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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:

COMPTTEL submits this letter in response to USTelecom's June 4, 2014 filing in the above-referenced proceeding.¹ In the absence of any new substantive response to COMPTTEL's proposals for addressing special access reform as part of the Commission's managerial framework for the IP transition, USTelecom resorts to rehashing the same assertions that COMPTTEL and its members have already thoroughly refuted in previous filings in this proceeding. As discussed below, the Commission should dismiss USTelecom's tired claims in this proceeding and move forward with resolving long-pending special access issues.

First, USTelecom continues to rely on the litigation position taken by the Commission in 2011, as part of its effort to avoid a mandamus order in this proceeding, that some competitive LECs' inability to respond to the Commission's 2010 voluntary data request somehow impeded the special access rulemaking.² But as some COMPTTEL members already have explained in the record,³ the facts belie this claim. The voluntary data request sought information on the extent to which carriers have deployed their own loop facilities. Many COMPTTEL members (such as Sprint, tw telecom, and TelePacific) responded to the voluntary request, as did numerous other

¹ See generally Letter from Glenn Reynolds, Vice President, Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed June 4, 2014) ("USTelecom June 4th Letter").

² See *Id.* at 1-2.

³ See Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 46 (filed May 31, 2013) ("tw telecom *et al.* May 31, 2013 Reply Comments").

CLECs that were not COMPTTEL members at the time (such as XO and Cox).⁴ But many other COMPTTEL members have no (or few) self-deployed loop facilities and are almost entirely or entirely dependent upon the incumbent LECs' last-mile facilities to reach their customers. These COMPTTEL members thus had little (if any) of the data requested by the Commission. This should come as no surprise to the Commission or to the incumbent LECs. Since at least 2003, the Commission has repeatedly found *de minimis* competitive deployment by competitive LECs due to the extremely high barriers to such deployment.⁵ The claim that competitive LECs are the source of the rulemaking delay is therefore inaccurate and contradicted by the Commission's acknowledgment in its opposition in the mandamus proceeding that the FCC "has already collected a significant body of evidence regarding the operation of [the special access] market."⁶

Second, USTelecom mischaracterizes COMPTTEL's advocacy as urging the Commission "to ignore cable in the special access proceeding."⁷ In fact, numerous parties, including COMPTTEL members, have merely asked the Commission to exclude "best efforts" broadband Internet access services provided by cable companies (and other companies) from its analysis of competition in the market for *special access services*. This approach is entirely consistent not only with the substantial body of evidence in the record,⁸ but also with Commission precedent and well-established economic principles for

⁴ See, e.g., Reply of Petitioners in Support of Petition for Writ of Mandamus, No. 11-1262, nn.6-7 (D.C. Cir. Oct. 19, 2011).

⁵ See, e.g., Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-Based Special Access Services, WC Dkt. No. 05-25, at 41-46 (filed Nov. 2, 2012) ("Petition to Reverse Forbearance") (explaining that the available evidence shows that incumbent LECs still own the *only* last-mile connection necessary for the provision of TDM or Ethernet special access services to the vast majority of customer locations in the U.S.).

⁶ See Opposition of FCC to Petition for Writ of Mandamus, No. 11-1262, at 26 (D.C. Cir. Oct. 6, 2011); see also *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd. 10557, ¶ 49 (2012) (using information submitted by competitors in response to the first voluntary data request to find that the geographic scope of competitive entry has been far smaller than the Commission predicted).

⁷ USTelecom June 4th Letter at 3.

⁸ See, e.g., Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 50-57 (filed Feb. 11, 2013) ("tw telecom *et al.* Feb. 11, 2013 Comments") (detailing the record evidence demonstrating that retail business customers that purchase special access services generally do not view "best efforts" broadband Internet access services as viable substitutes); Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 20-23 (filed Feb. 11, 2013) (discussing the reasons why "best efforts" offerings that are provided over HFC networks are "unsuitable for [Sprint's] wireless macrocell-site backhaul needs or as wholesale inputs to the core retail services it sells to its enterprise customers"); Comments of XO Communications, LLC, WC Dkt. No. 05-25, Exhibit 1, ¶ 10 (filed Feb. 11, 2013); Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, at 12 (filed Feb. 11, 2013) (explaining that "best efforts" broadband Internet access services are not a substitute for

defining product markets.⁹

Third, USTelecom continues to assert that the high ranking of some competitive LECs on Vertical Systems Group's list of top Ethernet service providers in the U.S., in terms of retail business Ethernet ports, is further evidence that special access regulation is not warranted.¹⁰ As some of COMPTTEL's members have already explained, those rankings are irrelevant to the Commission's analysis in the special access rulemaking for several reasons.¹¹ Most significantly, the cited competitive LECs often require last-mile access to BOC facilities when providing Ethernet service. The rankings, however, do not differentiate between Ethernet ports associated with services that competitive LECs provide over their own last-mile facilities and Ethernet ports associated with services that competitive LECs provide over last-mile facilities leased from incumbent LECs. It would defy logic for the Commission to refrain from adopting reform of incumbent LECs' Ethernet special access prices on the basis of retail competition from service providers that rely on those very same ILEC inputs to deliver Ethernet special access

special access services in part because “[b]y definition, best efforts business broadband Internet access services take customers to the Internet and only to the Internet, via the carrier’s choice of Internet access point; they cannot provide a dedicated connection between two premises designated by the customer, such as a bank ATM machine, a merchant’s point-of-sale terminal, a secure data storage facility, or a cellular service tower”). *But see* AT&T Proposal for Wire Center Trials, GN Dkt. Nos. 13-5 & 12-353, Attachment, Exhibit E, Product Data Sheets # WSA2 and # WSA3 (filed Feb. 27, 2014) (citing as a replacement for AT&T’s DS1 and DS3 special access services in the Kings Point area a service, likely a “best efforts” broadband Internet access service, from Comcast that provides speeds of only 768 Kbps upstream).

⁹ *See, e.g.*, Reply Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 14-17 (filed May 31, 2013); Petition to Reverse Forbearance at 30-33; *tw telecom et al.* Feb. 11, 2013 Comments at 49-51. Notwithstanding USTelecom’s claims to the contrary (*see* Letter from Glenn T. Reynolds, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Nov. 29, 2012)), the fact that *some* customers may view a product as a substitute for another product does not, by itself, mean the two products belong in the same product market. *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, n.179 (2010) (“*Phoenix Order*”). Rather, the critical question is whether *enough* customers would switch to a competitor’s service in response to a price increase by the incumbent LEC to render the price increase unprofitable. *See id.* ¶ 56. As demonstrated in the record, due to a number of differences in the characteristics of the services, it is unlikely that enough purchasers of dedicated special access services would switch to “best efforts” broadband Internet access services in response to a small but significant (*e.g.*, five percent) increase in the price of their special access services to make such an increase unprofitable. *See tw telecom et al.* Feb. 11, 2013 Comments at 51-57.

¹⁰ USTelecom June 4th Letter at 5.

¹¹ *See tw telecom et al.* May 31, 2013 Reply Comments at 49-50; *see also* Opposition of *tw telecom*, Level 3, Integra, EarthLink and Cbeyond to CenturyLink’s Forbearance Petition, WC Dkt. No. 14-9, at 18-19 (filed Feb. 14, 2014).

services to their own end-user customers.¹² The Vertical Systems Group rankings also do not differentiate between the level of competition in the provision of Ethernet services at different capacity levels (*e.g.*, between 10 Mbps services and 1 Gbps services). This omission makes it impossible for the Commission to rely on the rankings as a basis for determining the extent to which incumbent LECs face competition in a particular product market. In addition, Vertical Systems Group simply ranks providers based on the total number of ports they sell *nationwide*. As such, these rankings have no bearing on the level of competition in the provision of Ethernet services in a particular geographic market (*e.g.*, at an individual customer location).

Fourth, USTelecom alleges that the largest ILECs are concerned that they may lose their dominance in the undefined “business services market” to the largest cable companies, particularly the combined Comcast/Time Warner Cable entity, at some unspecified point in the future.¹³ Straining to justify its assertion, USTelecom develops an apples-to-oranges analysis, evaluating different industry segments, for different service offerings, and over different periods of time. Namely, USTelecom compares six cable companies’ total business services revenues in 2013 to four ILECs’ revenues solely from DS1s and DS3s in 2010. For example, ILECs’ revenues for DS1s and DS3s are only a portion of the ILEC business services revenues, whereas cable companies’ “business services revenues” exceed their share of the special access marketplace (as these revenues undoubtedly include revenues from best efforts business broadband Internet access services that do not belong in the same product market as special access services and may include revenues from other services that are also irrelevant to this proceeding, such as video services sold to businesses).¹⁴ A more apt comparison is revealing: AT&T *alone* reportedly had more “business services revenue” for *one quarter* of 2013 (reportedly \$8.9 billion)¹⁵ than what USTelecom attributes to the six largest cable companies *for the entire year* (\$8.5 billion). And according to USTelecom’s source, “[c]able takes home *just 6%* of the annual US business telecom spend.”¹⁶

¹² It is also worth noting that the Vertical Systems Group rankings of the incumbent LECs do not take into account their wholesale Ethernet port sales. As a result, the rankings may significantly understate the share of ports sold by incumbent LECs nationwide. For this reason, the Commission cannot rely on the rankings to properly conduct separate analyses of the wholesale and retail markets for Ethernet special access services.

¹³ *See, e.g.*, USTelecom June 4th Letter at 4-6.

¹⁴ For example, over 13% of Time Warner Cable’s business service revenue for the first quarter of 2014 was from video and only 15% was from wholesale transport. *See* Time Warner Cable, 10-Q, for the quarterly period ended March 31, 2014, at 13, *available at*: <http://timewarnercable.q4cdn.com/64d0101d-ae12-415a-a208-e02efe3c04bc.pdf>

¹⁵ *See* Sue Marek, “AT&T U-verse subs top 9.4 million in Q2, 45 Mbps speeds coming soon,” *FierceTelecom*, July 23, 2013, *available at*: <http://www.fiercetelecom.com/story/att-u-verse-subs-top-94-million-q2-45-mbps-speeds-coming-soon/2013-07-23>.

¹⁶ Light Reading, “Heavy Reading: Cable Biz Sales to Hit \$8.5B” (Dec. 4, 2013), *available at*: [http://www.lightreading.com/heavy-reading-cable-biz-sales-to-hit-\\$85b/d/d-id/706824?f_src=lightreading_editorspicks_rss_latest](http://www.lightreading.com/heavy-reading-cable-biz-sales-to-hit-$85b/d/d-id/706824?f_src=lightreading_editorspicks_rss_latest) (emphasis added).

Finally, even if USTelecom's assertions with regard to the cable companies' penetration in the "business services" market were valid, USTelecom's argument boils down to asking the Commission to forego adopting long overdue special access reform because the market for special access services is, at best, an incumbent LEC-cable *duopoly*. But the Commission has already found that duopoly markets are unlikely to yield competitive outcomes and are likely to harm consumer welfare (*e.g.*, through supracompetitive prices).¹⁷

It follows that the Commission should ignore USTelecom's self-serving claims and move forward with special access reform. Increased competitive entry into the multibillion dollar special access market, and the resulting benefits of lower prices and increased investment, are unlikely to occur unless and until the Commission acts to reform this market.

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

Respectfully submitted,

/s/ Angie Kronenberg

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Karen Reidy

cc: Jonathan Sallet
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¹⁷ See *Phoenix Order* ¶¶ 29-31.