

**Before the
Federal Communications Commission
Washington, D.C. 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 THE NATIONAL ASSOCIATION OF STATE
UTILITY CONSUMER ADVOCATES AND THE MARYLAND OFFICE OF
PEOPLE’S COUNSEL ON FURTHER NOTICE OF PROPOSED RULEMAKING**

David Springe, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

David C. Bergmann
Counsel
3293 Noreen Drive
Columbus, OH 43221
Phone (614) 771-5979
david.c.bergmann@gmail.com

Paula M. Carmody
Maryland Office of People’s Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202
(410) 767-8150

February 19, 2016

Table of Contents

I. INTRODUCTION AND EXECUTIVE SUMMARY	1
II. DISCUSSION.....	4
<i>A. The ILECs' assertions about "potential" competition are misleading.</i>	4
<i>B. Consumer harm from premature pricing flexibility</i>	7
<i>C. The FCC should resist ILEC efforts to discount the value of the data that has been painstakingly collected.</i>	9
<i>D. ILEC claims on competition are overstated.</i>	10
<i>E. Contrary to ILEC assertions, best-efforts broadband is not a reasonably comparable substitute for traditional special access service, and therefore does not discipline the rates, terms and conditions of ILECs' offerings.</i>	12
<i>F. Wireless growth creates new demand for special access backhaul, underscoring the importance of just and reasonable special access rates so that wireless companies that do not have ILEC affiliates can efficiently supply wireless services and compete fairly.</i>	13
<i>G. Demand for TDM special access circuits continues to be substantial, and correcting the flawed pricing system is essential.</i>	14
<i>H. The FCC should take steps to ensure that ILECs' Ethernet prices are just and reasonable.</i>	16
III. CONCLUSION	18

I. INTRODUCTION AND EXECUTIVE SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”) and the Maryland Office of People’s Counsel (“OPC”) (together, “Consumer Advocates”) submit these reply comments in response to comments filed to address the request of the Federal Communications Commission (“FCC” or “Commission”) for comment on possible changes to its rules for pricing the special access services that incumbent local exchange carriers (“ILECs”) provide in price cap areas.¹ The comments followed a first-time submission of data on special access.

The ILECs argue that competition is rampant in the special access market, and that, therefore, the ILECs’ special access rates are just and reasonable. However, the large volume of data provided to the Commission by carriers tells a different story, clearly showing that competition for special access is insufficient for the market to ensure that the ILECs’ charges are just and reasonable.²

The voluminous and geographically disaggregated data about special access circuits, collected by the Commission from ILEC and CLEC suppliers of special access services, enables an assessment of actual competition, as opposed to potential competition, and allows an analysis of relevant markets as they have actually evolved, rather than speculation about how they might evolve. Consumer Advocates urge the Commission to continue to base its decision on the traditional market power analysis that

¹ *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*Data Collection Order* or *Special Access FNPRM*), Section IV.B, paras. 80-90.

² See, e.g., XO Comments at i-ii (“The facts support” XO’s arguments.)

it has relied on in recent years.³ Consumer Advocates concur with Sprint's Declarants that, in performing such market power analysis, the FCC should define relevant product and geographic markets as precisely as possible.⁴

Although the data set is not perfect, it is sufficient to allow for meaningful analyses of market concentration. Where different parties may interpret the data differently, the orders of magnitude are sufficiently comparable so that the FCC can use the information for policy-making.⁵ Different methodologies for "scrubbing" the data and for geocoding addresses (i.e., assigning them to census blocks) likely explain some discrepancies in the data interpretation.

The comprehensive detailed data analysis submitted in some of the initial comments, including regression analyses,⁶ shows unambiguously that the relevant geographic and product markets for special access services are highly concentrated, and that within such markets the ILECs are dominant providers within their respective footprints.⁷ The data corroborate the concerns that have been voiced for many years in this proceeding about the ILECs' ability to maintain supracompetitive rates for their

³ *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (Qwest Phoenix Forbearance Order), ¶ 55, *aff'd Qwest v. FCC*, 689 F.3d 1214 (10th Cir., 2012).

⁴ Sprint, Declaration of Stanley M. Besen and Bridger M. Mitchell ("Besen/Mitchell Declaration") at para. 10.

⁵ Compare, for example, the quantity of census blocks with CLEC fiber as presented by Verizon on page 46 and as presented by Sprint, Declaration of William P. Zarakas and Susan M. Gately ("Zarakas/Gately Declaration"), Table 8

⁶ Ad Hoc Comments at i-ii; XO Comments at ii.

⁷ See e.g., Sprint at iii-v, 2, 25-29; Ad Hoc at 4-8. See also Sprint, at 21, stating that "the incumbent LECs, by any measure, continue to have market power in the provision of special access services."; *id.* at 28, citing Besen/Mitchell Declaration at para. 42, stating: "At the vast majority of locations where special access is sold, the incumbent LEC is the only facilities-based provider with any customers. Even in the few locations (or even census blocks) where there is any competition, there generally is only a duopoly that plainly does not ensure the results that a competitive marketplace would produce."

special access services.⁸ Regardless of their validity when adopted in 2005,⁹ the FCC rules that gave pricing flexibility to the ILECs for their special access charges should be reformed to meet the current facts and changes in the market. Those changes include the increased dominance of the ILECs resulting from the lack of actual competition, and the resultant ILEC profit-seeking.¹⁰

The market is concentrated.¹¹ Special access prices are “supra-competitive.”¹² Due to this lack of competition, the economy and its consumers have failed to benefit from reasonable prices under the current rules.¹³

As mentioned, the vast amount of data and the confidential status claimed for much of that data has made the review of the data – and the preparation of these reply comments – extremely difficult for parties with limited resources.¹⁴ Consumer Advocates have not attempted to review all the data.¹⁵ Our review focused on Ad Hoc and Sprint, and, on the ILEC side, on Verizon. It is clear from the data reviewed by Consumer Advocates and other parties that “substantive changes to the pricing flexibility rules and thus to special access pricing”¹⁶ are necessary.

⁸ See Ad Hoc Comments at i.

⁹ See XO Comments at i.

¹⁰ Special access is just one of the areas where long-ago Commission decisions have been called into question by the reality of the 2016 markets. The 2014 Open Internet order reversed the 2003 finding that broadband is an information service. Fixes are needed for the freeze of separations factors in 2001; and the overarching decision in 2007 to discontinue reporting under the ARMIS system.

¹¹ XO Comments at iii.

¹² Id. at iv.

¹³ See, generally, INCOMPAS Comments, Public Knowledge Comments.

¹⁴ On February 8, 2016, Consumer Advocates filed a motion for a 14-day extension of the reply comment filing date. The motion was not granted.

¹⁵ OPC’s consultant, Susan Baldwin, is the only person working on these reply comments to have signed the Acknowledgment of Confidentiality.

¹⁶ Consumer Advocates’ Initial Comments (January 22, 2016) at 2.

II. DISCUSSION

A. The ILECs' assertions about "potential" competition are misleading.

The ILECs claim there is substantial competition.¹⁷ The ILECs have been depicting special access competition as being "just around the corner" for many years.. As the data produced pursuant to the Commission's request demonstrate, however, the potential competition that ILECs have predicted for so long has not turned into actual competition.

Based on its experience, the FCC has learned that predictive judgments about competition are likely to be less reliable than judgments firmly rooted in traditional data-driven market power analysis.¹⁸ Indeed, the point of this labor-intensive data exercise is to anchor the FCC's deliberations in fact rather than speculation.

The FCC has previously stated: "It is well established that the assessment of a carrier's individual market power requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for the exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power."¹⁹ As they have in prior proceedings, the ILECs attempt to lead the Commission to their desired conclusion by adopting an expansive definition of

¹⁷ See, e.g., Verizon at 24-27, citing confidential data in paper prepared on behalf of seven ILECs: Drs. Mark Israel, Daniel Rubinfeld, and Glenn Woroch, "Competitive Analysis of the FCC's Special Access Data Collection," ("ILEC White Paper"), Israel et al., Competitive Analysis of the FCC's Special Access Data Collection; see also, ILEC White Paper at 25, asserting "abundant competition").

¹⁸ See *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010) (Qwest Phoenix Forbearance Order), aff'd *Qwest v. FCC*, 689 F.3d 1214 (10th Cir., 2012), at paras. 24, 37.

¹⁹ Qwest Phoenix Forbearance Order, para. 28, internal citation omitted.

the relevant geographic markets.²⁰ The white paper authored on behalf of seven ILECs (Alaska Communications, AT&T, CenturyLink, FairPoint, Frontier, Hawaiian Telcom, and Verizon) relies inordinately on potential entry to assess competition and fails to afford sufficient weight to CLECs' actual market shares.²¹

Starting from the proposition that the size of the average census block is small, especially where special access demand is likely to be concentrated,²² the ILEC economists paint a picture of CLECs' competitive footprints in which there is broad coverage.²³ As data inputs for their analysis, the ILEC economists combine the data from the special access data collection with 2013 data from the National Broadband Map.²⁴ Then, having broadened their definition of CLEC footprints in this manner, they use this as a basis for concluding that there is very extensive territory in which CLECs have the *potential* to compete.

The argument that the Commission should rely on potential competition based on the proximity of CLEC facilities is one that the ILECs have presented to the FCC on multiple occasions,²⁵ and yet the facts continue to show that in spite of having facilities "in the vicinity" of potential customers, CLECs must rely on ILEC facilities to reach the vast majority of customer locations. There is no evidence in this record that the potential

²⁰ See, e.g., Verizon at 45.

²¹ Drs. Mark Israel, Daniel Rubinfeld, and Glenn Woroch, "Competitive Analysis of the FCC's Special Access Data Collection," ("ILEC White Paper").

²² ILEC White Paper at 11.

²³ Id. at 12.

²⁴ Id.

²⁵ See, e.g., WC Docket NO. 05-25, AT&T Supplemental Comments (August 7, 2007) at 10 (referring to analyses of the proximity of CLEC fiber to AT&T's special access demand within certain MSAs); Petition of Qwest Corporation/or Forbearance Pursuant to 47 USC. § 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223, Qwest Petition (June 21, 2004) at 13, 21. In the Qwest Phoenix Forbearance Order, the Commission found this prediction to be "unwarranted."

competition posited by the ILECs is serving to discipline the rates, terms, and conditions of ILECs' special access services. Consideration of competitors' ability to profitably enter a market may deserve some consideration (the ILEC White Paper points to Section 1.32 of the DOJ/FTC Horizontal Merger Guidelines), but years of experience make clear that facilities proximity alone is not a reliable predictor of a CLEC's ability to land nearby business of sufficient quantity to justify investment in constructing a last-mile connection. For this reason, Consumer Advocates strongly urge the Commission to base its decision on the data about actual CLEC vs. ILEC provisioning of special access service, consistent with its prior findings that predictions about a CLEC's investment "have not been borne out by subsequent developments."²⁶ The data shows that the Commission should not rely on ILEC unsubstantiated predictions about potential CLEC entry.

Consumer Advocates urge the Commission to continue to apply traditional market share analysis to the special access market. Using this approach, it is clear from the data collected in this proceeding that ILECs possess market power in relevant geographic and product markets. This is borne out by detailed analyses conducted by Sprint and Ad Hoc (among others). Based on her in-depth analysis of the data set, Ad Hoc's Declarant concludes that there is a "striking disparity between the coverage of CLEC fiber routes and the actual locations where CLECs have been able to provide facilities-based connections to their customers."²⁷ Ad Hoc's economist also conducted a detailed market share analysis, which further corroborates a finding of ILEC market dominance.²⁸

²⁶ Qwest Phoenix Order, at para. 34.

²⁷ Ad Hoc, Gately Declaration, at para. 12.

²⁸ See, e.g., Ad Hoc, at 5-7 and Gately Declaration, at paras. 13 through 16, and Tables 3 through 5.

Sprint economists also conducted extensive analyses in which they looked at data for a vast number of circuits in a vast number of census blocks.²⁹ One notable area of analysis concerned the national revenues from special access. The Commission has estimated that the national special access market generates roughly \$40 billion annually.³⁰ Sprint's economic analysis showed substantial total industry revenues (as totaled from the combined raw ILEC and CLEC Pricing Files)³¹ and confirms that ensuring just and reasonable rates for special access would profoundly benefit both those who purchase special access and the economy as a whole. The ILECs control a commanding percentage of this multi-billion dollar market.³² Taken together, the ILEC's market dominance and control over the lion's share of special access revenues demonstrate the importance of the FCC's timely implementation of regulatory reform.

B. Consumer harm from premature pricing flexibility

Special access services may sound obscure and far removed from consumers' everyday lives. Yet the rates, terms, and conditions for ILECs' various special access services (the vast majority of which are jurisdictionally classified as interstate services,

²⁹ Where assumptions needed to be made, Sprint's economists erred on the side of overstating the competitive presence of non-ILEC suppliers of special access services. See, e.g., Besen/Mitchell, footnote 6; para. 29 (stating: "For purposes of this analysis, we conservatively treat all CLECs that offer service to a single location in a census block as serving the entire block. We note, however, that this approach is likely to overstate potential competition at many purchaser locations. The provision of service to some purchasers in a census block is not necessarily an indication that a competitor can serve all buildings in that census block, or even that the "potential competitor" provides the same special access service as the ILEC." See also Besen/Mitchell at footnote 52 explaining that the data set did not allow the calculation of revenue-based market shares at a more granular geographic level than the ILEC's entire footprint. As explained, in para. 34 by the Sprint Declarants: "Thus, these ILEC-footprint revenue-based shares are likely to overstate significantly the extent of competition in many smaller geographic areas."

³⁰ *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket 15-247, Order Initiating Investigation and Designating Issues for Investigation, FCC 15-1194, rel. 10/16/15, at para. 2.

³¹ Besen/Mitchell, at para. 15 and Table 1.

³² Id. Sprint economists' examination of ILECs' market share separately by bandwidth, showing the percentages of total revenues associated with different bandwidths further corroborate ILECs' market dominance. See Id., at para. 18 and Table 3.

and thus subject to the FCC's oversight) have far-reaching consequences. They affect the wireless bills that consumers pay, and the cost of products and services that businesses – which depend critically on dedicated specialized telecommunications circuits (special access) – offer to consumers. The current flawed pricing framework for ILECs' special access customers harms consumers, businesses and the economy.³³

Prices in areas with pricing flexibility (that was granted because of claimed competition) are higher than in those without pricing flexibility. Indeed, the gap between the higher prices in the areas with pricing flexibility and the lower prices in the areas without pricing flexibility has grown since flexibility was granted.³⁴ The supracompetitive profits produced by excessive prices drain the economy by inefficiently causing consumers to pay too much for services provided by carriers who rely on special access (including consumers of special access services, such as large businesses, government agencies and CLECs) and as consumers of the products and services that the large businesses and government agencies provide.

Excessive special access rates also thwart the FCC's goal of competition because CLECs and wireless carriers, which rely on ILECs' special access services, confront inefficient barriers to entry and costs of doing business. Accurate pricing signals would encourage efficient entry and operations.

Yet AT&T's and Verizon's wireless affiliates are uniquely shielded from the harm of over-priced special access services. Excessive special access rates do not harm the wireless affiliates of AT&T and Verizon, because the money is simply going from one pocket to another. The data collected by the FCC demonstrates the reliance of ILECs

³³ See Public Knowledge at 1-6; Ad Hoc at 8; Sprint at 70-79.

³⁴ Ad Hoc at 11-12.

on their ILEC affiliates.³⁵ In contrast, excessive special access rates *do harm* other wireless carriers, creating unnecessary and inefficient obstacles to wireless competition, at a time when national wireless usage is growing.

For more than a decade, the ILECs have benefited enormously from delays in this proceeding, taking advantage of pricing flexibility (predicated on an assumed competitive special access market) to obtain supracompetitive profits every year that pricing flexibility has been maintained. With this data now in hand, there is no basis for further delays in ending this unwarranted pricing flexibility. Delaying reform would prolong market inefficiencies, thwart competition, and cause consumers (either directly or indirectly) to pay excessive prices for essential telecommunications services, including for the products and services that businesses offer throughout the economy, which depend on special access services as an input to the cost of doing business.

C. The FCC should resist ILEC efforts to discount the value of the data that has been painstakingly collected.

Various ILECs fault the data as stale, and express concerns about the reliability of the data and the process of obtaining access to and analyzing the data.³⁶ The volume and complexity of data submitted in this proceeding are unprecedented. It would be unreasonable to expect a “perfect” set of data, and no data set of this magnitude could have been collected without some time lag. As discussed above, the data collection process was recent, and for many years ILECs such as Verizon received large financial benefits from offering unregulated special access services under less-than-competitive conditions. Now, to move forward, the Commission must resist appeals by Verizon and other ILECs to discount the value of this important data.

³⁵ Ad Hoc, Declaration of Susan M. Gately (“Gately Declaration”) at para. 13 and Table 3

³⁶ See, e.g., Verizon at 2, 12-14; USTelecom at 23.

Verizon argues that “backward-looking regulation” would give cable companies an unfair advantage³⁷ and refers to a rapidly evolving marketplace, including increasing demand for mobile broadband.³⁸ Verizon's analysis does not address a key point that has been made comprehensively by consumers and competitors and is borne out by the FCC's data: Despite many years of an evolving marketplace, demand for time division multiplexing (“TDM”) -based services continues to be critically important, and, moreover, has not abated.³⁹ Indeed, as discussed above, the efficient supply of mobile broadband itself depends on special access services offered with accurate pricing signals.

Verizon's stress on dynamic analysis⁴⁰ ignores the fact that FCC's previous optimistic view of competition, based in part on speculation about the evolution of competition, has led to years of excessive rates in special access markets throughout the country. Again, Consumer Advocates suggest that the Commission afford little weight to references to the *potential* for high capacity competition.⁴¹ Verizon's faith in the market to yield efficient rates is misplaced.⁴² The market place is malfunctioning, with rates higher in those areas that have pricing flexibility than those that do not.⁴³

D. ILEC claims on competition are overstated.

Based on its analysis of the data collected in this proceeding, Verizon computes the number of zip codes throughout the nation where CLECs have deployed fiber, and the

³⁷ Verizon at 3.

³⁸ Id. at 3, 7-10.

³⁹ Ad Hoc, at 11-12.

⁴⁰ Verizon at 5.

⁴¹ See e.g., id. at 4, CenturyLink at 11, ILEC White Paper at 6-13.

⁴² Verizon at 12.

⁴³ Ad Hoc at 11-12.

number of zip codes throughout Verizon's footprint where CLECs have deployed fiber.⁴⁴ Verizon then also computes the percentage of the U.S population that these zip codes cover, as well as the percentage of the population in Verizon's footprint that these zip codes cover.⁴⁵ Verizon conducts a similar analysis based on the presence of CLEC fiber in census blocks.⁴⁶ Verizon also calculates the percentage of the nation's business establishments contained within these zip codes with CLEC presence and the percentage of establishments in Verizon's footprint within these zip codes with CLEC presence.⁴⁷

But these percentages do not provide evidence of widespread competition.

The mere deployment of fiber within a zip code (or even within a census block) does not provide evidence to evaluate actual competition in the relevant geographic and product markets.⁴⁸ Simply because there are fiber strands within a zip code or census block does not mean that a CLEC is actually serving customers.⁴⁹

Years of experience have shown that fiber "nearby" is largely meaningless. The approach taken in Table 8 of Sprint's Zarakas/Gately Declaration, which shows minimal competition, is far more meaningful than Verizon's analysis because it tallies not just the census blocks (separately by ILEC footprint), where there is CLEC fiber, but more importantly, shows the number of census blocks where CLECs **actually serve** special

⁴⁴ Verizon at 45.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id. at 46.

⁴⁸ Verizon's analysis of the contribution of fixed wireless services to the special access market shares similar deficiencies to those of its analysis of CLECs' presence in the market (e.g., being anecdotal; the vast majority of the discussion ignores actual demand). Verizon at 46-51.

⁴⁹ Ad Hoc Gately Declaration at para. 12. See also Sprint, Zarakas/Gately Declaration, Table 8, comparing the number of census blocks with a CLEC presence with the number of census blocks where CLECs actually serve customers

access customers.

Further, Verizon's analysis blurs the lines between relevant products. Customers demand various bandwidths of special access service. If the only demand at a given building is for a few DS-1 circuits, then it may not be cost-effective for a CLEC to compete by deploying a fiber connection to that building. Finally, although the FCC has bowed to the limitations of data collection by collecting certain data only at a census block level, it is apparent, when a building-specific analysis is introduced, that the ILEC's broader geographic market focus is misleading.⁵⁰

E. Contrary to ILEC assertions, best-efforts broadband is not a reasonably comparable substitute for traditional special access service, and therefore does not discipline the rates, terms and conditions of ILECs' offerings.

In a further attempt to identify a new "potential" threat to their market power in special access, the ILECs assert the importance of the facilities coverage of cable companies.⁵¹ Those cablecos could ostensibly offer competition for the ILECs' special access services through broadband. Yet Verizon makes light of criticisms that best-efforts broadband differs in important respects from traditional special access, and asserts that "these differences" (on which it does not elaborate) "are not critical for many customers, and also are diminishing."⁵² Special access customers are in a better position than Verizon to know whether best-efforts broadband offers them a reasonable alternative to traditional special access. The Commission's data contains no evidence that cable companies have actually captured a substantial share of the market. Thus the provision of special access service by cable companies is apparently not viewed as a viable option

⁵⁰ See, e.g., Table 5 of Sprint, Gately/Zarakis Declaration, which summarizes the competitive analysis of CLEC presence when examining special access markets disaggregated by buildings and cell towers.

⁵¹ See, e.g., Verizon at 28-40.

⁵² Id. at 39.

by the carriers, businesses and agencies that rely on the service. The sheer volume of stable demand for TDM services, discussed below, undermines Verizon's assertion. Customers continue to rely on traditional special access services and the specialized capabilities that they offer.

F. Wireless growth creates new demand for special access backhaul, underscoring the importance of just and reasonable special access rates so that wireless companies that do not have ILEC affiliates can efficiently supply wireless services and compete fairly.

In its comments, Verizon asserts that backhaul for wireless providers "represents a significant and rapidly growing segment of the marketplace" in which CLECs have new opportunities to expand,⁵³ but Verizon's discussion of this segment of the market consists largely of anecdotes and discussions of press reports,⁵⁴ with little if any empirical support from the data produced for this record. Whether the increased demand for backhaul capacity will provide a new opportunity for CLECs or simply another opportunity to ILECs to sell overpriced special access services remains to be determined.

Yet insofar as increased demand for wireless broadband creates more demand for backhaul, and given Verizon Wireless' and AT&T Wireless' unique ability to purchase special access services from their ILEC affiliates, it is critically important that the special access circuits that provide wireless backhaul be offered at just and reasonable rates. Sprint, a major national wireless carrier, clearly has not found that competition is yielding economically efficient rates for backhaul to its towers.⁵⁵ Verizon's own limited analysis of the data collected shows that ILECs continue to supply a significant percentage of

⁵³ Id. at 51.

⁵⁴ Id. at 51-61.

⁵⁵ See, e.g., Sprint at 86-88.

TDM-based circuits purchased by wireless carriers.⁵⁶

G. Demand for TDM special access circuits continues to be substantial, and correcting the flawed pricing system is essential.

Consumer Advocates repeat here observations about TDM demand made in their initial comments, because the observations provide a critically important context for this proceeding. Specifically, in their initial comments, Consumer Advocates stressed the following passage from the FCC's Tariff Pricing Plan Investigation:

Despite the growth of newer technologies, preliminary analysis of the Commission's special access data collection shows that revenues from such TDM services continue to make up in the range of sixty percent of the roughly \$40 billion annual special access market.⁵⁷

Joint Commenters quoted further, indicating that the FCC's preliminary analysis shows that, unlike wireline switched access lines,

for some of the largest price cap incumbent LECs, *DS1 and DS3 channel termination sales actually increased from 2010 to 2013*. Additionally, Vertical Systems Group estimates that on the basis of total actual bandwidth delivered, use of legacy business services will remain stable at least through 2017.⁵⁸

These facts are important to reiterate because, as emphasized by Ad Hoc, ILECs have persisted in portraying TDM-based special access services as an endangered species, with ever-diminishing significance (most colorfully but inaccurately described by AT&T in a 2010 filing as "going the way of the dodo").⁵⁹ Similarly, the ILECs have engaged in

⁵⁶ Id. at 61. See also Ad Hoc Gately Declaration at para. 13 and Table 3 for detailed analyses showing the major purchasers of special access services and also showing the magnitude and percentages of revenues that ILEC affiliates (including wireless and interexchange affiliates) buy from their own ILECs or other ILECs.

⁵⁷ *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket 15-247, Order Initiating Investigation and Designating Issues for Investigation, FCC 15-1194, rel. 10/16/15, at para. 2.

⁵⁸ Id., at para. 14 (footnote omitted, emphasis added).

⁵⁹ Ad Hoc, at 8, citing a January 2010 AT&T filing in this docket. See more generally Ad Hoc, at 8-11 discussing and quoting previous ILEC depictions of the special access market, including at 9, where Ad Hoc quotes Verizon as saying (in 2012) that the "marketplace for high-capacity services is changing

parallel attempts to persuade state regulators that TDM-based residential services are irrelevant, in spite of clear evidence that consumers continue to value and use these services. It is also worth asking why ILECs are so committed to fighting for the right to set prices without constraint for services that they claim are becoming obsolete. The fact that billions of dollars continue to be at stake underscores the importance of fixing a flawed pricing system for services that are essential *today* for our nation's economy.

Further illustrating the importance of TDM-based services – even to the ILECs' own affiliates – Ad Hoc computes the total revenues associated with the special access services that AT&T's own interexchange and wireless affiliates purchase from AT&T (the ILEC) and computes the percentages from TDM-based services and packet-switched services respectively, characterizing the packet-switched share as “tiny.”⁶⁰ The preferences of AT&T's own affiliates for TDM-based service contradicts the ILECs' claims that TDM-based services are in a state of decline. If AT&T's wireless affiliate pays AT&T excessive rates for special access, however, the monies remain within the company. This is in sharp comparison to the impact on competitors such as Sprint from for paying excessive rates for special access services to support *its* wireless services.

While the ILECs claim there are dynamic changes in the special access market,⁶¹ demand for traditional special access services has remained constant or has grown, depending on the level of service.⁶² The FCC data provide no support for the ILECs'

rapidly, as the market undergoes “a fundamental shift away from TDM-based DS1 and DS3 special access services as customers look to newer technologies.”

⁶⁰ Ad Hoc at 10 (see the highly confidential version for the actual percentages).

⁶¹ See, e.g., Verizon at 41-43, USTelecom at 5-6, 16.

⁶² *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket 15-247, Order Initiating Investigation and Designating Issues for Investigation, FCC 15-1194, rel. 10/16/15, at para. 2.

claim that a future where TDM-based special access services are minimal is just around the corner. By this logic, in order to avoid being “backward-looking,” the ILECs would have the FCC ignore the vast amount of data that it has collected in this proceeding and instead make decisions based on speculations about potential competition.⁶³

**H. THE FCC SHOULD TAKE STEPS TO ENSURE THAT ILECS’
ETHERNET PRICES ARE JUST AND REASONABLE.**

Initial comments demonstrate that the FCC should reverse its forbearance with respect to Ethernet services.⁶⁴ As pointed out by Ad Hoc, “Ethernet is just another bandwidth option,” and the same entry barriers that affect traditional TDM-based services apply.⁶⁵ Moreover, “[r]eform of the Commission’s Ethernet policies is particularly important for enterprise customers because the service plays a key cost management role when locations require more bandwidth” that falls in the gap between DS1 and DS3 connections.⁶⁶

In its comments, TDS, which serves small- and medium-sized business in second and third tier markets, such as Ann Arbor, Madison, and other mid-western cities,⁶⁷ provides a “real-world” context for its concerns about ILECs’ pricing of Ethernet in the range of 10 to 100 Mbps and above,⁶⁸ showing that the barriers experienced by CLECs in the context of TDM-based special access apply equally with respect to Ethernet services. As TDS explains with respect to its efforts to deploy Ethernet on a competitive basis: “Even if a CLEC or cable competitor could serve a small percentage of the locations on

⁶³ See ILEC White Paper at 8.

⁶⁴ Ad Hoc at 14-17 ; TDS Metrocom, LLC (“TDS”) at 1-5.

⁶⁵ Ad Hoc at 14.

⁶⁶ Id.

⁶⁷ TDS at 1, 5.

⁶⁸ Id., at 2-5, 18-24.

an economical basis, the competitor's inability to build economically to all, or nearly all, of the locations dooms competition for these customers unless the Commission maintains reasonably priced wholesale access to RBOC last mile facilities."⁶⁹

ILECs' Ethernet prices demonstrate their market power – the ILECs' wholesale rates charged to TDS often exceed the corresponding retail rates that ILECs charge to their business customers.⁷⁰ This price squeeze underscores the importance of the FCC reforming its price regulation of Ethernet services.

Regardless of the technology used,⁷¹ the last leg of the special access circuit to the customer premises necessitates substantial investment, creating barriers to entry and fortifying ILECs' market power.⁷² Moreover, there are no other products that substitute for Ethernet service – Ethernet offers reliability and security and network availability guaranteed close to 100% of the time.⁷³ As previously discussed, cable modem service does not provide these guarantees, and, as TDS explains, most of its small- and medium-sized customers prefer dedicated connections with symmetrical speeds, capabilities that cable modem service does not provide.⁷⁴ Moreover, cable modem service is provided over shared facilities, which can lead to delays and which contrasts with the dedicated and symmetric service that Ethernet offers.⁷⁵

Ensuring just and reasonable rates for Ethernet services provided for dedicated

⁶⁹ Id. at 2. More than 80% of the business locations that TDS serves have fewer than 20 employees per location. Id. at 6, Second Declaration of Matthew J. Loch ("Second Loch Declaration"), at para. 3.

⁷⁰ TDS at 25-29; Second Loch Declaration at paras. 18-24.

⁷¹ ILECs dominate the last mile of special access services "be they TDM or not TDM." Ad Hoc, at 17.

⁷² See, e.g., TDS at 18-23, discussing the cost of entry.

⁷³ Id. at 17.

⁷⁴ Id.

⁷⁵ Id. at 17; Second Loch Declaration at paras. 4-5.

last-mile connections is completely consistent with the goal of technology transition. In order to facilitate a competitively neutral and economically efficient transition to new platforms, it is critically important that wholesale pricing signals be just and reasonable regardless of whether the circuits be offered using TDM or packet switching technology. Accordingly, the FCC should reverse its decision to forbear from dominant carrier regulation of ILEC Ethernet services and restore an effective framework for ensuring just and reasonable rates for such services.

III. CONCLUSION

As they have done for many years in his proceeding, ILECs continue to exaggerate the pace and scope of consumers' (including CLECs, wireless carriers, large businesses, and government agencies) transition away from TDM-based special access services. Traditional dedicated circuits (and the reliability and symmetry of transmission that they offer) continue to meet an essential need in today's telecommunications markets that the cable industry does not offer.

Moreover, the mere transition from traditional TDM platforms for special access services to packet-switched platforms used to provide Ethernet special access services does not in any way alter the need for a fact-based assessment of market structures. A change in technology does not alter ILECs' market dominance. The FCC's unprecedented and admirable collection of data demonstrates that the barriers to profitable entry in the "last leg" market are formidable. This means that often the ILEC is either the only supplier or, far less frequently, one of two suppliers of special access services. As NASUCA has consistently observed, a duopoly – whether in the wholesale or retail market – does not provide effective competition.

The status quo is harming consumers, competitors, and the economy. Consumer Advocates urge the Commission to return services now subject to Phase II pricing flexibility to the price cap regime and also to include Ethernet services under the price cap regime. Consumer Advocates concur with Sprint that the Commission should: “implement long-term repairs to the special access regulatory system by: (1) establishing pricing benchmarks to adjust prices in areas where competition does not constrain prices; (2) revising the X-factor that accounts for the productivity gains that would lead to lower prices in a competitive market; and/or (3) using existing models that measure costs of service to set appropriate caps on prices.”⁷⁶

David Springe
Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

David C. Bergmann
Counsel
3293 Noreen Drive
Columbus, OH 43221
Phone (614) 771-5979
David.c.bergmann@gmail.com

Paula M. Carmody
Maryland Office of People’s Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202
(410) 767-8150

February 19, 2016

⁷⁶ Sprint, at vi.