

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access Rates 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

**COMMENTS OF
BT AMERICAS, CBeyond, EarthLink, INTEGRA, LEVEL 3, AND TW TELECOM**

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BT Americas Inc. (“BT”), Cbeyond Communications, LLC (“Cbeyond”), EarthLink, Inc. (“EarthLink”), Integra Telecom, Inc. (“Integra”), Level 3 Communications, LLC (“Level 3”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these comments in response to the Commission’s Paperwork Reduction Act (“PRA”) *Notice*¹ on the information collection proposed in the *Special Access Data Request Order*.²

I. INTRODUCTION AND SUMMARY

By adopting the *Special Access Data Request Order*, the Commission has taken another long overdue step toward “evaluat[ing] competition in the market for special access services.”³ Those services are critical broadband inputs for businesses and consumers in virtually every

¹ See *Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 78 Fed. Reg. 9911 (Feb. 12, 2013) (“*Notice*” or “*PRA Notice*”).

² *Special Access for Price Cap Local Exchange Carriers, Report and Order and Further Notice of Proposed Rulemaking*, 27 FCC Rcd. 16318 (2012) (“*Special Access Data Request Order*”).

³ *Id.* ¶ 1.

economic sector, including financial services, manufacturing, retail, healthcare, education, and government.⁴ It is therefore not surprising that incumbent LECs' unreasonably high special access prices have inflicted substantial harm on the U.S. economy. In fact, overpricing of incumbent LEC special access has diminished investment, stifled innovation, and suppressed competition in the business broadband market, and has thereby deprived American businesses and consumers of billions of dollars in economic output and hundreds of thousands of jobs.⁵ And these harms continue today.

The FCC has nevertheless failed to address incumbent LECs' excessive special access prices for more than a decade. The Commission's primary justification for this delay has been lack of "an evidentiary record that is sufficient to evaluate current conditions in the special access market."⁶ The FCC explained to the D.C. Circuit that it can "make no decisions about

⁴ See Brief of Petitioners in Support of Petition for Writ of Mandamus, *COMPTTEL v. FCC*, Case No. 11-1262, at 4-6 (D.C. Cir. Jan. 13, 2012).

⁵ See, e.g., Susan M. Gately and Helen E. Golding, S.M. Gately Consulting LLC, *The Benefits of a Competitive Business Broadband Market*, at ii (Apr. 2013), available at <http://thebroadbandcoalition.com/storage/benefits-of-broadband-competition.pdf> (finding that prompt adoption of special access reform and other "policies that fix the known shortcomings in the present regulatory structure can be expected to stimulate the hiring of as many as 650,000 new employees into the ranks of the telecom sector over the next five years and the investment of an additional \$184-billion in private funds into U.S. telecommunications networks"); see also *id.* at 15-21; Letter from Maura Corbett, Spokesperson, NoChokePoints Coalition, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Mar. 14, 2011), Attachment, Stephen E. Siwek, Economics Incorporated, *Economic Benefits of Special Access Price Reductions*, at 3 (Mar. 2011) (finding that "a 50% reduction in [s]pecial access prices would result in a \$20-\$22 billion increase in U.S. output, a \$4.4-\$4.8 billion increase in employee earnings, an increase of between 94,000 and 101,000 jobs and an increase in value added to the U.S. economy of between \$11.8-\$12.4 billion"); Lee L. Selwyn *et al.*, Economics and Technology, Inc., *Special Access Overpricing and the U.S. Economy* (Aug. 2007), attached as "Attachment B" to Comments of Ad Hoc Telecommunications Users Committee, WC Dkt. No. 07-97 (filed Aug. 31, 2007).

⁶ Opposition of Federal Communications Commission to Petition for Writ of Mandamus, *COMPTTEL v. FCC*, Case No. 11-1262, at 1 (D.C. Cir. Oct. 6, 2011) ("FCC Mandamus Opposition Brief"); see also *Special Access Data Request Order* ¶ 69 ("[T]here is insufficient

revising its special access rules [until] it has compiled and analyzed an adequate evidentiary record.”⁷ The incumbent LECs have agreed with the Commission’s view and repeatedly called for the FCC to undertake a comprehensive data collection effort in this proceeding.⁸ Most recently, the incumbent LECs have warned that the Commission cannot “grant relief first and collect data afterwards.”⁹ Thus, by the terms of the FCC’s and the incumbent LECs’ own logic,

evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market.”).

⁷ FCC Mandamus Opposition Brief at 19. The Joint Commenters have explained that the docket in this proceeding contains ample evidence to support the adoption of regulations that prevent incumbent LECs from utilizing volume and term special access arrangements as a means of excluding competitors from the relevant special access markets. *See* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 11-47 (filed Feb. 11, 2013) (“Joint Commenters’ Comments”); Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 5-13 (filed Mar. 12, 2013) (“Joint Commenters’ Reply Comments”). Nevertheless, as discussed in Part II.A below, to the extent that the Commission determines that it lacks sufficient record evidence to adopt such regulations, the proposed data request will yield information that is necessary to assess the optimal means of preventing incumbent LECs from engaging in exclusionary conduct in the provision of special access services.

⁸ *See, e.g.*, Letter from Jeffrey S. Lanning, Assistant Vice President – Federal Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed July 25, 2012) (“support[ing] the idea that the Commission should issue a mandatory data request in the special access docket to develop a full understanding of markets for [special access] services”); Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed July 31, 2012) (“The Commission needs to receive data from all participants in the marketplace for [special access] services, including cable companies and other providers that are offering competitive alternatives to ILEC special access. The Commission should be explicit in its data request that responses are mandatory and that there will be remedies for those that do not respond.”); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 11 (filed Mar. 28, 2012) (arguing that “if the Commission is determined to move forward with this rulemaking proceeding, it should promptly issue new data requests”).

⁹ Reply Comments of AT&T Inc., WC Dkt. No. 05-25, at 49 (filed Mar. 12, 2013) (“AT&T Reply Comments”); *see also* Reply Comments of Verizon and Verizon Wireless, WC Dkt. No. 05-25, at 25 (filed Mar. 12, 2013) (“Verizon Reply Comments”) (“The Commission should not regulate before completing its data collection and analysis.”); Reply Comments of CenturyLink, Inc., WC Dkt. No. 05-25, at 18 (filed Mar. 12, 2013) (“CenturyLink Reply Comments”) (“The

the information collection proposed in the *Special Access Data Request Order* is necessary to assess the reasonableness of incumbent LECs' special access prices. Indeed, as Verizon's own experts have stated, this data gathering effort will "dramatically improve [the FCC's] understanding of the competitive dynamics of markets for [special access] services."¹⁰ And the requested data "is necessary to perform even the most basic assessment of competitive issues, including market definition."¹¹

Accordingly, there can be no dispute that the information sought in the special access data request is necessary for the proper performance of the FCC's functions and will be of practical utility, as required by the PRA.¹² In particular, as discussed in Part II.A below, the required information will be of practical utility to the Commission in determining the relevant special access markets in which the incumbent LECs possess market power and the extent to which incumbent LECs have been exercising that market power by charging special access rates that violate Sections 201(b) and 202(a) of the Communications Act.¹³ Moreover, as discussed in Part II.B below, the FCC's estimate of the burden posed by the special access data request on respondents is generally accurate, and the hourly burden is nowhere near the wildly unrealistic estimates proffered by some incumbent LECs. In all events, given the harms caused by incumbent LECs' overpricing of special access services and the Commission's and the

Commission is exactly right: it should not and may not intervene further in this marketplace until after it has collected and analyzed all relevant data.").

¹⁰ Declaration of Kevin W. Caves and Jeffrey A. Eisenach ¶ 49, *attached as* Attachment A to Verizon Reply Comments.

¹¹ *Id.* ¶ 50.

¹² *See* 44 U.S.C. § 3506(c)(3)(A).

¹³ 47 U.S.C. §§ 201(b), 202(a).

incumbent LECs' position that these harms cannot be addressed without collecting additional information, the practical utility of the information collection justifies the overall burden of the collection. The FCC can nevertheless minimize the burden of the special access data request on respondents by eliminating questions regarding "best efforts" business broadband Internet access services. As explained in Part II.C below, it is not necessary for the Commission to collect data on "best efforts" services because, among other reasons, those services do not belong in the same product market as special access services.

II. DISCUSSION

A. Collection Of The Information Sought In The Special Access Data Request Is Necessary For The Proper Performance Of The FCC's Functions.

In the *PRA Notice*, the Commission seeks comment on "whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information [will] have practical utility."¹⁴ In determining whether the requested information will have "practical utility" under the PRA, the Office of Management and Budget ("OMB") will "take into account whether the agency demonstrates actual timely use for the information . . . to carry out its functions."¹⁵ There is no question that the information the Commission seeks to collect in the special access data request is necessary for the FCC to carry out its responsibilities. As discussed herein, that information will be of practical utility to the Commission in performing one of its primary functions—enforcing Sections 201(b) and 202(a) of the Communications Act.

The FCC has a duty to ensure that common carriers provide interstate communication services at rates, and on terms and conditions, that are just and reasonable and not unjustly or

¹⁴ See *PRA Notice*; see also 44 U.S.C. § 3506(c)(2)(A)(i).

¹⁵ 5 C.F.R. § 1320.3(l).

unreasonably discriminatory pursuant to Sections 201(b) and 202(a) of the Act, respectively. These statutory provisions apply to incumbent LECs' provision of interstate special access services. The Commission enforces Sections 201(b) and 202(a) by defining practices that run afoul of carriers' obligations via rulemakings, such as the special access rulemaking proceeding,¹⁶ and adjudications.¹⁷ Enforcement of these provisions is central to the Commission's consumer protection function.¹⁸ As the FCC has held, "Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years."¹⁹

As the Commission explained in the *Competitive Carrier Orders* and subsequent orders, firms with substantial and persisting market power²⁰ have the incentive and ability to charge rates that are unreasonably high and/or unreasonably discriminatory in violation of Sections 201(b) and/or 202(a) of the Act.²¹ In order to determine whether incumbent LECs have market

¹⁶ See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶ 2 (2005) (seeking comment on the steps the FCC should take to ensure that rates for special access services are just and reasonable after the expiration of the CALLS plan).

¹⁷ See *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 15 (1998).

¹⁸ See *id.* ¶¶ 15-18.

¹⁹ *Id.* ¶ 15.

²⁰ The Commission has defined "market power" as the "power to control price." See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C.2d 1, ¶ 54 (1980) ("*Competitive Carrier First Report and Order*").

²¹ See, e.g., Final Answer Brief of Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 7-8 (10th Cir. Mar. 18, 2011) (citing *Competitive Carrier First Report and Order* ¶¶ 46-54) (explaining that unlike firms with market power, firms lacking market power do not have the ability or

power and are exercising that market power by charging rates that are unreasonable or unreasonably discriminatory in violation of Sections 201(b) or 202(a), the Commission must define the relevant product and geographic markets and assess the level of incumbent LEC market power in those markets.²² Under this market power analysis, the FCC examines a number of factors including, among others, market shares of the relevant participants, the likelihood of potential entry, the level of demand elasticity, and the cost structure, size and resources of the incumbent LECs.²³ For numerous reasons, the vast majority of the information sought in the special access data request will be of practical utility in conducting this market power analysis.

First, the Commission proposes to collect data from both competitive providers and incumbent LECs regarding the prevalence and location of facilities that are capable of providing special access services.²⁴ This information will assist the Commission in measuring competitive

incentive to price their services unreasonably or discriminate among customers unjustly in violation of Sections 201(b) or 202(a) of the Act); *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 4 (1995) (same).

²² See, e.g., *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, ¶ 37 (2010) (“*Phoenix Order*”) (explaining that “the Commission’s market power analysis [i]s designed to identify when competition is sufficient to constrain carriers imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions”).

²³ See, e.g., *id.* ¶ 44 & n.144.

²⁴ See *Special Access Data Request Order*, Appendix A, Questions II.A.3-5 (requesting that competitive providers submit information regarding the locations to which they own or lease facilities that can be used to provide special access services and maps of those facilities); *id.*, Question II.A.7 (requesting that competitive providers submit information regarding the wire centers in which they are collocated); *id.*, Questions II.B.2-3 (requesting that incumbent LECs provide information regarding the locations to which they own or lease facilities that can be used to provide special access services); see also *id.*, Question II.E.2 (requesting that mobile wireless service providers report information regarding the facilities that connect to their tower sites). Gathering facilities data at the building or tower level is necessary because the Commission has

providers' share of the facilities that have been deployed to business locations and are being used or can be used to provide special access services. The requested facilities data will also respond to incumbent LECs' concerns that the FCC "lacks the data to make an informed decision about the full extent of competitive alternatives to ILEC special access services."²⁵ Indeed, given that ownership of the only wire connection serving most commercial buildings forms the basis of incumbent LEC market power in the provision of special access services, data regarding local transmission facilities owned and controlled by incumbent LECs and their competitors is central to the special access market analysis.

Second, the FCC proposes to collect information that would be used to assess the circumstances in which it is efficient for competitive providers to construct new facilities to additional business locations in the future. This includes data from competitive providers such as (1) the business rules they use to determine whether to construct facilities to a location;²⁶ (2) maps of their existing fiber networks;²⁷ and (3) the business rules they use to determine whether to submit a bid in response to a request for proposal.²⁸ The Commission also requests historical information regarding competitors' deployment of new facilities at a sample of locations, which will "help [the Commission] understand how competitive facilities are deployed over time and whether the presence of competitive facilities in fact provides a threat of competitive entry in

found that "[c]ompetition in the provision of special access appears to occur at a very granular level—perhaps as low as the building/tower." *Special Access Data Request Order* ¶ 22.

²⁵ See, e.g., AT&T Reply Comments at 39-40; see also *id.* at 52 (asserting that the Commission "does not yet have the data necessary to determine the ILECs' market shares").

²⁶ See *Special Access Data Request Order*, Appendix A, Question II.A.8.

²⁷ See *id.*, Question II.A.5.

²⁸ See *id.*, Question II.A.11.

nearby or adjacent areas.”²⁹ Collecting this type of information, which indicates the extent to which incumbent LECs face potential competition in the relevant geographic and product markets, will address incumbent LECs’ demands that the FCC “look not only at the competitive alternatives available to customers today, but also at new sources of supply that competitors have planned or that are likely to become available going forward.”³⁰

Third, the Commission proposes to collect data regarding the prices that both competitive providers and incumbent LECs charge for special access services at retail and wholesale and the volume of special access services they sell at those prices.³¹ This data “will allow comparisons of different providers’ prices, after controlling, where necessary, for differences in cost-causing

²⁹ *Special Access Data Request Order* ¶ 34.

³⁰ Comments of Verizon, WC Dkt. No. 05-25, at 3 (filed Feb. 11, 2013) (“Verizon Comments”); *see also* *Special Access Data Request Order* ¶ 48 (“[W]e agree with commenters who argue that to understand the impact of competition for special access, it is important to grasp the effects of potential, as well as actual, competition.”).

³¹ *See* *Special Access Data Request Order*, Appendix A, Questions II.A.12-14 (requesting that competitive providers submit information regarding the prices that they charge their customers for special access services); *id.*, Questions II.A.15-16 (requesting that competitive providers submit information regarding their revenues from the sale of special access services); *id.*, Questions II.B.4-6 (requesting that incumbent LECs provide information regarding the prices that they charge their customers for special access services); *id.*, Questions II.B.8-11 (requesting that incumbent LECs provide information regarding their revenues from the sale of special access services); *id.*, Question II.B.7 (requesting that incumbent LECs provide information regarding the type of rate regulation (*e.g.*, price cap, Phase I pricing flexibility, Phase II pricing flexibility) that applies to each wire center in which they sell special access services); *see also* *id.*, Question II.D.2 (requesting that all providers submit information regarding where their rates are recorded (*e.g.*, in tariffs or in documents that are not publicly available)). To ensure that the pricing information it collects accurately reflects the prices that are actually being paid in the marketplace, the Commission asks purchasers of special access services to report pricing information as well. *See id.*, Questions II.F.2-7 (requesting that purchasers of special access services report information regarding their special access expenditures). The Commission also requests information on adjustments, rebate, or true-ups that may affect the prices ultimately paid by purchasers. *See id.*, Question II.A.13; *id.*, Question II.B.5.

factors”³² (e.g., sales volume).³³ For example, the Commission will be able to compare incumbent LECs’ wholesale prices for packet-mode special access services with the wholesale prices charged by other incumbent LECs and by competitors, and with the retail prices charged by incumbent LECs and competitors for these services. In addition, the agency will be able to compare incumbent LECs’ prices for DS1 and DS3 special access services with the cost-based prices for DS1 and DS3 unbundled network elements. By making such comparisons, the FCC will be able to assess whether incumbent LECs are exercising market power by charging special access prices that are unjust, unreasonable, or unjustly or unreasonably discriminatory in violation of Sections 201(b) or 202(a) of the Act.

Fourth, the Commission requests information regarding the terms and conditions pursuant to which providers sell special access services.³⁴ This information will allow the FCC to properly account for discounts associated with various terms and conditions when analyzing the special access pricing data it receives. This information will also assist the Commission in assessing the level of demand elasticity in the relevant geographic and product markets because the terms and conditions in incumbent LEC special access purchase arrangements (*i.e.*, tariffs,

³² *Special Access Data Request Order* ¶ 36.

³³ *See id.* ¶ 38 (stating that “among other things, sold or purchased volumes and volume density are a key driver of special access costs”).

³⁴ *See id.*, Appendix A, Questions II.A.17-19 (requesting that competitive providers report information regarding the terms and conditions pursuant to which they sell special access services); *id.*, Questions II.B.12-13 (requesting that incumbent LECs report information regarding the terms and conditions pursuant to which they sell special access services); *id.*, Questions II.F.8-14 (requesting that purchasers of special access services provide information regarding the terms and conditions pursuant to which they purchase such services).

contract tariffs, and commercial agreements) affect a purchaser's ability to switch from an incumbent LEC to an alternative provider of special access.³⁵

Moreover, the requested information will assist the Commission in studying the harms to competition caused by the exclusionary terms and conditions under which incumbent LECs offer circuit portability, term discounts and other aspects of their special access offerings. This inquiry is central to identifying the circumstances in which such terms and conditions violate Section 201(b) of the Act. In particular, while the Joint Commenters and other purchasers of special access services have provided extensive and dispositive proof that the terms and conditions in incumbent LEC special access purchase arrangements harm competition by locking up demand,³⁶ the incumbent LECs insist that these terms and conditions are reasonable.³⁷ To the extent that the Commission believes it lacks sufficient information to evaluate the incumbent LECs' claims, collecting information on special access terms and conditions will assist the FCC in doing so.

Finally, the scope of the information requested by the Commission, in terms of the time period and the type of services covered, is also of practical utility. As the FCC has explained, collecting the requested information for calendar year 2012 will enable it to "obtain the most up-to-date data available while still providing respondents a reasonable [amount of] time to gather and submit their data," and gathering 2010 data is useful because "a two year period between

³⁵ See *Special Access Data Request Order* n.76.

³⁶ See *supra* note 7. As explained above, the Joint Commenters do not believe that further data collection is required for the Commission to provide immediate relief from incumbent LECs' exclusionary, lock-up special access purchase arrangements. If the Commission disagrees with this assertion, however, collecting the information discussed herein is necessary to determine how best to address incumbent LEC exclusionary conduct in the provision of special access services. See *id.*

³⁷ See, e.g., Verizon Reply Comments at 19-28; CenturyLink Reply Comments at 17-30.

observations is more likely to include changes in the relevant variables than a one year period.”³⁸ Collecting information for these two non-consecutive years will also allow the Commission to examine whether and how competition develops (or, more accurately, does not develop) over time in special access markets. Moreover, gathering information for only two calendar years “appropriately balances the need for time series data with the burden [on respondents] of producing data for multiple years.”³⁹

Furthermore, collecting the information described above for both circuit-based special access services (*e.g.*, DS1 and DS3 services) and packet-based special access services (*e.g.*, Ethernet services) is fully consistent with the FCC’s obligation to ensure that rates, terms, and conditions for *all* special access services comply with the requirements of Sections 201(b) and 202(a) of the Act. Given that an increasing number of business customers are demanding packet-mode special access services,⁴⁰ the Commission cannot conduct a comprehensive assessment of special access competition without gathering data on such services. Collecting the requested information for incumbent LEC packet-based special access services is especially important because the vast majority of those services are not tariffed.⁴¹ As a result, the Commission often lacks the most basic information regarding the rates, terms, and conditions on

³⁸ *Special Access Data Request Order* ¶ 27.

³⁹ *Id.*

⁴⁰ *See* Joint Commenters’ Reply Comments at 15 & n.40.

⁴¹ *See* 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 Docket No. 05-25, at 9-18 (filed Nov. 2, 2012) (“Ad Hoc *et al.* Petition to Reverse Forbearance”) (describing how the FCC eliminated the dominant carrier pricing and tariffing obligations applicable to the packet-based special access services offered by Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest).

which incumbent LECs offer packet-based special access services relative to competitive providers, and the FCC is therefore frequently unable to assess incumbent LECs' implausible claims that they face sufficient competition to ensure that these rates, terms, and conditions are just and reasonable.⁴²

B. The FCC's Burden Estimate Is Generally Accurate And The Overall Burden Of The Special Access Data Request Is Justified By Its Practical Utility.

In the *PRA Notice*, the Commission estimates that it will take respondents on average 134 hours to complete the special access data request, and it seeks comment on that estimate.⁴³ Most of the Joint Commenters have found that this burden estimate is fairly accurate.

For example, tw telecom has estimated that it would take roughly between 115 and 130 hours to respond to the data request. This estimate includes time to gather the requested data from tw telecom's systems, supplement and "scrub" that data, supply the requested network maps, provide the requested latitude and longitude information, and provide narrative responses to the questions posed in the data request that require such a response. Similarly, BT has found that it would take between 100 and 120 hours to respond to the data collection, and Cbeyond has found that the FCC's estimate of 134 hours is a reasonable approximation.

Some of the Joint Commenters' burden estimates are higher than that of the Commission. For instance, Integra has determined that it would take roughly 260 hours to respond to the data

⁴² See, e.g., Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 1 (filed June 13, 2012) (asserting that "[t]he Ethernet Marketplace is robust and intensely competitive"); Letter from Linda Vandeloop, Director, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 6-7 (filed Apr. 27, 2012) ("The Ethernet Marketplace is Intensely Competitive and Became Even More So in 2011[.]"); Comments of CenturyLink, Inc., WC Dkt. No. 05-25, at 18 (filed Feb. 11, 2013) ("CenturyLink Comments") (claiming that "the marketplace for these more advanced services is competitive"); Verizon Comments at 11 ("Competition for Ethernet services . . . constrains pricing for traditional special access.").

⁴³ See *PRA Notice*.

collection. In addition, EarthLink has estimated its burden to be roughly 320 hours in part because EarthLink has made seven acquisitions since December 2010, and the relevant data associated with each acquired entity is still being integrated onto a single operations support system.

In all events, the overall burden posed by the special access data request is substantially lower than that claimed by the largest incumbent LECs. Indeed, Verizon's preliminary estimate of more than 15,000 hours⁴⁴ appears to be designed solely to bolster its advocacy against employing a market power analysis in this proceeding.⁴⁵ And, in light of the estimates provided above, CenturyLink's estimate of "about 40,000 hours"⁴⁶ to complete the special access data request hardly seems credible.

Nor should there be any dispute that the overall burden of the special access data collection is justified by its practical utility.⁴⁷ As discussed above, incumbent LECs' excessive special access prices have had far-reaching, harmful effects on the U.S. economy for more than a decade, and the Commission has repeatedly stated that it cannot address these harms until it has what it believes is a full evidentiary record. Nor can the FCC identify the relevant markets

⁴⁴ See Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 3 (filed Oct. 2, 2012).

⁴⁵ See, e.g., Verizon Reply Comments at 2 (urging the FCC not to rely on a market power framework to analyze special access competition); *id.* at 8-12 (describing "factor[s] weighing against the use of a market power analysis").

⁴⁶ See Letter from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Jan. 10, 2013) ("CenturyLink has reviewed the FCC's Data Request in the above-captioned proceeding. . . . CenturyLink estimates that the burden hours to comply with the data request will be about 40,000 hours.").

⁴⁷ See 5 C.F.R. § 1320.5(e) (providing that, in determining whether the proposed information collection is necessary for the proper performance of the agency's functions, OMB will consider "whether the burden of the collection of information is justified by its practical utility").

which should be free of regulation without the requisite data.⁴⁸ For this reason, even CenturyLink—which anticipates spending 40,000 hours on the information collection—has urged the FCC to “enforce its mandatory comprehensive data collection” to “obtain[] a useful and comprehensive data set.”⁴⁹

C. The FCC Can Minimize The Burden On Respondents By Removing Questions About “Best Efforts” Services From The Special Access Data Request.

In the *PRA Notice*, the Commission seeks comment on “ways to minimize the burden of the collection of information on the respondents.”⁵⁰ Although the overall burden of the special access information collection is outweighed by its practical utility, the FCC can nevertheless minimize the burden on respondents by removing questions regarding “best efforts” business broadband Internet access services from the proposed data request. The Commission should do so for a number of reasons.

First, it is not necessary to gather data on “best efforts” business broadband Internet access services because those services are not viable substitutes for special access services. As purchasers of special access services have explained, “[a]ll special access services have two definitional characteristics which distinguish them from best efforts business broadband Internet access services.”⁵¹ The first is that “special access connections are, by definition, dedicated to

⁴⁸ See *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd. 10557, ¶ 104 (2012) (stating that “once [it has] performed a broader evaluation of competitive conditions, . . . the Commission may ultimately conclude that it is appropriate to grant regulatory relief”) (emphasis added).

⁴⁹ CenturyLink Comments at 6 & 8.

⁵⁰ *PRA Notice*.

⁵¹ Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, at 11 (filed Feb. 11, 2013).

the exclusive use of the customer” and thus “guarantee[] that the minimum bandwidth they purchase will always be available when they want to use it.”⁵² The second is that special access services originate and terminate at locations chosen by the customer, not the service provider.⁵³ “By definition, best efforts business broadband Internet access services take customers to the Internet . . . via the carrier’s choice of Internet access point,” and “they cannot provide a dedicated connection between two premises designated by the customer,” such as a retailer’s point-of-sale terminal and an off-site data storage facility.⁵⁴ For these reasons, among others, existing purchasers of dedicated special access services do not view “best efforts” services as suitable alternatives,⁵⁵ and “best efforts” services do not belong in the same product market as

⁵² *Id.*

⁵³ *See id.* at 12.

⁵⁴ *Id.*

⁵⁵ *See, e.g.,* Declaration of Kevin F. Brand on Behalf of EarthLink, Inc. ¶ 9, *attached as* Appendix D to Joint Commenters’ Comments (“In light of the demands of business customers that purchase special access services (*e.g.*, their need for dedicated bandwidth) and the differences between special access services and ‘best efforts’ Internet access services, I do not believe that the vast majority of businesses currently purchasing special access services view ‘best efforts’ Internet access services as a viable substitute.”); Declaration of James A. Anderson ¶ 10, *attached as* Exhibit 1 to Comments of XO Communications, LLC, WC Dkt. No. 05-25 (filed Feb. 11, 2013) (“Special access and Ethernet services are usually sold with quality of service guarantees. ‘Best efforts’ Internet broadband access or transport services do not offer those same guarantees and typically do not appeal to XO’s customers, other carriers, mid-sized and large businesses, and enterprises.”); Letter from Joshua M. Bobeck, Counsel for PAETEC, and Thomas Cohen, Counsel for XO Communications, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 24-25 (filed May 28, 2010) (“The available evidence in the record indicates that most customers of special access service do not view HFC-based services as substitutes for special access services because HFC networks are not capable of providing the features demanded by special access customers such as guaranteed bandwidth and service level agreements.”). In light of this record evidence, it is not surprising that AT&T fails to provide any support for its claim that “the evidence shows that many business customers are willing to switch from DSn-based service to ‘best efforts’ services provided by cable companies.” *See* AT&T Reply Comments at 18. Nor does Verizon offer any support for its assertion that business customers “appear to be accepting” “best efforts” services as alternatives to special access. *See* Verizon Comments at 23.

special access services.⁵⁶ Therefore, collecting information on “best efforts” services is not necessary or useful to the Commission in conducting the market power analysis described above.

Second, if gathering data on the availability and pricing of “best efforts” services was truly necessary to assess competition in the provision of special access services, the FCC would have requested such information in its recent data requests in the CenturyLink forbearance petition proceeding. But it did not. In fact, as part of its effort to collect data showing whether there is sufficient competition in the provision of packet-based special access services in the legacy CenturyTel and Embarq territories to grant forbearance, the Commission did not ask CenturyLink or interested parties to submit *any* information on their “best efforts” services.⁵⁷

Third, if collecting information on “best efforts” services was actually necessary for the Commission’s market power analysis in this proceeding, the Commission would require *all* respondents to provide such information. But it is not proposing to do so. Instead, the FCC is proposing to require only those service providers that voluntarily submitted data in connection

⁵⁶ See, e.g., Joint Commenters’ Comments at 50-57; Sprint Comments at 20-23; Ad Hoc *et al.* Petition to Reverse Forbearance at 39-40 & nn.125-126. Notably, the parties now supporting the collection of data on “best efforts” services have previously “argued that best efforts broadband Internet access services—even when marketed to small- to medium-sized business customers—are not part of the relevant product market.” See *Special Access Data Request Order* ¶ 17 (citing AT&T and Verizon comments). For example, in 2010, AT&T argued that there are such “important differences” between DS1 special access services, on the one hand, and “best efforts” “DSL, FiOS, U-Verse, and cable modem services,” on the other hand, that prices for the two types of services are “incomparable.” Reply Comments of AT&T Inc., WC Dkt. No. 05-25, Appendix A, at 6-7 (filed Feb. 24, 2010) (“AT&T 2010 Reply Comments”). Now, however, AT&T claims that “[t]he mere fact that the cable companies’ ‘best efforts’ services may have some quality differences from the ILECs’ services does not mean that the two services must be in separate product markets.” AT&T Reply Comments at 18. AT&T cannot have it both ways—“either the prices are incomparable, or the services are in the same product market.” AT&T 2010 Reply Comments at 7.

⁵⁷ See Letter from Julie A. Veach, Chief, Wireline Competition Bureau, FCC to Craig J. Brown, Associate General Counsel, CenturyLink, DA 13-339, Attachment, “Information, Data, and Document Request” (rel. Mar. 5, 2013); *Competition Data Requested in CenturyLink Forbearance Petition*, Public Notice, DA 13-337 (rel. Mar. 5, 2013).

with the State Broadband Initiative (“SBI”) Grant Program to report information on the availability and pricing of their “best efforts” services.⁵⁸

Finally, while limiting the scope of the “best efforts” information collection in this manner reduces the burden for carriers that did not submit data in connection with the SBI Grant Program, it penalizes those that did. For example, under the terms of the proposed data request, if a service provider voluntarily submitted a rough approximation of the areas where it offered “best efforts” broadband Internet access services to the SBI grantees in 2010, it is now required to provide the Commission with “a list of all the census blocks in which [it was] providing Best Efforts Business Broadband Internet Access Services as of December 31, 2010.”⁵⁹ In addition, service providers that submitted data in connection with the SBI Grant Program for 2010 and 2012 are also required under the proposed data request to provide a list of prices for the “best efforts” services they were marketing in each census block as of December 31, 2010⁶⁰ and December 31, 2012⁶¹ even though such pricing information was never requested by the SBI grantees.

III. CONCLUSION

For the foregoing reasons, the FCC should proceed with its proposed mandatory special access data request. The Commission can, however, minimize the burden on respondents by removing questions about “best efforts” services from the proposed request.

⁵⁸ See *Special Access Data Request Order* ¶ 46.

⁵⁹ *Id.*, Appendix A, Question II.C.2.c.ii.

⁶⁰ *Id.*

⁶¹ *Id.*, Question II.C.2.d.i-ii.

Respectfully submitted,

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