 10 Mbps.<sup>43</sup> Analysts call this service “a business-class, high-capacity symmetric network access service for teleworkers that is more secure than broadband Internet access paired with Layer 3 IP [virtual private networks] that remote workers often use.”<sup>44</sup> Although the service requires installation of Ethernet equipment at the cable headend, analysts conclude that “overall the operator should have little trouble delivering the service.”<sup>45</sup>

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<sup>41</sup> See Sprint Comments at 12-14; Windstream Comments at 10-30; Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“Level 3, *et al.* Comments”), at 15-18, 27-30.

<sup>42</sup> Baker Declaration at ¶ 31.

<sup>43</sup> Cindy Whelan, Current Analysis, *Comcast Takes Telework to the Next Level with Ethernet @Home* (Dec. 16, 2014), at 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 3.



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Most importantly, businesses are buying best efforts business broadband in place of lower-end dedicated services. Analysts have observed that “cable companies have emerged as a credible competitive threat, as their introduction of telephony and increasing broadband speeds have allowed them to serve. . . the Low- and Medium-complexity segments using only-slightly-adapted consumer products.”<sup>46</sup> It was recently reported that “Comcast’s high bandwidth/low price broadband value proposition for smaller businesses dominates revenue growth.”<sup>47</sup> Similarly, small businesses comprise an overwhelming segment of Charter’s Spectrum Business service, even though it does not feature the same internal sales and support resources as more sophisticated enterprise services.<sup>48</sup> And for Time Warner Cable, which has the most fiber lit buildings of the cable providers for whom such data is publicly available, “revenue remains dominated by small businesses seeking basic, competitively priced bundles of broadband, voice and video.”<sup>49</sup> Given business customers’ embrace of best efforts services, the Commission must include it in its analysis of competition in the special access market.

### **B. Dedicated Ethernet Services**

While the 2013 data collected by the FCC is a good start, it does not paint a full picture of the vibrantly competitive business broadband marketplace. Commenters have made a compelling case regarding the growth and proliferation of cable and CLEC competition in the special access market in just the past two years. The FCC must consider these developments to ensure that any conclusions reached are data driven and fully supported by the record.

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<sup>46</sup> Sanford C. Bernstein & Co., LLC, *U.S. Telecom: A Primer in the \$70B Enterprise Telecom Market (Cable’s Opportunity = Telcos’ Loss?)* (July 16, 2015), at 6.

<sup>47</sup> Current Analysis, “Comcast Business – Business Services US” (Nov. 13, 2015), at 2.

<sup>48</sup> Current Analysis, “Spectrum Business – Business Services US” (Nov. 23, 2015), at 2.

<sup>49</sup> Current Analysis, “Time Warner Cable Business Class – Business Services US” (Oct. 16, 2015), at 2.

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As numerous parties have observed, significant competition has developed in just the past two years due to the explosive growth of Ethernet services offered by incumbents and competitors alike. According to a recent Vertical Systems Group report, the base of U.S. retail Ethernet installations grew 23 percent in 2014, and based on demand projections, more than half a million new ports will be added to the U.S. Ethernet base in the next five years.<sup>50</sup> Frost & Sullivan projects that business carrier Ethernet services market revenue will grow from \$4.7 billion in 2014 to \$12.0 billion in 2020.<sup>51</sup>

The most significant growth has been from the cable sector, which has invested billions of dollars to expand its business model to include provision of high-capacity services in the enterprise marketplace. It is widely recognized that “[c]able is the fastest growing segment in the wholesale and retail business Ethernet markets.”<sup>52</sup> As Vertical Systems Group reports, “[t]he Cable MSO segment remained the fastest growing overall in 2014, garnering growth that considerably outpaced the Incumbent Carrier and Competitive Provider segments... Already established in metro markets, leading cable companies are fortifying their Ethernet offerings to meet the needs of larger businesses with regional and nationwide networks.”<sup>53</sup> In the past two years, “cable operators have increased the penetration of business locations they serve by more

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<sup>50</sup> Vertical Systems Group, *Mid-Year 2015 U.S. Ethernet Leaderboard*.

<sup>51</sup> Frost & Sullivan, *Business Carrier Ethernet Services Market Update, 2015* (Sept. 2015), at 1.

<sup>52</sup> See, e.g., Sean Buckley, Cable Hones Its Wholesale Skills in Special Access, Wireless Backhaul, *Fierce Telecom* (Apr. 7, 2015), <http://www.fiercetelecom.com/special-reports/cable-hones-its-wholesale-skills-special-access-wireless-backhaul>.

<sup>53</sup> Vertical Systems Group, *2014 U.S. Cable MSO Ethernet LEADERBOARD* (Mar. 16, 2015), <http://www.verticalsystems.com/vsglb/2014-u-s-cable-mso-ethernet-leaderboard/>.

than 50 percent while ILEC penetration dipped nearly 14 percent.”<sup>54</sup> Indeed, the largest U.S. incumbent cable operators – Time Warner Cable, Comcast, and Cox – are now the fifth, sixth, and eighth largest providers of Ethernet services in the United States, respectively.<sup>55</sup>

It is clear that cable has been very aggressive in expanding into the business broadband marketplace, and Comcast has led the way. Analysts indicate that Comcast has been the fastest growing Ethernet provider for the past two years and is said to be “well positioned in 2015 due to its extensive fiber network footprint.”<sup>56</sup> By all accounts, Comcast has been hugely successful in connection with its business services. Comcast Business offers “the largest facilities-based last mile alternative to the phone company,” with more than 141 national route miles of fiber and the first and largest fully 40G backbone.<sup>57</sup> Its business subscribers include “large customers from multiple industries,” including financial services firms, banks, hospitality chains, and retailers.<sup>58</sup> Comcast’s first quarter revenue from business services in 2015 grew 21.4 percent from the

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<sup>54</sup> Sean Buckley, *Cable Operators Taking Greater Share of Large Businesses, Says Analyst Firm*, Fierce Telecom (Sept. 21, 2015), <http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21>.

<sup>55</sup> See Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015), <http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/>.

<sup>56</sup> Comcast, *The Fastest Growing Ethernet Provider, Two Years Running* (Feb. 25, 2015), <http://corporate.comcast.com/news-information/news-feed/the-fastest-growing-ethernet-provider-two-years-running>.

<sup>57</sup> Comcast Business: The Comcast Network (2014), <http://i.crn.com/custom/The-Comcast-Network-Overview.pdf>.

<sup>58</sup> Press Release, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015), <http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises> (“Comcast Fortune 1000 Press Release”).

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previous year, to more than \$1.1 billion.<sup>59</sup> In fact, Comcast’s business services have been “the second-largest contributor to overall cable revenue growth for 18 of the last 19 quarters with third-quarter revenue increasing 19.5% to \$1.2 billion.”<sup>60</sup>

Building on this success, Comcast recently announced that it has created a new business unit specifically to market and sell enterprise services to Fortune 1000 companies on a nationwide basis. In a recent earnings call, Comcast emphasized that it is targeting “large enterprises that have 300 locations or more” and that it provides managed services “to more than 20 large enterprise companies and has[s] already signed multiple eight figure deals.”<sup>61</sup>

Time Warner Cable likewise has enjoyed tremendous success in the business broadband marketplace. Time Warner Cable proclaims itself to be “the largest multi-system operator provider of Ethernet services.”<sup>62</sup> The company just reported its “17th consecutive quarter of year-over-year growth above \$100 million,” and is “still targeting at least \$5 billion in annual revenue in the Business Service area by 2018.”<sup>63</sup> Indeed, Comcast and Time Warner Cable have each reported revenue growth of 20 percent or more for 2015.<sup>64</sup> As cable television

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<sup>59</sup> TheStreet, *Comcast Earnings Report: Q1 2015 Conference Call Transcript* (May 4, 2015), <http://www.thestreet.com/story/13137080/4/Comcast-cmcsa-earnings-report-q1-2015-conference-call-transcript.html>.

<sup>60</sup> Thompson Reuters StreetEvents, *CMCSA – Q3 2015 Comcast Corp. Earnings Call*, Edited Transcript (Oct. 27, 2015) (“*Comcast Q3 Earnings*”), at 5.

<sup>61</sup> *Comcast Q3 Earnings* at 14.

<sup>62</sup> Charter-TWC Public Interest Statement (June 25, 2015), at 12.

<sup>63</sup> SA Transcripts, *Time Warner Cable Q3 2015 Results – Earnings Call Transcript* (Oct. 29, 2015), <http://seekingalpha.com/article/3620806-time-warner-cable-twc-robert-d-marcus-on-q3-2015-results-earnings-call-transcript> (Statement by Senior Vice President, Controller, Chief Accounting Officer, and Acting Co-Chief Financial Officer William F. Osbourn, Jr.).

<sup>64</sup> Comcast, *2nd Quarter 2015 Results* at 5 (July 23, 2015), [http://files.shareholder.com/downloads/CMCSA/559455302x0x840662/3FD48B40-95E5-42A2-9B6C-AAABC026FA16/2Q15\\_Earnings\\_Presentation.pdf](http://files.shareholder.com/downloads/CMCSA/559455302x0x840662/3FD48B40-95E5-42A2-9B6C-AAABC026FA16/2Q15_Earnings_Presentation.pdf) (Comcast business revenue “increased 20.4% to \$1.2Bn,” and “[p]enetration at ~25% for small and <10% for mid-sized

subscriptions among residential customers decline, the incumbent cable industry now views the enterprise services market as a key area for future growth.<sup>65</sup>

CLECs have made significant strides in the Ethernet marketplace as well. Indeed, the second largest U.S. provider of Ethernet services is Level 3, which ranks ahead of two of the three largest ILECs – Verizon and CenturyLink.<sup>66</sup> Level 3, which offers a range of enterprise broadband services, recently reported 55,000 route miles of fiber in metropolitan markets, with roughly 33,300 buildings on-net in North America and more than 100,000 enterprise buildings near its fiber net.<sup>67</sup> Windstream provides comparable services over its nationwide network, offering Ethernet at speeds of up to 1 Gbps with “the same reliability and performance of a

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businesses.”); Time Warner Cable, Inc., Form 10-K, at 36 (SEC filed Feb. 13, 2015), <http://d11ge852tjjqow.cloudfront.net/NYSE-TWC/fc9807bb-a6ad-4388-aa61-ea5652ffd65f.pdf>; Time Warner Cable Press Release, *Time Warner Cable Reports 2014 Fourth-Quarter and Full-Year Results* (Jan. 29, 2015), <http://ir.timewarnercable.com/investor-relations/investornews/financial-release-details/2015/Time-Warner-Cable-Reports-2014-Fourth-Quarter-and-Full-Year-Results/default.aspx>; *id.* (under “Selected Business Services Financial Results”) (reporting annual growth in business revenues of more than 20 percent overall, including a 60 percent increase in revenues from wholesale services provided to other carriers).

<sup>65</sup> See, e.g., Alan Breznick, *Cable Gives Thanks for Business Services*, Light Reading (Nov. 27, 2015), <http://www.lightreading.com/cable/cable-business-services/cable-gives-thanks-for-business-services/a/d-id/719564> (“Cable operators are increasingly relying on commercial services for revenue growth as their residential video revenues flatten out and their residential broadband business faces fresh competitive and regulatory challenges.”); Mari Silbey, *Moffett: Business Services Critical to Cable Growth*, Light Reading (Dec. 1, 2015), <http://www.lightreading.com/cable/cable-business-services/moffett-business-services-critical-to-cable-growth/d/d-id/719612> (“In the near-term future, business services will be increasingly critical to cable’s continued success.”).

<sup>66</sup> Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015), <http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/>.

<sup>67</sup> See Level 3 Communications, Inc., *Second Quarter 2015 Results* (July 29, 2015), at 13, [http://investors.level3.com/files/doc\\_downloads/2Q15-Earnings/2Q15-External-Earnings-Presentation\\_Final-PDF.pdf](http://investors.level3.com/files/doc_downloads/2Q15-Earnings/2Q15-External-Earnings-Presentation_Final-PDF.pdf).

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traditional T1.”<sup>68</sup> Windstream has “operations in 48 states and the District of Columbia,” and after acquiring several other CLECs, states that it has “a presence in virtually every city” and is “the provider of choice for four out of five Fortune 500 companies for data, voice, network and cloud solutions.”<sup>69</sup> Zayo, which was formed through acquisition of more than 34 companies worth about \$4.6 billion, now operates fiber networks covering “over 300 metro markets” in “46 states, plus Washington D.C.”<sup>70</sup> Similarly, XO, whose long-haul network is designed to handle high-capacity traffic up to 100 Gbps,<sup>71</sup> boasts that it offers a “[b]road nationwide reach to more than 85 major metro markets,” “more than 1 million fiber miles,” and the “[u]se of multiple Ethernet access technologies to reach over 10 million business locations.”<sup>72</sup> XO states that it has deployed “[o]ne of the largest Ethernet access networks reaching more than 2 million business locations with customers that include “more than 50 percent of the Fortune 500 as well as the largest cable operators, mobile wireless companies and internet-based content providers.”<sup>73</sup> Other competitors of all sizes also have continued to expand and thrive in this marketplace.<sup>74</sup>

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<sup>68</sup> Windstream, Ethernet Internet, <http://www.windstreambusiness.com/products/enterprise-network-services/dedicated-internet-services/ethernet-internet>.

<sup>69</sup> Windstream Holdings, Inc., Form 10-K, at 3 (SEC filed Feb. 24, 2015), <http://www.sec.gov/Archives/edgar/data/1282266/000128226615000010/a201410k.htm>.

<sup>70</sup> Zayo Group Holdings, Inc., Form 424(B)(4) Prospectus, at 2 (SEC filed Mar. 13, 2015), <http://www.sec.gov/Archives/edgar/data/1608249/000119312515090531/d877708d424b4.htm>; Zayo Company History, <http://investors.zayo.com/company-history.aspx>.

<sup>71</sup> XO Communications, Network Assets, <http://www.xo.com/why/the-right-network/assets/>.

<sup>72</sup> XO Communications, Ethernet Private Line, <http://www.xo.com/network-services/ethernet-services/private-line/>.

<sup>73</sup> XO Communications, Wholesale Business, <http://www.xo.com/solutions/business/wholesale/>; XO Communications, Careers, <http://www.xo.com/about/careers/>.

<sup>74</sup> See, e.g., Birch Press Release, *Birch Intensifies Metro-Fiber Initiative, Adds 80,000 Buildings Across a 22-State Area* (Nov. 30, 2015), <http://www.birch.com/press-releases/birch-intensifiesmetro-fiber-initiative> (announcing that Birch added “another 80,000 new buildings across a 22-state area, bringing the total to more than 400,000 Metro-Fiber buildings nationwide”).

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These are just a few examples of the remarkable CLEC presence in the market. These multi-billion dollar companies have been enormously successful, making their suggestion that greater regulation (or any regulatory oversight, for that matter) is needed to facilitate competition in the special access market exceedingly farfetched.<sup>75</sup> CLECs have deployed fiber in at least **BEGIN HIGHLY CONFIDENTIAL \*\*\* [REDACTED] \*\*\* END HIGHLY CONFIDENTIAL \*\*\*** census blocks nationwide, covering approximately **BEGIN HIGHLY CONFIDENTIAL \*\*\* [REDACTED] \*\*\* END HIGHLY CONFIDENTIAL \*\*\*** of the U.S. population.<sup>76</sup> At least one CLEC has deployed fiber in **BEGIN HIGHLY CONFIDENTIAL \*\*\* [REDACTED] \*\*\* END HIGHLY CONFIDENTIAL \*\*\*** of the subset of top census blocks that comprise 80% of total high-capacity revenues that can be assigned to census blocks.<sup>77</sup> And according to the CLECs' own analysis, they are the sole providers of special access service in a not-insignificant **BEGIN HIGHLY CONFIDENTIAL \*\*\* [REDACTED] \*\*\* END HIGHLY CONFIDENTIAL \*\*\*** of census blocks.<sup>78</sup> Indeed, if the Commission were to conclude erroneously that more regulation is needed to protect consumers, it would be compelled to apply that regulation to the CLECs in those census blocks as well.

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<sup>75</sup> See, e.g., New Paradigm Resources Group, Inc. Press Release, *New CLEC Report™ Tracks Over 200 Facilities-Based CLECs; Data Continues to Drive Explosive Growth of Competitive Local Telecom Industry* (May 1, 2000), <http://www.nprg.com/Media/PDF/119-new-clec-reporttracks-over-200-facilities-based-clecs> (“From revenue of \$2 billion derived from access services in 1996, CLECs reported more than \$28.5 billion in 1999 derived from a plethora of services they now offer.”).

<sup>76</sup> See Verizon Comments at 46.

<sup>77</sup> See *id.* at 47.

<sup>78</sup> Besen/Mitchell Declaration at 14.

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To hear the CLECs tell it, however, “facilities-based competition has barely made a dent in the incumbent LEC[s’] stranglehold on connections to business customers.”<sup>79</sup> Yet all the while they have been crying for more regulation, “they have consistently invested in new facilities, won market share, developed new offerings, competed aggressively in the provision of next-generation IP networks and services, and – perhaps most tellingly – highlighted these achievements to Wall Street investors and the Commission.”<sup>80</sup>

Their tales of gloom and doom are further undermined by their continued investment – to the tune of billions of dollars – to expand their networks to reach new customers. For example, Windstream recently announced “12 new 100G markets including: Buffalo, Denver, Houston, San Antonio, Oklahoma City, and Tulsa” and “plans to expand 100G service to seven additional markets, including Minneapolis and Louisville in September” in 2015.<sup>81</sup> XO has launched a \$500 million initiative to grow its nationwide network, which to date has completed fiber construction projects into nearly 550 enterprise buildings across 25 regional markets, with additional on-net connections to be added throughout 2016.<sup>82</sup> Similarly, Birch Communications

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<sup>79</sup> Level 3, *et al.* Comments at 6.

<sup>80</sup> CenturyLink Comments at 3.

<sup>81</sup> Windstream News Release, *Windstream and Infinera Partnership Drives Windstream Carrier Solutions’ Leadership in the Wave Transport Market* (Aug. 12, 2015), [http://news.windstream.com/article\\_display.cfm?article\\_id=1659](http://news.windstream.com/article_display.cfm?article_id=1659).

<sup>82</sup> Sean Buckley, *XO Takes Success-Based Approach to On-Net Fiber Buildouts*, FierceTelecom (Sep. 3, 2015), [http://www.fiercetelecom.com/story/xo-takes-success-based-approach-net-fiberbuildouts/2015-09-03?utm\\_medium=nl&utm\\_source=internal](http://www.fiercetelecom.com/story/xo-takes-success-based-approach-net-fiberbuildouts/2015-09-03?utm_medium=nl&utm_source=internal); Sean Buckley, *XO Invades CenturyLink’s Turf by Extending Fiber into 100 Salt Lake City Buildings*, FierceTelecom (Aug. 28, 2015), [http://www.fiercetelecom.com/story/xo-invades-centurylinks-turf-extending-fiber-100-salt-lake-city-buildings/2015-08-28?utm\\_medium=nl&utm\\_source=internal](http://www.fiercetelecom.com/story/xo-invades-centurylinks-turf-extending-fiber-100-salt-lake-city-buildings/2015-08-28?utm_medium=nl&utm_source=internal).



announced last fall that it had expanded its Metro-Fiber services to more than 400,000 Metro-Fiber buildings across the country.<sup>83</sup>

#### IV. THE COMMISSION MUST REJECT CALLS FOR RE-REGULATION OF ILEC FACILITIES

The CLECs' faulty analysis has led to the erroneous conclusion that "there is almost no competition anywhere in the special access marketplace."<sup>84</sup> They suggest that the Commission must correct this issue by, among other things, returning areas that are currently subject to Phase II pricing flexibility to the price cap regulatory regime.<sup>85</sup> They even go so far as to suggest that "the Commission should adopt a presumption that incumbent LECs' control over connections to end users gives them market power in all relevant dedicated services markets."<sup>86</sup> Furthermore, they suggest that to overcome this presumption, "the incumbent LEC would be free to seek to demonstrate in a forbearance petition that it no longer has market power in a relevant dedicated services market, but it would bear the burden of proving that this is the case."<sup>87</sup>

The Commission must find that "there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public" before regulation is justified.<sup>88</sup> True market failure is very rare because it only occurs when there is no

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<sup>83</sup> See Birch Press Release, *Birch Intensifies Metro-Fiber Initiative, Adds 80,000 Buildings Across a 22-State Area* (Nov. 30, 2015), <http://www.birch.com/press-releases/birch-intensifies-metrofiber-initiative>.

<sup>84</sup> See, e.g., Sprint Comments at 80.

<sup>85</sup> See *id.*

<sup>86</sup> Level 3, *et al.* Comments at 64.

<sup>87</sup> *Id.*

<sup>88</sup> *Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, Tentative Decision and Request for Further Comments, 94 FCC2d 1019, ¶ 107 (1983). See *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1508 (D.C. Cir. 1984) ("It is of course elementary that market failure and the control of monopoly power are central rationales

incentive for private businesses to provide a service.<sup>89</sup> In most cases, “market forces will yield economically efficient results.”<sup>90</sup>

The econometric analysis conducted by Compass Lexecon completely dispels any notion that such failure has occurred in the special access market. Compass Lexecon evaluated the economics of special access services markets and, consistent with Commission and D.C. Circuit precedent and DOJ’s Horizontal Merger Guidelines, determined that ILECs face competition for special access services where competitors have made sunk investments in competitive facilities. This data shows beyond any doubt that the special access market is robustly competitive, especially (but not exclusively in) in those areas in which the Commission previously granted ILECs Phase I and/or Phase II pricing flexibility.

Indeed, competitors have deployed sunk facilities in virtually every census block accounting for virtually all special access demand. As of 2013, competitors had deployed high-capacity facilities in \*\*\* **BEGIN HIGHLY CONFIDENTIAL** \*\*\* ■ \*\*\* **END HIGHLY CONFIDENTIAL** \*\*\* percent of all census blocks in which an ILEC offered special access services.<sup>91</sup> They had deployed facilities in \*\*\* **BEGIN HIGHLY CONFIDENTIAL** \*\*\* ■ \*\*\* **END HIGHLY CONFIDENTIAL** \*\*\* percent of census blocks in MSAs in which ILECs had been granted Phase I pricing flexibility, and in a comparable \*\*\* **BEGIN HIGHLY**

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for the imposition of rate regulation.”) (citing S. Breyer, *Regulation and Its Reform* (1982), at 15-16).

<sup>89</sup> See *MB Fin. Group, Inc. v. United States Postal Serv.*, 545 F.3d 814, 819-20 (9<sup>th</sup> Cir. 2008).

<sup>90</sup> FCC, *Biennial Regulatory Review 2000*, 2001 FCC Lexis 378, ¶ 19 (2001); see also *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 173 (1994) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of... terms and conditions of service by carriers who lack market power.”).

<sup>91</sup> See CenturyLink Comments at 2.

CONFIDENTIAL \*\*\* ■ \*\*\* END HIGHLY CONFIDENTIAL \*\*\* percent of census blocks within Phase II MSAs.<sup>92</sup> Even in MSAs with no pricing flexibility, competitors had deployed facilities in \*\*\* BEGIN HIGHLY CONFIDENTIAL \*\*\* ■ \*\*\* END HIGHLY CONFIDENTIAL \*\*\* percent of census blocks.<sup>93</sup>

The Compass Lexecon analysis eviscerates any claim that the special access marketplace is in need of more regulation. In fact, this analysis demonstrates that ILECs are unjustifiably subject to price cap regulation in many areas. Competitive providers have deployed facilities almost ubiquitously, covering the vast majority of census blocks, even in MSAs that have not been awarded any pricing flexibility. Based on this analysis, it is clear that the Commission's current triggers more than sufficiently ensure that Phase II pricing flexibility is permitted only where there is extensive competitive entry throughout an MSA. It also demonstrates that the current triggers are conservative and under-inclusive in the sense that they have not resulted in Phase II pricing flexibility in many areas where competitors have deployed extensive facilities.

Thus, there is no need for the Commission to impose new mandates where ILECs enjoy pricing flexibility today. There is simply no basis on which the Commission could or should revisit its prior grants of pricing flexibility or other relief, given that competitive deployment in both Phase I and Phase II areas is ubiquitous. Moreover, the Commission should extend Phase II relief in all areas where it has granted Phase I pricing flexibility. As indicated above, the competitive deployment in Phase I areas matches deployment in Phase II MSAs. Thus, there is no reason to withhold relief that has been granted in Phase II areas from Phase I areas.

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<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

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Going forward, the Commission should adopt a framework that takes into account both actual and potential competition. Under the new regime, the Commission should provide relief from price cap regulations where business density is high or there are other indications that third parties could likely provide service. Likewise, to reflect potential competition, the Commission should afford ILECs relief from price cap regulation where there is sufficient demand to enable non-ILECs to provide service on their own.

Moreover, whatever framework the Commission ultimately adopts must apply to all similarly-situated providers. There is no basis for applying disparate regulatory treatment to providers offering the same service in the same marketplace. Differential treatment of competitors is unfair and harms competition because some firms face regulatory burdens not imposed on their rivals. The Commission must avoid creating market distortions caused by asymmetrical regulation by promoting regulatory parity among providers of similar services. As CenturyLink observes, “[t]he goals of regulatory and competitive neutrality between similarly situated competitors cannot be met if ILECs, and ILECs alone, are saddled with wholesale access obligations that their competitors do not bear.”<sup>94</sup>

Should the Commission nonetheless find it advisable to re-impose price cap regulation in some manner under certain circumstances, it should require a petitioning party to bear a high burden in demonstrating particular competitive harms warrant that reversal. The approach suggested by the CLECs – i.e., adopting a presumption that price cap regulation is appropriate unless the ILEC can show otherwise – “would put ILECs in the untenable position of continually

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<sup>94</sup> *Id.* at 34.

defending the regulatory status quo and their existing commercial relationships.”<sup>95</sup> The Commission must reject this approach.

**V. CONCLUSION**

In sum, the Commission should reject the CLECs’ faulty analysis suggesting that there is insufficient competition in the market for enterprise services. It also must include in its assessment the full range of high-capacity services available to enterprise customers, including best efforts business broadband and dedicated Ethernet services offered by cable providers and other competitors. Finally, the Commission must reject calls to impose additional regulations exclusively on ILECs when evidence of a vibrantly competitive special access marketplace indicates that additional relief is warranted for such providers.

Respectfully submitted,

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February 19, 2016

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<sup>95</sup> *Id.* at 29.