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May 27, 2015

VIA ECFS

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

Re: *Technology Transitions*, GN Docket No. 13-5; *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174; *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

Dear Ms. Dortch:

In this ex parte letter, COMPTEL further elaborates on the Commission's jurisdiction to address incumbent LEC ("ILEC") special construction practices for Ethernet services, and on some recurring issues that necessitate a near-term Commission response, which could occur through an enforcement advisory, declaratory ruling, or new rule. Competitive LECs ("CLECs") and business service customers are increasingly observing the imposition of unwarranted and/or excessive special construction charges being used as an opportunity for ILECs to impose de facto last-mile price increases.[1] This appears especially to be the case with Ethernet services.[2]

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[1] *See, e.g.*, Comments of COMPTEL, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 35 (Feb. 5, 2015) ("COMPTEL Comments"); Comments of the Ad Hoc Telecommunications Users Committee, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 17 (Feb. 5, 2015) (attesting "first hand that ILECs have repeatedly demanded payment of special construction charges when none of the conditions required under the tariff are present"); Comments of XO Communications, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket Nos. 05-25, 15-1, RM-11358, RM-10593, at 11 (Feb. 5, 2015) (noting that "where Verizon brings FiOS to a building previously served by copper, Verizon has apparently adopted a policy of no longer supporting new orders for copper loops to the building, even if the loop facilities are still in place and not defective or degraded").

[2] *See* Letter from Malena Barzilai, Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, WC Docket No. 05-25, RM-10593, at 2 (April 17, 2015); Letter from Karen Reidy, COMPTEL, to Marlene H.

Unwarranted special construction charges, whether imposed on orders for TDM-based or Ethernet-based services, inhibit competition before, during, and after the transition to IP-based services, and thus have a negative impact on business, nonprofit, and government customers—by driving up prices these customers pay, and by sometimes making the prices for competitive alternatives so high that customers feel as if they have no choice but to stay with the incumbent. The Commission has long recognized that charges for facilities construction can be a source of impermissible unreasonable discrimination, and a means to attempt to avoid the "basic common carrier responsibility" for "planning and investing in facilities" to respond to reasonable requests for service.[3]

To address unjustified, competition-impeding special construction practices, the Commission should adopt COMPTEL's proposed policy principles regarding the application of special construction charges to reaffirm the basic law regarding special construction and ensure ILEC compliance with Sections 201 and 202.[4] As the Commission long ago made clear, "An individual customer cannot fairly be assessed special construction charges simply because existing facilities are fully utilized and additional facilities are necessary."[5] Special construction also may not be charged when "the facility is fungible," and therefore "if a long term customer ceases to use it the facility would become available to serve other long term or occasional customers."[6] Under COMPTEL's principles, ILECs could and should be able to continue to impose *justified* special construction charges. In particular, where a CLEC is ordering TDM-based or packet-based special access services, an ILEC would be permitted to impose special construction charges for network build-out where *both* of the following two conditions are met:

(1) ***Existing ILEC facilities, even with routine maintenance and conditioning, do not have capacity available at or above the level requested by the CLEC.*** Where (i) an ILEC theoretically could use copper to meet a wholesale request, but the ILEC has tested and found that no spare copper loop facilities would be capable of fulfilling the CLEC's order, even with routine maintenance and conditioning (e.g., removal of bridge taps and loading coils), (ii) the ILEC does not have fiber connecting to the relevant location, and (iii) condition (2) below regarding no ILEC use is also met, the ILEC could impose special construction charges. Similarly, where a CLEC requests services that require

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Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, WC Docket No. 05-25, at 2 (April 23, 2015).

3 *See Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion and Order, 97 FCC 2d 1082, 1212-1213 (1984).

4 Letter from Karen Reidy, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, at 1; COMPTEL Comments at 36-37.

5 *Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. Nos. 258 & 260, & the Establishment of Tariff F.C.C. No. 269, for Series 7000 Terrestrial Television Transmission Servs.*, Memorandum Opinion and Order, 88 FCC2d 1656, 1665 ¶ 16 (1982).

6 *Id.* ¶ 15.

fiber and the ILEC does not have fiber already connected to the relevant location, the ILEC could impose special construction charges if condition (2) below also is met.[7]

(2) ***The ILEC's special construction charges do not address costs of network delivery infrastructure that the ILEC will use for its own operations.*** The ILEC could impose special construction charges where it must deploy new network delivery infrastructure (e.g., conduit, subduct, buried, aerial infrastructure) to fulfill the CLEC's request, and the ILEC certifies that it will not use the infrastructure—including the supporting infrastructure such as conduit or poles—for any of its or its affiliates' retail services in the future.

In addition, to ensure special construction charges do not cause significant delay in deployment of competitive services to customers, COMPTEL recommended that where these two conditions are met, the ILEC should be required to respond to the CLEC's request within five days with an explanation of the basis for its conclusions that special construction is needed (consistent with its tariff) and a detailed cost estimate for the special construction. Furthermore, the ILEC must agree to a reasonable number of audits per year to ensure that its no-use certifications remain valid.

I. The FCC Has Ample Authority to Regulate ILEC Special Construction Practices Regardless of Any Forbearance Granted With Respect to Specific Packet-Based-Services.

There is no dispute that the Commission has the authority to regulate special construction charges associated with orders for TDM-based special access services. These services remain fully subject to Sections 203 through 205 as well as Sections 201 and 202 of the Communications Act. Indeed, the FCC has explicitly stated that "[s]pecial construction of lines may be provided by common carriers for individual customers under the tariff and facilities-

[7] When fiber for any of the ILEC's services (retail and/or wholesale) already connects to the location addressed by the order, the ILEC, however, shall make capacity available to the requesting wholesale customer without assessing a special construction charge, just as it would for a retail customer at the same location.

authorization procedures of Title II."[8] Consistent with that statement, all ILECs offer special construction in a standalone tariff.[9]

With respect to those ILECs that have received forbearance from economic regulation of *specified* packet-switched special access services, with the possible exception of Verizon, none has obtained forbearance from Sections 201 or 202, or from 251(b)(1) or (c)(4). Thus, the Commission continues to have the authority to regulate unjust and unreasonable or unreasonably discriminatory practices with respect to the sale and provision of the specified services for which they obtained forbearance, even if special construction is viewed as a part of, and not separate from, those services (as they should be, as discussed below). Asserting that the ILEC has "no other requirement" for facilities when, for example, it would make use of those facilities in the future to compete for service to that location or to house other ILEC facilities, is both misleading and anticompetitive. Such a practice unduly raises rivals' costs by forcing the wholesale customer, which also pays monthly service charges, to bear the whole up-front costs of facilities that will be used in the future for the ILEC's own services.[10]

Although Verizon may have received forbearance from Sections 201 and 202 for specified packet-based special access services when its forbearance petition was "deemed granted," special construction is not among those specified services. Special construction is a common carrier service,[11] which ILECs generally tariff separately from any transmission service that rides on specially constructed facilities. Though a customer request for a specific transmission service—including one for which the ILEC obtained forbearance—may require an ILEC to expand its capacity, the ILEC can use the new facilities and infrastructure to offer other

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8 *Special Constr. of Lines & Special Serv. Arrangements Provided by Common Carriers*, 97 FCC 2d 978, 981 ¶ 1 (1984) ("*Special Construction NPRM*"). Though the Commission, in 1984, issued a Notice of Proposed Rulemaking that proposed removing special construction from the common carrier regime, the proceeding went dormant and was ultimately terminated. *See id*. Thus, Section 202(a) applies to special construction charges, just as it does to all other ILECs' special construction charges.

9 *See e.g.*, Verizon FCC Tariff No. 21, *available at* http://www.verizon.com/tariffs/Sections.aspx?docnum=FCCIEA21&type=T&sch=N&se=Y&att=N&typename=IT&tims_status=E&entity=I*.

10 *See also, e.g.*, *Expanded Interconnection with Local Telephone Company Facilities*, Memorandum Opinion and Order, FCC 94-190, 9 FCC Rcd. 5154, 5172, ¶ 57 (1994) (holding that requiring a competitor to pay the incumbent to construct duplicative last-mile facilities is inconsistent with the Commission's rules and precedent); *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, FCC 97-208, 12 FCC Rcd. 18,730, 18,745-46, 18,751, ¶¶ 23-24, 37 (1997) (finding that incumbents cannot force interconnectors to pay for services and equipment that they do not actually need, because this would impede efficient competitive entry).

11 *See Special Construction NPRM*, 97 FCC 2d at 980 ¶ 4.

services or serve other locations. If, for example, an ILEC must construct new conduit to offer a forborne service at a particular location, the ILEC will be able to offer other services—including TDM data or voice services—at that location over facilities running through that conduit. In addition, the ILEC may be able to use the newly constructed conduit to serve other nearby locations. If special construction were not a separate common carrier service, the ILEC would have the ability to place unreasonable special construction charges on the backs of competitive carriers and consumers who request and are charged monthly fees to use transmission services that happen to have received forbearance.

Thus, if Verizon wishes to free special construction services from Title II regulation, Verizon must seek forbearance for its special construction charges. It is indisputable, however, that Verizon has never requested this forbearance. Verizon's forbearance petition, as amended, covered only ten specific broadband services.[12] Verizon did *not* include special construction services on that list.[13] Indeed, neither Verizon's petition nor any amendment even mentions special construction.

Forbearance is an exception from Title II statutes and regulations. To grant the exception, the Commission must assess competition, and it is unreasonable to assume the Commission will sufficiently analyze competition in markets a forbearance petition fails to address. Indeed, the Commission consistently has refused to grant forbearance for services not specifically addressed in forbearance petitions.[14] As the sole drafter, Verizon controlled the scope of its petition, and if it wanted to submit information upon which the Commission could consider forbearance for special construction services, it could have done so—but did not. Moreover, Verizon received forbearance through a "deemed grant,"[15] and Verizon's petition and subsequent ex parte define and limit the scope of Verizon's forbearance grant. As with other unilateral documents, such as tariffs, the Commission should construe ambiguities against the

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[12] *See Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Petition of the Verizon Telephone Companies for Forbearance (Dec. 20, 2004), *as amended by* Letter from Edward Shakin, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-440, at Attachment 1 (Feb. 7, 2006).

[13] *See id*.

[14] *See, e.g., Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 40 (2007) (limiting forbearance grant to "broadband services that AT&T currently offers and lists in its petitions").

[15] FCC News Release, Verizon Telephone Companies' Petition for Forbearance from Title II and *Computer Inquiry* Rules with Respect to Their Broadband Services Is Granted by Operation of Law (Mar. 20, 2006).

author—in this case, Verizon.[16] Accordingly, the Commission should narrowly construe the "deemed grant" and conclude that, because Verizon has not sought forbearance for special construction services, all applicable Title II regulations, including Sections 201, 202, and 208, apply.

Furthermore, newly-constructed facilities that can be used to provide DS1 or DS3 common carrier special access services are services provided "in connection with" those common carrier services. A conduit or fiber bundle can support, for example, both TDM and packet-based special access services. Once deployed, Verizon has a duty under Section 201(a) to make services such as switched services, as well as DS1 and DS3 special access services, available via newly-deployed facilities upon reasonable request therefor.[17] It is contrary to that statutory obligation for Verizon (or any other ILEC) to seek to evade the price cap regulatory regime applicable to DS1 and DS3 services by charging TDM or packet-based special access customers inappropriate special construction fees for facilities that may be used to fulfill Verizon's common carrier duty to provide DS1 and DS3 special access services, or switched access.[18] The nexus to common carrier DS1 and DS3 special access services as well as switched access grants the Commission jurisdiction over special construction of any facility that Verizon can use to provide such common carrier services, even if the initial impetus for the construction is a customer request for a specified service for which Verizon has been granted forbearance from Title II.

The Commission, therefore, has ample authority to provide the guidance or clarification that COMPTEL has requested with respect to special construction, regardless of the technology of the service being ordered.

II. The Commission Should Adopt Principles that Reaffirm and Ensure that Special Construction Cannot be Imposed in Instances in which Service Cannot Be Provided Over Existing Facilities and the ILEC Has No Need for the Facilities.

COMPTEL's requests for Commission guidance or clarifications addressed three areas that are frequent sources of dispute over the legitimacy of special construction charges: (1) when are facilities truly unavailable; (2) what does it mean for an ILEC to have "no other requirement" for the facilities requested; and (3) transparency with respect to the basis for asserting special construction charges apply and the basis for cost estimates.

First, with respect to determining when facilities are unavailable, ILECs should not be able to withhold unused existing facilities or capacity from a wholesale customers to serve retail customers, nor should special construction charges substitute for ILECs' adequate maintenance

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[16] *See Halprin, Temple, Goodman, & Sugrue*, Memorandum Opinion and Order, 13 FCC Rcd. 22,568 ¶ 9 (1998) ("[W]e must construe any ambiguities in tariffs against the filing carrier.").

[17] *See* 47 U.S.C. § 201(a).

[18] *See Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d at 1212-1213.

of their own facilities.[19] Withholding unordered capacity from wholesale customers on the hope of selling the same capacity to retail customers discriminates against wholesale users simply because they are wholesale purchasers. Such an action constitutes unreasonable discrimination, and violates Sections 201, 202, and 251(b)(1) and (c)(4), which require ILECs to provide retail services for resale on a nondiscriminatory basis.[20] With respect to IP-based services, it also slows the transition to such services, as end users are deterred from using the provider of their choice, and which may offer the best solution that fits their needs.

Similarly, where an ILEC has not retired a facility, it should not be permitted to charge special construction for routine maintenance and conditioning. These are services that the ILEC would perform for its retail customers and are covered by its basic service rates. There is nothing extraordinary about routine maintenance and line conditioning.

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[19] Several ILECs' comments at least seem to recognize that it is improper for special construction to be charged when existing copper facilities are capable of supporting the requested services. *See* AT&T Comments at 31 (citing 47 C.F.R. sec. 51.319(a)(3)(iii)(B)) and agreeing generally that the existing rules require an ILEC to "restore [] copper loop to serviceable condition" upon request of a competitor); CenturyLink Comments at 31, n.88 (noting that CenturyLink's general practice is not to disable copper loops or "de facto" retire them, and it replaces loops or subloops when they become inoperable); Comments of Cincinnati Bell Telephone Company LLC at 11 ("Certainly, copper cable that continues to be used for the provision of telecommunications service should be maintained to a standard that delivers appropriate service to customers and meets structural and safety standards. . . . If an actual request to use the facility is made, the ILEC has an obligation to make it serviceable.").

[20] *See* 47 U.S.C. 251(b)(1); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, FCC 96-325, 11 FCC Rcd. 15,499, 15,981-82 ¶¶ 976-977 (1996). *See also* 47 U.S.C. § 251(c)(4). Longstanding Commission rules hold that a carrier may not, under Sections 201 and 202, exclude wholesale customers from the same services at the same quality level that are available to retail customers. *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd. 7418, 7445 ¶ 46 (2001) ("[T]he Commission's Title II resale requirements mandate that wireline common carriers provide telecommunications services to competitors."); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 FCC 2d 167, 168 ¶ 1 (1980) ("[R]estrictions of any kind on the resale and sharing of domestic public switched network services are unjust, unreasonable, and unreasonably discriminatory, and hence unlawful under Sections 201(b) and 202(a) of the Communications Act."); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 FCC 2d 261, 283-284 ¶¶ 40-41 (1976) ("[W]e conclude that the restrictions on the subscriber's resale and sharing of communications service are unjust and reasonable under Section 201(b) of the Act . . . . The tariff provisions which deny service to resellers and sharers are . . . unlawfully discriminatory under Section 202(a) of the Act.").

Second, with respect to the longstanding requirement (manifest through the ILEC tariffs) that special construction can only be imposed when the ILEC has "no other requirement" for the facilities to be constructed, the COMPTEL principles would require the ILEC to certify that it will not use the facility for its own purposes during the life of the facility. Special construction was not intended to underwrite an ILEC's upgrades to its network as part of its normal operations. Moreover, "no other requirement" cannot reasonably be interpreted to apply only to the present, to the exclusion of the future. Otherwise, special construction would always apply when a wholesale order was the first placed for a location, but the ILEC could then sell services utilizing those facilities to others, and effectively obtain a double recovery of the costs of the facilities. In addition, the ILEC would be recovering 100 percent of joint or common costs from the wholesale purchaser and none from its retail purchasers, which is both unreasonably discriminatory and anticompetitive.

Third, with respect to transparency, COMPTEL's principles and requested guidance would require ILECs to provide detailed back-up for cost estimates and to agree to a reasonable number of audits per year. The Commission has the authority to declare the refusal to agree to provide such back-up or to perform such audits to be unreasonable.

The reasonableness of this requested guidance is supported by analogy to the Commission's decisions with respect to requests by telecommunications and cable providers to attach their facilities to poles owned by ILECs and utilities under the Commission's pole attachment rules. The Pole Attachment Act, as amended by the Telecommunications Act of 1996, requires the ILEC to provide non-discriminatory access to facilities if sufficient capacity is available, and requires practices to be just and reasonable.[21] These are the same statutory standards as are applicable here. In the context of pole attachments, this statute is the basis for Commission rules requiring utilities to explain their reasons for rejecting a request,[22] and to provide reasonable back-up information, upon request, to support any make-ready charges.[23] In

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[21] 47 U.S.C. § 224(f).

[22] *See* 47 C.F.R. § 1.1403(b) ("The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.").

[23] *See Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd. 24,615, 24,641 ¶ 62 (2003) ("We believe that Georgia Power had an obligation to provide a reasonable amount of information sufficient to substantiate its make-ready charges and do not view this as an 'extra' administrative service for which a separate charge should apply."). *See also Implementation of Section 224 of the Act*, Report and Order on Reconsideration, 26 FCC Rcd. 5240, 5332 ¶ 185 (2003) n.572 (2011) ("We note that parties can seek Commission review of make-ready charges to the extent that they believe such charges are unjust or unreasonable.").

addition, make-ready work necessary to correct the utility's own non-compliance is a utility use/benefit and thus requires the utility to bear a proportionate share of the cost.[24]

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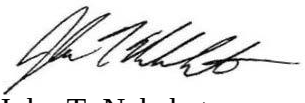
In sum, the Commission should adopt COMPTEL's proposed framework and reaffirm when an ILEC may claim that "there are no facilities available," and in cases where there is "no other requirement for those facilities." The ILEC would be permitted to certify, subject to periodic audits, that it will not use the infrastructure for any of its or its affiliates' retail services in the future. ILECs, however, are precluded from using special construction charges as a means for denying consumers meaningful competitive choices or unduly driving up charges incurred by competitive carriers' customers. The Commission has ample authority to reaffirm and clarify these requirements with respect to all ILEC special construction, whether in support of orders for TDM- or Ethernet-based services.

Sincerely,



John T. Nakahata
On Behalf of COMPTEL

cc: Matthew DelNero
Carol Mattey
Deena Shetler
David Zesiger
Randy Clarke
Daniel Kahn
Pamela Arluk

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[24] *See Knology*, 18 FCC Rcd. at 24,630 ¶¶ 39-40 (requiring utility to refund payments made by attacher for safety-related pole replacements "that need to be performed whether or not Knology attaches to the pole"); 47 C.F.R. § 1.1416(b) ("The costs of modifying a facility shall be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification."); *Cavalier Tel., LLC*, 15 FCC Rcd. 9563, 9571 (2000) ("Complainant is only responsible for make-ready costs generated by its own attachments. Respondent is prohibited from holding Complainant responsible for costs arising from the correction of safety violations of attachers other than Complainant.").