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VIA ECFS

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

Re: ***Special Access Rates for Price Cap Local Exchange Carriers,*** **WC Docket No. 05-25 and RM-10593**

Dear Ms. Dortch,

INCOMPAS hereby responds to a recent ex parte letter filed by AT&T in which AT&T argues that the Commission must overcome high legal and administrative hurdles before it can reform its policies governing packet-based special access services.[1] There is no basis for AT&T's arguments. As Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC have explained,[2] the Commission's existing policies for packet-based special access services have not engendered "serious reliance interests" for the incumbent LECs even for those services encompassed by the Commission's grants of forbearance. Moreover, reversing forbearance from applying dominant carrier and other regulations to these services would not require that the Commission overcome unusually difficult administrative or legal obstacles. In addition, as explained below, the Commission's grant of forbearance does not even apply to all incumbent LEC packet-based special access services.

When it granted AT&T forbearance from the application of its dominant carrier tariff filing, cost support, discontinuance, and domestic transfer of control and certain *Computer Inquiry* requirements to broadband services, the Commission expressly limited the grant to "(1) [AT&T's] *existing* non-TDM-based, packet switched services capable of transmitting 200 kbps

[1] Letter from Keith Krom, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Sept. 28, 2015) (AT&T Ex Parte").

[2] Letter of Thomas Jones, Counsel for Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Nov. 9, 2015).

or greater in each direction; and (2) [AT&T's] *existing* non-TDM based, optical transmission services."[3] The Commission reiterated this approach, explaining, "that dominant carrier tariffing and pricing regulation of Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services, *as offered by AT&T today*, is not necessary to ensure that AT&T's rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory."[4] The Commission determined that it could not find, based on the record before it, "that AT&T will lack market power with regard to any as yet unoffered broadband telecommunications services."[5] The other orders granting forbearance also limited the grant to the services offered at the time of the grant.[6]

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[3] Memorandum Opinion and Order, *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*, 22 FCC Rcd. 18705, FCC 07-180, ¶12 (2007) ("AT&T Forbearance Order") (emphasis added).

[4] *Id*. at ¶ 30 (emphasis added).

[5] *Id*. at ¶ 63.

[6] "[W]e grant substantial forbearance relief to [Embarq and Frontier/ Qwest] with regard to their *existing* packet-switched broadband telecommunications services and their existing optical transmission services." *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.* C. *§ 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, WC Docket No. 06-147, FCC 07-184, 22 FCC Red. 19478, ¶ 1 (2007) *("Embarq & Frontier Forbearance Order"); Qwest Petition for Forbearance Under 47 U.S. C. § 160(c) from Title 11 and Computer inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, FCC 08-168, 23 FCC Rcd. 12260, ¶ 1 (2008) *("Qwest Forbearance Order")* (emphasis added). "In light of these findings, we conclude that dominant carrier tariffing and pricing regulation of Frame Relay Services, ATM Services, LAN Services, Ethernet-Based Services, Video Transmission Services, Optical Network Services, and Wave-Based Services, *as offered by the petitioners today*, is not necessary to ensure that the petitioners' rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory." *Embarq* & *Frontier Forbearance Order* at ¶ 12; *Qwest Forbearance Order* at ¶ 33. "We do not know the precise nature of such future services, including how, and to what customers, they would be offered, information that we would need to evaluate whether they are sufficiently similar to the services for which we grant forbearance here. Similarly, we do not know the competitive conditions associated with such potential services. We thus are unable to conclude on the record here that the section 10 criteria are met for such services. We therefore cannot find that dominant carrier regulation will not be necessary to ensure that the charges, practices, classifications, and regulations in connection with those as yet unoffered services will be just, reasonable, and not unreasonably discriminatory within the meaning of section 10(a)(1)." *Embarq* & *Frontier Forbearance Order* at ¶ 39; *Qwest Forbearance Order* at ¶ 43 (emphasis added).

At the time of the grant of forbearance, the switched Ethernet service[7] AT&T offered in its special access tariffs was OPT-E-MAN (OPTical Ethernet Metropolitan Area Network) service,[8] so forbearance encompassed that service as it was offered at the time of the FCC's order. In April of 2010, AT&T announced, via a Press Release, a plan to: "Introduce a *new* metro switched Ethernet service across AT&T's 22 state U.S. footprint, *delivering additional capabilities and bandwidth options* while eventually streamlining [its] Ethernet portfolio."[9] In January of 2011, AT&T fulfilled this promise by introducing "AT&T Switched Ethernet Service" ("ASE"). AT&T made the changes to its "AT&T Telco Carrier Coding Guide," to reflect more than a dozen new capabilities. One significant capability, namely the Per Packet Class of Service (PPCoS) offering, made the product usable as a wholesale input for competitive carriers. While AT&T appears to continue to offer OPT-E-MAN in certain areas,[10] AT&T has outlined the steps for customers wishing to migrate their service, including the need to issue a disconnect order for their OPT-E-MAN service and place an order for ASE.[11]

In determining whether a carrier's offerings constitute different services for purposes of regulation, the Commission "takes a functional approach that evaluates the totality of the circumstances."[12] For example, when determining whether a service is being discontinued, the FCC focuses on whether the offering to be discontinued provides different functionalities to customers than those the carrier will continue to offer after discontinuance. The FCC does not focus on the technical attributes of the underlying architecture of the offerings.[13] There are a number of functional differences between AT&T's OPT-E-MAN service that was offered at the

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[7] Switched Ethernet service is a special access service because it employs dedicated facilities that provide direct Ethernet Virtual Connections (EVCs) between the end user and the carrier, or between two discrete end user locations. *See*, *Special Access Rates for Price Cap Local Exchange Carriers,* Order and Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, FCC 05-18, ¶ 7 (2005).

[8] *See e.g.*, The Southern New England Telephone Company, Tariffs Part IV, Section 12, Sheet 1 Effective Data: March 1, 2006 ("SNET 2006 Tariff") ; *See also*, AT&T's Data Products Brochure dated Feb. 20, 2008, *available at* http://www.business.att.com/content/productbrochures/w_data_srvs.pdf;

[9] AT&T Plans $1 Billion Investment in 2010 in Network Capabilities, Solutions and Applications for Businesses, April 6, 2010, available at: http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30702 (emphasis added).

[10] *See* http://www.att.com/gen/general?pid=9524

[11] *See e.g.*, AT&T OKLAHOMA GUIDEBOOK, Part 6, Section 9 H. 10, Tracking No. OK-13-0064, Effective: June 14, 2013.

[12] *Technology Transitions et al,* Notice of Proposed Rulemaking and Declaratory Ruling, GN Docket No. 12-5, FCC 14-185, ¶ 115 (2014).

[13] *Id.* at n. 228.

time of the grant and ASE that is offered now. Just to name a few:

- ASE allows the customer to groom the product (ASE) to the needs of individual traffic flows by introducing six individual classes or categories of network behavior to which the individual traffic flows may be assigned, which optimizes the cost/performance value for the customer. Conversely, OPT-E-MAN only allowed customers to perform two-class grooming, and then, not on individual traffic flows, but only on an Ethernet Virtual Connection (EVC) basis.[14]
- ASE introduced Per Packet Class of Service, which allows the customer to assign performance and capacity parameters on a Per Packet basis, *within* an EVC. [15] OPT-E-MAN did not offer this capability.
- ASE can be interconnected on a peer-to-peer basis with another Ethernet Service Provider.[16] This key feature enables a wholesale customer to preserve Quality of Service and prioritization policy when services span multiple service provider networks. OPT-E-MAN Service did not offer a meet-point billing arrangement involving other carriers.[17]
- ASE supports port with capacities of 1 Gbps and 10 Gbps capacity, whereas OPT-E-MAN only supported ports with 1Gbps of capacity.[18]

As these examples demonstrate, ASE delivers a functionally different service to customers than OPT-E-MAN delivered to customers at the time of the grant. Since AT&T did not offer ASE at

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[14] *See e.g.*, AT&T OPT-E-MAN webpage, Options subheading, *available at* http://www.att.com/gen/general?pid=9524 and SNET 2006 Tariff at 12.1; *See also*, AT&T Interstate Guidebook, PART 5 - Special Access Services - Common ASE, SECTION 4 - AT&T Switched Ethernet Service, *available at* http://cpr.att.com/pdf/is/0005-0004.pdf.

[15] *See* AT&T Interstate Guidebook, PART 5 - Special Access Services - Common ASE, SECTION 4 - AT&T Switched Ethernet Service, subsection 4.1(H)(2) "*Per Packet Class of Service Arrangement*", available at http://cpr.att.com/pdf/is/0005-0004.pdf.

[16] *See* AT&T Interstate Guidebook, PART 5 - Special Access Services - Common ASE, SECTION 4 - AT&T Switched Ethernet Service, subsection 4.1(H)(4) Incumbent Local Exchange Carrier Meet Point Arrangement, *available at* http://cpr.att.com/pdf/is/0005-0004.pdf.

[17] *See e.g.*, SNET 2006 Tariff at 12.3 L.

[18] "OPT-E-MAN builds on the strengths of our network with Cisco equipment to provide you with scalable optical service within the metropolitan area. This service provides flexible bandwidth options, from *5 Mbps to 1 Gbps*, to help you meet your growing Ethernet application needs." AT&T OPT-E_MAN webpage *available at* http://www.att.com/gen/general?pid=9524 (emphasis added). *See also*, http://www.business.att.com/content/productbrochures/OEM.pdf; "The Customer Port Connection is available at transmission speeds of 100 Mbps, 1 Gbps and 10 Gbps," AT&T Interstate Guidebook, PART 5 - Special Access Services - Common ASE, SECTION 4 - AT&T Switched Ethernet Service, subsection 4.1(H)(1)(a) Basic Customer Port Connection (Basic port), *available at* http://cpr.att.com/pdf/is/0005-0004.pdf (emphasis added).

the time for the FCC's grant of forbearance to AT&T, the FCC did not forbear from dominant carrier and other regulations to ASE.

This analysis has implications that extend beyond just the regulation of ASE. To begin with, it shows that the Commission should review the packet-based services offered by all incumbent LECs that received forbearance in order to assess the extent to which they were introduced after the carrier received forbearance. Forbearance does not apply to packet-based special access services introduced after forbearance was granted.

Furthermore, in assessing the extent to which forbearance engendered serious reliance interests, the Commission should account for the fact that forbearance does not even apply to at least some of the packet-based special access services offered by incumbent LECs. Perhaps even more importantly, forbearance would not apply to any packet-based special access services that the incumbent LECs introduce in the future. This fact puts the lie to any incumbent LEC claim that they are relying on the absence of regulation as a basis for making investment decisions for packet-based special access services to be introduced in the future.

Finally, the required differential treatment of packet-based special access services offered by incumbent LECs at the time the Commission granted forbearance on the one hand and packet-based special access services introduced after forbearance was granted on the other hand only increases the importance of a comprehensive reassessment of the regulatory policies applicable to incumbent LEC packet-based special access services. Not only was forbearance inappropriately granted as a result of both a default grant for Verizon (caused by agency inaction) and subsequent orders that relied on predictive judgments that have (unsurprisingly) proved to be inaccurate, but forbearance will increasingly apply to services based on when they were introduced. These are neither sound nor consistent bases for setting regulatory policy, and they must be reassessed promptly.

Respectfully Submitted,

/s/ Karen Reidy