



1200 G STREET, NW, SUITE 350 PH: 202.296.6650
WASHINGTON, DC 20005 FX: 202.296.7585

September 10, 2014

VIA ECFS

EX PARTE

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

Re: *Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25*

Dear Ms. Dortch:

As the Chairman stated in remarks on the future of broadband competition, “[c]ommunications policy has always agreed on one important concept: the exercise of uncontrolled last-mile power is not in the public interest. This has not changed as a result of new technology. When network operators have unrestrained last-mile power, public policy can step in to protect consumers and innovators.”¹ COMPTEL accordingly urges the Commission to adopt near-term measures to alleviate the harm of the last-mile bottleneck to competition in the IP era. Competitive carriers have been at the forefront of bringing competition and innovation to businesses throughout the country. As the IP transition moves forward, it is important to preserve business consumers’ choice in providers and ensure that these competitive alternatives are even more robust as IP technology is deployed in all networks. While IP technology offers significant efficiencies and drives innovation, the transition to this technology does not change the economics that preclude a competitor from replicating most incumbent local exchange carrier (LEC) last-mile connections.

Thus, for there to be significant competitive alternatives to the incumbent LECs in the business market, competitors must have access to incumbent LEC last-mile facilities on reasonable rates, terms and conditions.² This letter focuses on terms and conditions, but it is

¹ Prepared Remarks of FCC Chairman Tom Wheeler “The Facts and Future of Broadband Competition” 1776 Headquarters, Washington, D.C. September 4, 2014.

² COMPTEL recently met with FCC staff to discuss the actions the Commission should take to promote the IP transition in a manner that ensures competitive choice and provides the certainty needed for investment and innovation by competitive carriers. Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5 *et al.* (filed Aug. 13, 2014) (addressing last-mile access and IP interconnection for managed voice traffic).

critical that the FCC address both rates and terms for TDM and non-TDM special access services.³ Reforming terms and conditions without reforming rates will not sufficiently address the market power being exercised by incumbents today and, absent effective Commission oversight, could lead to incumbents eliminating plans and effectively increasing prices. Both are critical to a competitive market.

Because lock-in plans are so inimical to the development of competition, the Commission should not delay in addressing unjust and unreasonable terms and conditions imposed by the incumbent LECs that effectively lock-up competitors, preclude them from using facilities/services of other carriers (to the extent such an alternative exists) and disincentivize them from building their own facilities in the limited portion of the last mile where overbuilding could become economically viable. COMPTTEL urges the Commission to act now to end these exclusionary practices. In addressing terms and conditions the Commission cannot allow incumbents to undermine the Commission's goal by eliminating the pricing under the discount plans they offer special access purchasers today, forcing customers into their even higher priced "rack rates."⁴

Expeditious action on this problem is warranted, as incumbent LEC lock-up plans have impeded competition in the multi-billion dollar special access market and undermined investment in broadband networks, contrary to the Chairman's and Commission's goals of increasing consumer choice.⁵ The Commission has the authority and a sufficient record to adopt such rules now while it conducts the mandatory information collection and associated market power analysis.⁶ While the Commission can adopt regulations prohibiting anticompetitive conduct absent a market power finding,⁷ there is no question that (1) the largest incumbent LECs have market power in the provision of DS1- and DS3-equivalent special access services as well

³ As elaborated on in prior COMPTTEL filings, the Commission also should (1) open a proceeding to establish fundamental criteria that a dominant provider of legacy services will need to meet in a Section 214 discontinuance request stemming from the TDM-to-IP transition in the last-mile and (2) clarify that a shift from TDM to IP electronics does not alter the requirement to unbundle DS1 and DS3 loops. *See, e.g., id.*

⁴ *See infra n. 33.*

⁵ *See e.g., supra n. 1.*

⁶ *See, e.g.,* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 46-47 (filed Feb. 11, 2013) ("tw telecom *et al.* Feb. 11, 2013 Comments"); *see also* Comments of XO Communications, LLC, WC Dkt. No. 05-25, at 20 (filed Feb. 11, 2013) ("XO Feb. 11, 2013 Comments"); Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at iii (filed Feb. 11, 2013) ("Sprint Feb. 11, 2013 Comments").

⁷ *See Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services et al., Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16587, ¶ 17 (1998)* ("Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market.").

as Ethernet special access services,⁸ and (2) they have exploited that market power by inducing many purchasers of those services to enter into tariffed offerings, contract tariffs, and commercial agreements that contain anticompetitive terms and conditions.⁹ Many of these terms and conditions are patently unreasonable in violation of Section 201(b) of the Communications Act.¹⁰

The record contains substantial evidence of these unreasonable terms and conditions. Among them are various loyalty provisions that limit competition by effectively requiring wholesale customers to purchase a large proportion of their past or current special access needs from the incumbent LEC, and requirements that persist into successor agreements.¹¹ For example, under AT&T's Term Payment Plan for the Southwestern Bell and Pacific Bell territories, wholesale customers can obtain special access services at "discounted" rates off of AT&T's excessively high month-to-month rates only by committing to purchase circuits for a fixed term, and these customers can obtain critical "benefits" such as "circuit portability"—*i.e.*, the ability to connect and disconnect individual special access circuits used to serve downstream retail customers during the committed term without incurring the incumbent's early termination

⁸ See, e.g., Letter from Eric Einhorn *et al.*, Windstream Corporation, to Jonathan Sallet and Julie Veach, FCC, GN Dkt. Nos. 13-5 and 12-353, at 2 (filed Apr. 28, 2014) ("Windstream April 28, 2014 Letter"); tw telecom *et al.* Feb. 11, 2013 Comments at 14-20; Letter from Michael J. Mooney, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 2-26 (filed June 8, 2012); Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 14 (filed June 5, 2012) ("tw telecom June 5, 2012 Letter") ("[Competitors] still cannot deploy facilities to the vast majority of business locations in the U.S. at which the demand for transmission services is insufficient to justify deployment of fiber. These are the locations at which the ILECs continue to have market power, and nothing in the ILEC filings or anywhere else in the record in this proceeding demonstrates otherwise.").

⁹ See, e.g., Comments of TelePacific Communications, WC Dkt. No. 05-25, at 12-15 (filed Feb. 11, 2013) ("TelePacific Feb. 11, 2013 Comments"); XO Feb. 11, 2013 Comments at 8-15; Sprint Feb. 11, 2013 Comments at 23-39.

¹⁰ 47 U.S.C. § 201(b).

¹¹ See, e.g., XO Feb. 11, 2013 Comments, Exhibit 2, ¶¶ 8-12 (describing provisions in AT&T and Verizon's special access commitment plans that "constrain XO's ability, for the most part, to obtain special access from competitors even when such alternative sources are available"); tw telecom *et al.* Feb. 11, 2013 Comments, Appendix A, Stanley M. Besen and Bridger M. Mitchell, "Anticompetitive Provisions of ILEC Special Access Arrangements," ¶¶ 23-32 (Feb. 11, 2013) ("Besen/Mitchell Paper") (discussing loyalty provisions in various incumbent LEC special access lock-up plans that have prevented tw telecom from shifting more than a modest portion of its special access demand to alternative suppliers); Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 8-16 (filed Feb. 22, 2012) ("Level 3 Feb. 22, 2012 Letter") (describing various forms of lock-up provisions in incumbent LEC special access plans that prevent Level 3 and other purchasers from switching more than a fraction of their purchases to competitive suppliers).

penalties—only by committing to maintain 80 percent of their historic special access purchase volumes with AT&T for three years.¹² Similarly, under Verizon’s Commitment Discount Plan for the Bell Atlantic and NYNEX territories, a wholesale customer can obtain DS1 circuit portability so long as it commits to maintaining at least 90 percent of its historic purchase volume in service with Verizon for a period of between two and seven years. In addition, customers receive the most favorable discounts off of Verizon’s inflated rack rates if they agree to maintain this purchase volume for seven years.¹³ And, under CenturyLink’s Regional Commitment Plan for the legacy Qwest territory, a wholesale customer must commit to maintaining 95 percent of its previous purchase volume in service with CenturyLink to receive a “discount” and circuit portability.¹⁴

These loyalty commitments are “particularly insidious because many of them require customers to commit to purchase an extremely high percentage of their total special access circuits from the incumbent LEC across a region encompassing several states.”¹⁵ In this way, incumbent LECs tie the sale of services that are or might be subject to competitive supply (*e.g.*, high capacity services in a very dense, urban area) in order to receive “discounts” or other “benefits” on services that are not subject to competitive supply (*e.g.*, high capacity services in a rural area or to locations otherwise served only by incumbent LECs due to the economics of deployment).¹⁶

Incumbent LECs typically enforce these loyalty commitments using both (1) heavy shortfall fees if purchase volumes fall below commitment levels; and (2) overage penalties for exceeding committed purchase levels, combined with a waiver of the penalty as long as the additional volumes are committed to the incumbent in future periods (*i.e.*, ratcheting up the agreement’s commitment levels).¹⁷ And as explained in the record, other unreasonable terms and conditions in some incumbent LEC special access lock-up plans include (1) various types of

¹² See, *e.g.*, *tw telecom et al.* Feb. 11, 2013 Comments at 22-25; Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 12 (filed June 27, 2012) (“Level 3 June 27, 2012 Letter”); Reply Comments of XO Communications, LLC, WC Dkt. No. 05-25, at 10 (filed Mar. 12, 2013) (“XO Mar. 12, 2013 Reply Comments”).

¹³ See, *e.g.*, *tw telecom et al.* Feb. 11, 2013 Comments at 25; see also XO Mar. 12, 2013 Reply Comments at 4-6 (discussing Verizon’s Commitment Discount Plan).

¹⁴ See, *e.g.*, Reply Comments of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC and *tw telecom inc.*, WC Dkt. No. 05-25, at 10-11 (filed Mar. 12, 2013) (“*tw telecom et al.* Mar. 12, 2013 Reply Comments”); Level 3 June 27, 2012 Letter at 15-16.

¹⁵ Sprint Feb. 11, 2013 Comments at 28; see also *id.* at 29-30.

¹⁶ See, *e.g.*, XO Mar. 12, 2013 Reply Comments n.11; TelePacific Feb. 11, 2013 Comments at 15-18; see also *tw telecom et al.* Feb. 11, 2013 Comments at 30-33 (providing other examples of how incumbent LEC special access lock-up plans act as tying arrangements).

¹⁷ See, *e.g.*, Sprint Feb. 11, 2013 Comments at 30-32; *tw telecom et al.* Feb. 11, 2013 Comments, Appendix A, Besen/Mitchell Paper ¶¶ 29-30; Level 3 Feb. 22, 2012 Letter at 5, 11-13.

excessive early termination penalties that limit a customer's ability to switch to an alternative provider;¹⁸ (2) onerous circuit migration policies and fees that restrict customers' ability to move circuits from the incumbent LEC to another provider;¹⁹ and (3) restrictive technology migration provisions that make it difficult for purchasers to upgrade from DS1 or DS3 circuits to Ethernet, including that provided by the incumbent LEC, where it would otherwise be economically feasible to do so.²⁰

The record makes clear that these terms and conditions have had—and continue to have—harmful effects on competition and consumer welfare as well as the transition to fiber and packet-based networks. In particular, competitive carriers have repeatedly explained how these provisions impede competition by creating additional barriers to entry and expansion in those instances where deploying last-mile connections otherwise could be economically viable²¹ and result in higher prices for those services.²² Additionally, competitive carriers have shown that

¹⁸ See, e.g., Sprint Feb. 11, 2013 Comments at 32-35 (discussing three types of early termination penalties).

¹⁹ See, e.g., *id.* at 35-36; Level 3 Feb. 22, 2012 Letter at 13-14.

²⁰ See, e.g., Letter from Jennie B. Chandra, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 and 12-353, at 4 (filed Aug. 7, 2014); XO Feb. 11, 2013 Comments at 13; Letter from Thomas Jones, Counsel for tw telecom holdings inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 20-22 (filed Apr. 11, 2012); Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 9 (filed Aug. 21, 2012) (“tw telecom Aug. 21, 2012 Letter”); Level 3 Feb. 22, 2012 Letter at 21.

²¹ See, e.g., Sprint Feb. 11, 2013 Comments at 24-25 (discussing how “[m]any incumbent LEC loyalty mandates lock customers into maintaining an extremely high percentage of their prior purchases not just for the term of their initial contract, *but also for all future renewals*”) (emphasis in original); Level 3 Feb. 22, 2012 Letter at 21 (stating that “when Level 3 has sought to sell special access to other large purchasers, it has generally been informed that the prospective purchaser would very much like to avail itself of Level 3’s lower prices and higher quality in those locations where Level 3 is prepared to offer special access, but is precluded from doing so by the price-cap LECs’ lock-up contracts”); Sprint Feb. 11, 2013 Comments at 24 (explaining that a “potential competitor would have to offer uneconomically low prices to overcome the substantial penalties buyers would face if they were to shift even a small percentage of their purchases to alternative vendors”); Level 3 Feb. 22, 2012 Letter at 18 (explaining that incumbent LECs’ lock-up plans inhibit competitive entry because they “tie up sufficient volume to prevent smaller competitors from achieving minimum viable scale”) (internal quotations omitted).

²² See, e.g., tw telecom *et al.* Feb. 11, 2013 Comments at 33 & Appendix A, Besen/Mitchell Paper, ¶¶ 34-37 (explaining that these loyalty commitments (1) cause demand for incumbent LEC DS1 and DS3 special access services to become less elastic, thereby giving the incumbents the incentive and ability to increase rates for those services without the threat of losing sales to alternative providers, and (2) deprive competitors of the ability to expand their operations to achieve economies of scale, thereby requiring those competitors to increase their prices); Level 3 Feb. 22, 2013 Letter at 19 (explaining that once an incumbent LEC “has contracted with some

these terms and conditions hinder broadband deployment²³ and the transition to IP-based services.²⁴

The incumbent LECs' attempts to refute competitive carriers' demonstrations of anticompetitive impact and defend their special access commitment plans lack merit. For instance, COMPTTEL members have explained at length that these plans are not, as the incumbent LECs' contend, "voluntary" in any meaningful sense of the word²⁵ and that wholesale customers serving retail business customers cannot realistically lower their volume commitments during or after their current plans expire.²⁶ Competitive carriers have refuted incumbents' claims

of its customers for a percentage discount off the month-to-month tariff [rates], it has an incentive to raise the latter above the level that it would have chosen otherwise" (quoting Reply Declaration of Joseph Farrell on Behalf of COMPTTEL, WC Dkt. No. 05-25, ¶ 21 (filed July 29, 2005)).

²³ See, e.g., *tw telecom et al.* Feb. 11, 2013 Comments at 40-42 (explaining that as a result of incumbent LECs' loyalty provisions, "there is a far smaller addressable market for existing or potential alternative wholesale providers than would otherwise be the case," and thus, "such providers have a reduced incentive to deploy last-mile fiber facilities to commercial buildings"); Level 3 June 27, 2012 Letter at 5 ("Level 3 would construct fiber to many more buildings that are near its network, if AT&T's (and other price cap LECs') lock-up arrangements did not hinder us from doing so. Level 3 is forced to sit out more often than it would like not because it wants to, but because if it did incur the expense to build to these buildings, its prospective, large customers would be unable to buy more than a fraction of their demand from Level 3 as they are already locked in to buying from AT&T and other price cap LECs instead.").

²⁴ See, e.g., Windstream April 28, 2014 Letter at 13-14; XO Feb. 11, 2013 Comments at 13 ("XO has only a limited ability . . . under its special access commitment plans with Verizon and AT&T to move TDM circuits to Verizon Ethernet platforms to meet the increasing demand and have the Ethernet purchases count against its volume commitments."); Level 3 Feb. 22, 2012 Letter at 21 (explaining that the upgrade provisions in Verizon's special access tariffs do not allow Level 3 to upgrade DS_n services to Ethernet services without incurring substantial early termination fees, and that the technology migration provisions in those tariffs are subject to a number of restrictions that limit their utility (e.g., length-of-commitment requirements, bandwidth requirements, revenue-test requirements, terminating location requirements, timing requirements, and notification requirements)).

²⁵ See, e.g., TelePacific Feb. 11, 2013 Comments at 15; XO Mar. 12, 2013 Reply Comments at 5-6 (explaining that because Verizon's month-to-month special access rates are so exorbitant and because Verizon is often the sole source of supply, XO often has "no choice . . . but to sign up for a long-term special access commitment plan" with Verizon); Sprint Feb. 11, 2013 Comments at 36-37.

²⁶ See, e.g., *tw telecom* June 5, 2012 Letter at 8-10; *tw telecom* Aug. 21, 2012 Letter at 7-8; XO Mar. 12, 2013 Reply Comments at 6-8; see also Sprint Feb. 11, 2013 Comments n.72 (explaining why Sprint cannot simply "avoid continuing its commitment by not renewing the loyalty plan").

that these special access plans are not anticompetitive loyalty contracts and are not exclusive.²⁷ Competitive carriers have also debunked incumbent LECs' assertions that their special access lock-up plans are necessary for predictability in business planning, and/or enable cost recovery²⁸ or, as designed by the incumbent LEC, that they are commonplace in many industries²⁹ or presumptively procompetitive.³⁰ And COMPTTEL members have repeatedly explained that increased deployment and adoption of Ethernet services does not obviate the need to preserve last-mile access in the form of DS1 and DS3 special access services or their equivalents.³¹

The record in this proceeding is comprehensive and supports prompt action. Moreover,

²⁷ See Letter from Thomas Jones, Counsel for BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Appendix A, Presentation of Drs. Stanley M. Besen and Bridger M. Mitchell, at 9 (filed Apr. 24, 2012) (explaining that a loyalty contract need not contain an explicit requirement that the customer purchase a percentage of its total demand from the seller); *id.* at 10 (explaining that if the incumbent LECs' special access plans are not literally exclusive, they can still substantially limit competitors' addressable market).

²⁸ See, e.g., Level 3 Feb. 22, 2012 Letter at 24 (“In theory, a firm may be justified in asking customers to commit to certain levels of purchases, where those purchases are used to support infrastructure investments or similar sunk costs by the supplier. But in practice . . . [m]ost of these circuits already exist . . . and the 85% to 100% commitment levels appear to be far higher than necessary to capture any incremental costs. Moreover, the price-cap LECs permit ‘portability’ such that a customer is free to strand the price-cap LEC’s investment by moving the volume to a location in another building, or even another geographic region (for example, from Los Angeles to Chicago, in AT&T’s case.)”); tw telecom June 5, 2012 Letter at 6-7 (explaining that prior purchase-based volume commitments have no rational basis in economics because the “same discount is offered to a customer with 100 circuits that meets the prior purchase percentage (e.g., 90 percent) by committing to purchase 90 circuits as is offered to a customer with 100,000 circuits that meets the prior purchase percentage by committing to purchase 90,000 circuits”).

²⁹ See, e.g., Reply Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 19 (filed Mar. 12, 2013) (“Sprint Mar. 12, 2013 Reply Comments”) (“Volume discounts are discounts for purchasing higher *volume* of product – independent of the customer’s past purchases. They reflect real efficiencies associated with selling a larger bundle of goods to a single customer. By contrast, loyalty [mandates] are discounts for maintaining a high *percentage* of past purchases with the incumbent.”) (emphasis in original); Level 3 Feb. 22, 2012 Letter at 9 (explaining that incumbent LECs’ loyalty mandates are not actually volume discounts because they “are not derived from cost-savings based on an *absolute* measure of volume”) (emphasis in original).

³⁰ See, e.g., Sprint Feb. 11, 2013 Comments at 26-27 (“While volume discounts are frequently procompetitive, antitrust enforcers and economists have long recognized that loyalty ‘discounts’ can be used by incumbents who possess market power to inhibit competition.”).

³¹ See, e.g., Windstream April 28, 2014 Letter at 9-11; tw telecom June 5, 2012 Letter at 12-16; Sprint Mar. 12, 2013 Reply Comments at 13-15; tw telecom Aug. 21, 2012 Letter at 9-10.

the Commission unquestionably has the authority to address unjust and unreasonable terms and conditions in incumbent LEC special access lock-up plans. For example, contrary to AT&T's claims, the Commission can adopt rules governing incumbent LEC tariffed offerings in this rulemaking proceeding without conducting individual hearings under Section 205 of the Act for each tariffed plan.³²

Accordingly, the Commission should promptly establish rules addressing the unjust and unreasonable terms and conditions in incumbent LEC special access lock-up plans, as it works in parallel to address unjust and unreasonable rates. At a minimum, the Commission should (1) limit the size of the volume commitment that an incumbent LEC may require as a condition of providing a "discount" or other "benefit" (such as circuit portability) to a level (*e.g.*, 50 percent)³³ so as to encourage the deployment of alternative competitive facilities by allowing purchasers to shift a material amount of their special access purchases to alternative wholesale providers without incurring substantial penalties;³⁴ (2) adopt rules that limit incumbent LEC early termination fees and nonrecurring charges to the recovery of the customer-specific sunk costs associated with providing a circuit to the customer;³⁵ (3) prohibit any volume commitments

³² As AT&T has recognized, courts have held that the hearing requirement in Section 205 is satisfied through notice-and-comment rulemaking procedures. *See* Brief of Petitioners, *In Re AT&T Corp.*, No. 03-1397, at 42 (D.C. Cir. Aug. 20, 2004); *see also International Settlement Rates*, Report and Order, 12 FCC Rcd. 19806 ¶¶ 300-01 (1997) (noting that the Supreme Court has held that "the notice and comment provisions of Section 553 of the APA satisfy a general hearing requirement such as that contained in Section 205") (citing *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973)); *AT&T Co. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978) (holding that notice and comment provides the "'full opportunity' to be heard" required under Section 205).

³³ While AT&T has asserted that the competitive carriers' proposal of a 50 percent volume commitment is arbitrary (*see* Reply Comments of AT&T, WC Dkt. No. 05-25, at 51 (filed Mar. 12, 2013)), AT&T itself has pointed to one contract it has with a 50 percent volume commitment as evidence that its special access lock-up plans are reasonable. *See* Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, n.10 (filed Mar. 28, 2012); *see also* Level 3 June 27, 2012 Letter at 12-13 ("Reducing the lock-up percentages to 50% across the board (as AT&T apparently did with this customer) would provide the entire industry the flexibility it needs to sell to, and buy from one another for half of their volume, and that would unleash the competitive forces that the industry . . . ha[s] been waiting on for over a decade.").

³⁴ *See, e.g.*, *tw telecom et al.* Feb. 11, 2013 Comments at 43-44; *TelePacific* Feb. 11, 2013 Comments at 18; *Sprint* Feb. 11, 2013 Comments at 39-40. As *Sprint* has discussed, in order for this remedy to succeed, the Commission should, among other things, require incumbent LECs to maintain their current discount and benefit levels despite changes to loyalty mandates. *See id.* at 40-41; *see also tw telecom et al.* Feb. 11, 2013 Comments n.101 (discussing additional rules the Commission should adopt to ensure that the incumbent LECs do not simply undo the Commission's action by eliminating the plans they offer special access purchasers today).

³⁵ *See, e.g.*, *Sprint* Feb. 11, 2013 Comments at 42-43; *tw telecom et al.* Feb. 11, 2013 Comments at 44-45 (discussing specific rules the Commission should adopt to prevent incumbent LECs from (1) imposing early termination penalties that far exceed the unrecovered sunk costs required to provide a circuit to a customer, or (2) imposing excessive nonrecurring charges and

(including minimum revenue commitments) that penalize competitive carriers for transitioning their purchases from DS1 and DS3 special access to Ethernet services; and (4) preclude an incumbent LEC from including in any new contract tariff discount plan any volume purchase commitment that extends for a period of more than one year (but permit terms that allow a customer to renew its service at the end of the year with a new volume commitment).³⁶ It is important that the Commission ensure that existing discount levels remain in place under the new terms and conditions, as it proceeds to take actions to ultimately address the unreasonableness of the existing special access rates. If the FCC addresses terms and conditions in isolation, incumbents could override the Commission's action by eliminating the plans they offer special access purchasers today, forcing customers into their outrageously higher-priced rack rates.³⁷

Increased competitive entry into the multi-billion dollar special access market and the resulting benefits of lower prices and increased investment for businesses, nonprofits, and government entities are unlikely to occur unless the Commission adopts these rules. Eliminating anticompetitive lock-up provisions would help enable those competitive alternative deployments that otherwise could have occurred absent lock-up provisions and place greater competitive pressure in the business services marketplace. Given the overwhelming record evidence that the terms and conditions in incumbent LEC special access lock-up plans are unreasonable, the Commission can and should adopt COMPTEL's proposed rules now.

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

Respectfully submitted,

/s/ Angie Kronenberg

Angie Kronenberg

Karen Reidy

cc: Jonathan Sallet
Julie Veach
Linda Oliver
Jennifer Tatel
Matt DelNero
Deena Shetler
Madeleine Findley

offering to waive them only if the customer commits to purchase the circuit for a committed term).

³⁶ See Level 3 Feb. 22, 2012 Letter at 28 and n.88.

³⁷ See *supra* n. 33