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

In the Matter of	)	
	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247
	)	
	)	

ORDER INITIATING INVESTIGATION AND DESIGNATING ISSUES FOR INVESTIGATION

Adopted: October 16, 2015 **Released: October 16, 2015**

By the Chief, Wireline Competition Bureau:

TABLE OF CONTENTS

I. INTRODUCTION

1. By this Order, the Wireline Competition Bureau (Bureau) initiates an investigation into the terms and conditions of certain incumbent local exchange carrier (LEC) tariff pricing plans of AT&T, CenturyLink, Frontier, and Verizon for business data services (or special access services)[1] that competitive LECs allege are unreasonable, anticompetitive, and lock up the vast majority of the demand for TDM-based business data services – assertions that the incumbent ILECs have disputed.[2] With substantial advocacy in the record on both sides of the issues, we believe that a more systematic inquiry into the tariff pricing plans in question is needed before any determination on the merits can be made. By initiating this investigation, the Bureau intends to gather sufficient information to enable the full Commission to decide whether and how to resolve these allegations.

2. *Background on TDM-based Special Access Services under Tariffs*. This investigation concerns only a subset of specialized telecommunications services that continue to operate under tariffs. Incumbent LECs have long been and in certain areas continue to be dominant providers of TDM-based business data services and thus have always been subject to price regulation and tariffing requirements for the provision of these services.[3] TDM-based business data services such as DS1 and DS3 channel terminations are the dedicated (usually copper) circuits that many business and other institutional users continue to rely on for their data and other communications needs. Despite the growth of newer technologies, preliminary analysis of the Commission's special access data collection shows that revenues from such TDM services continue to make up in the range of sixty percent of the roughly $40 billion

[1] Business data services, also known as special access services, include services that employ dedicated transmission facilities, including time-division multiplexed (TDM) or packet-based facilities, and that do not use local switches. Such services are typically purchased by business, governmental, educational, medical and other institutions to meet their data and other communications needs.

[2] This investigation is based on the record generated in the Commission's special access proceeding, WC Docket No. 05-25, and concerns a set of issues that have been and continue to be a principal focus of that proceeding. The investigation, however, is being initiated and will be conducted as a separate proceeding with its primary focus on the reasonableness of the tariff pricing plans designated in this Order.

[3] In contrast, the consumer broadband internet access services provided by price cap carriers that are at issue in the Commission's Open Internet proceeding are not subject to rate regulation. *See Protecting and Promoting the Open Internet,* GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5610, para. 25 (defining broadband Internet access services), 5612, paras. 37, 38 (applying a "light-touch" approach that limits application of Title II regulatory provisions), 5841-45, paras. 497, 505 (forbearing from sections 203, 204, and 205) (2015).

annual special access market. In their provision of TDM-based special access services, incumbent LECs remain subject to dominant carrier regulation, including the Commission's tariffing requirements.[4] Unlike certain optical or packet-based business data services like Ethernet, incumbent LECs' TDM-based business data services have not been the subject of Commission forbearance.

3. Market statistics underscore the continued unique role that incumbent LECs play in the provision of TDM-based special access services such as DS1 and DS3 channel terminations, at least on a nationwide basis. Preliminary review of the results of the Commission's special access data collection shows that as of 2013 incumbent LECs received roughly three-quarters of the approximately $20 billion in annual revenues from the sales of DS1 and DS3 channel terminations, and received close to two-thirds of all revenue from TDM sales.[5] When provided to competitive LECs and to other carriers, for example as an input into either their retail business or mobile wireless services, the use of business data services can have a direct impact on the customers of chains or other multi-location businesses that rely on seamless communications between their different geographic locations or, in the wireless marketplace, on the strength of competition that brings them new products or lower prices.

4. While competitors continue to expand their market presence by building IP-based facilities or extending purchased TDM based facilities to additional buildings, preliminary results from the Commission's data collection show that incumbent LECs remain the sole facilities-based provider of TDM-based special access services to a majority of business locations that demand or are likely to demand business data services nationwide.[6]

5. These nationwide data points find support in the experiences of particular competitive LECs. tw telecom asserts that "ILECs control the only last mile facilities serving the vast majority of business customer locations."[7] Similarly, Windstream asserts that Level 3 and XO serve 30,000 and 4,000 commercial buildings, respectively, a small fraction of their estimate of 3.5 million business locations nationwide that house more than one business.[8] XO states that "[i]n virtually all markets in

---

[4] Incumbent LECs file and maintain tariffs with the Commission specifying the rates, terms, and conditions governing access service offerings, including their TDM-based special access service offerings, unless the Commission forbears from applying these requirements. *See generally Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report and Order, 85 FCC2d 1 (1980).

[5] Commission staff is conducting a more detailed analysis of the special access data collection and has made the results of the data collection available for review by the public. *See* Press Release, FCC, FCC Takes Major Step in Review of Competition in $40 Billion Special Access market (Sept. 17, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0917/DOC-335352A1.pdf. Windstream cites industry figures that show that incumbent LECs control nearly 82 percent of local wholesale transport and a higher percent of last-mile access to commercial buildings. Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25 and RM-10593 at 3 (filed Sept. 24, 2015) (Windstream Sept. 24, 2015 *Ex Parte* Letter) (citing Atlantic-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report* (Sept. 2014)).

[6] *See Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*Data Collection Order*); Report and Order, 28 FCC Rcd 13189 (Wireline Comp. Bur. 2013) (*Implementation Order*); Order on Reconsideration, 29 FCC Rcd 10899 (Wireline Comp. Bur. 2014) (*Reconsideration Order*); Order, 29 FCC Rcd 14346 (Wireline Comp. Bur. 2014) (*Extension Order*).

[7] *See, e.g.,* Letter from Thomas Jones, Attorney for tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 3-4 (filed June 5, 2012) (tw telecom June 5, 2012 *Ex Parte* Letter).

[8] *See* Windstream Sept. 24, 2015 *Ex Parte* Letter at 2-3.

which XO operates, price cap LEC facilities retain a unique level of network coverage such that the clear majority of XO's special access requirements must be obtained from the price cap LECs."[9]

6. *Overview of Allegations*. Competitive LECs allege that incumbent LEC business data services tariff pricing plans incorporate a complicated web of all-or-nothing bundling, loyalty and term commitments, complex enforcing penalties, circuit migration rules and other provisions. They assert that the effect is to lock up substantial proportions of carrier and end-user demand, which locks out competition for such demand and consequently harms both competition and innovation. It is alleged that constrained competition not only keeps prices higher than they would otherwise be, but that the lock-up slows innovation, including the use of new IP-based products; limits investment in new networks; and even hampers competition in the closely-related mobile marketplace. These results are alleged to result, in part, from the continued reliance by competitive LECs and their customers on tariffed, incumbent business data services. In other words, competitive LECs assert that, in order to compete for customers with any demand for relatively low bandwidth services beyond large downtown areas, they must purchase as wholesale inputs significant amounts of business data services from the local incumbent LEC. They assert further that in practice their only option in making such purchases is to be entangled in a web of terms and conditions that limit significantly their ability to respond to marketplace opportunities to deploy their own infrastructure, which would introduce additional choices for customers. *If true*, the consequences could well be that, despite competitive entry for a segment of the demand for business data services, incumbent LEC dominance over facility-based provision of such services is preserved in many areas and costs for entry or expansion for competitive LECs is increased with the direct result of that dominance being that end-users are deprived of the benefits of both competition and innovation.

7. For example, Level 3 states that "the incumbents use a combination of devices to lock up the market for special access services, shrinking the addressable market for any carrier that wishes to provide service in competition with the incumbent LECs."[10] Windstream asserts that the incumbent LECs use their "overwhelming control … to dictate terms and conditions to disadvantage and raise the costs of their competitors."[11] Sprint states that incumbent LECs' pricing plans "include non-negotiable and anticompetitive terms and conditions that serve to strangle special access competition and therefore ensure the ILEC dominance continues."[12] Level 3 further states that, "[r]egrettably, left largely unchecked, many price cap LECs have been able to use their market dominance to force nearly all of their major customer (many of which are also their competitors) to 'lock-up' 85 to 100% of their existing special access purchases with the price-cap LEC."[13] And the Government Accountability Office observed that "[t]hese types of contracts may inhibit choosing competitive alternatives . . . . Unless a competitor

[9] Letter from Thomas W. Cohen, Counsel, XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM 10-593, at 4-5 (filed Sept. 23, 2015) (XO Sept. 23 , 2015 *Ex Parte* Letter) ("This allows price cap LECs to extract the commitments in the Commitment Plans from XO and other competitive carriers to ensure they can reach the end user locations they wish to serve".).

[10] Letter from Thomas Jones, Counsel to Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Sept. 23, 2015) (Level 3 Sept. 23, 2015 *Ex Parte* Letter). *See also* XO Sept. 23, 2015 *Ex Parte* Letter at 1 (incumbent LEC pricing plans "effectively lock up virtually all of XO's and other competitive carriers' demand for special access services").

[11] Windstream Sept. 24, 2015 *Ex Parte* Letter at 4; *see also* Letter from Paul Margie, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 5 (filed Sept. 23, 2015) (Sprint Sept. 23, 2015 *Ex Parte* Letter) ("In short, the ILEC's control over last-mile access allows it to undermine competition for enterprise landline, enterprise wireless, and integrated wireline and wireless communications services.").

[12] Sprint Sept. 23, 2015 *Ex Parte* Letter at 3.

[13] Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3 Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593, at 2 (filed Feb. 22, 2012) (Level 3 Feb. 22, 2012 *Ex Parte* Letter).

can meet the customer's entire demand, the customer has an incentive to stay with the incumbent . . . even if the competitor is less expensive."[14]

8. Competitive providers further contend that, while these tariff pricing plans are often described as "discount" plans, in reality the pricing they offer is often significantly higher than competitors' pricing for comparable facilities. For example, Level 3 identified a tariffed five year discount rate for a ten mile DS1 circuit from AT&T's Southwestern Bell Telephone Company at a monthly rate of $302.50 whereas a competitor charged a monthly rate of $120.00 for equivalent facilities under a one year commitment.[15] XO states that "circuit rates offered by competitors . . . can be as much as 40-60% less than the discounted price cap LEC rates."[16] Level 3 states that pursuant to an analysis of its DS1 purchases from one incumbent LEC, it determined that it pays the incumbent LEC "approximately $103 million per year for the circuits in question, but it would only pay competitive carriers approximately $86 million per year for those same circuits."[17] Sprint references these plans as "deceptively named 'discount plans.'"[18]

9. Competitors assert that these practices discourage competition, and limit investment and job growth. Comptel states that these plans are "inimical to the development of competition . . . in the multi-billion dollar special access market and undermine[ ] investment in broadband networks."[19] Competitors also assert these practices have a negative impact on end users. Windstream states that "[s]tate and local governments, schools, libraries, healthcare providers, and many small- and medium-sized businesses come out on the short end of the large ILECs' special access [practices]."[20] Sprint also notes the impact these practices have on mobile wireless networks' attempts to meet rapidly escalating demand for wireless data services: "Densification will require Sprint to deploy tens of thousands of new cell sites. Every one of these sites will require additional backhaul – and Sprint and other competitors will depend on both TDM and Ethernet special access more than ever to be able to compete."[21] In addition, the United States Small Business Administration has cited the importance of promoting competition to provide businesses with affordable access and choice regarding the services they need to grow and create new jobs.[22]

---

[14] Government Accountability Office, "FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services," at 30 (GAO-07-80 Nov. 29, 2006) (GAO Report), http://www.gao.gov/products/GAO-07-80.

[15] Level 3 Sept. 23, 2015 *Ex Parte* Letter at 5-6. Level 3 further notes that the competitor's "rate does not include transport charges because the provider does not impose them. Level 3 would be subject to an [early termination fee] if it stopped purchasing the service during the one-year term, but after that period, Level 3 could terminate the service at will without penalty. This would obviate the need for Level 3 to obtain circuit portability, and Level 3 would not have to make a volume commitment."). *Id*. at 6.

[16] XO Sept. 23, 2015 *Ex Parte* Letter at 9.

[17] Level 3 Sept. 23, 2015 *Ex Parte* Letter at 4.

[18] Sprint Sept. 23, 2015 *Ex Parte* Letter at 3.

[19] Letter from Angie Kronenberg, General Counsel, Comptel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Sept. 10, 2014) (Comptel Sept. 10, 2014 *Ex Parte* Letter).

[20] Windstream Sept. 24, 2015 *Ex Parte* Letter at 2.

[21] Sprint Sept. 23, 2015 Ex Parte Letter at 1.

[22] U.S. Small Business Administration Comments, WT Docket No. 12-69, WC Docket Nos. 10-188, 05-25, RM-11358, GN Docket No. 09-51 at 6 (noting the Commission should address issues regarding reasonable rates, terms, and conditions for special access because "[n]ew entrants to the business broadband market may be deterred" and current policies and rules "may be resulting in higher costs and lower quality service for business broadband consumers who could be using those extra resources to grow their businesses and hire more employees."). *See also,*

(continued…)

10. Competitive LECs further allege that the web of lock-up provisions is also inhibiting the transition from TDM-based special access services to packet-based special access services such as Ethernet.[23] They assert that the limitation on investment that results from constraining demand for special access services (that is the market of potential purchasers that can be served by incumbents and competitors alike) impedes the ability of competition to drive the technology transition. They further assert that "exclusionary purchase arrangements delay the adoption of Ethernet and other packet-mode services," by restricting the conditions under which purchasers may migrate their purchase from TDM- to IP-based services.[24] Competitive LECs claim this reduces their ability to invest in IP-based facilities to serve their customers.[25] While, as incumbent LECs have pointed out on various occasions,[26] competitive LECs have had success in obtaining a significant share of the market for Ethernet services, that does not provide a complete answer to the question on whether or not existing terms and conditions on the sale of DS1s and DS3s in question here are delaying the transition to modern services.[27]

11. As with telecommunications markets in general, we note that special access services are undergoing a fundamental transformation as providers transition from TDM-based special access infrastructure and services to packet-based special access infrastructure and services. The Commission has previously sought comment on questions concerning the potential interaction between incumbent LEC pricing plan terms and conditions and the IP transition[28] and is generally exploring ways to foster the IP transition in a manner consistent with its statutory goals in a separate proceeding.[29]

(Continued from previous page)
e.g., Letter from Karen Reidy, Vice President, Regulatory Affairs, Comptel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 5 (filed June 1, 2010) (Comptel June 1, 2010 *Ex Parte* Letter).

[23] The term "Ethernet" is used in this Order to refer to Ethernet and other generally higher capacity or packet-based special access services.

[24] Comments of BT Americas et al., WC Docket No. 05-25, RM-10593, at 41 (filed Feb. 11, 2013) (BT Americas et al. Feb. 11, 2013 Comments). *See also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 2-3 (providing examples that show commitment plans prevent the use of Ethernet services as a substitute for TDM service).

[25] Windstream Sept. 24, 2015 *Ex Parte* Letter at 1. *See also* letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, Attach. at 3 (filed Feb. 27, 2012) (tw telecom Feb. 27, 2012 *Ex Parte* Letter); Sprint Sept. 23, 2015 *Ex Parte* Letter at 8 (referencing "the diversion of scarce financial resources away from competitive infrastructure investment").

[26] *See, e.g.,* Letter from Robert C. Barber, General Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 2 (filed Oct. 10, 2014) (AT&T Oct. 10, 2014 *Ex Parte* Letter).

[27] Letter from Angie Kronenberg, General Counsel, Comptel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 3 (filed July 16, 2014) (Comptel July 16, 2014 *Ex Parte* Letter) ("the high ranking[s] of some competitive LECs on Vertical Systems Group's list of top Ethernet service providers in the U.S. . . . are irrelevant to the Commission's analysis in the special access rulemaking"). Separately, the question of whether and how to modify the existing pricing flexibility rules or adopt a new set of rules that will apply to requests for special access pricing flexibility, currently under review in the pending rulemaking in WC Docket No. 05-25, is distinct from the questions about specific tariff plans designated for investigation in this Order and the effects those plans may or may not have on the IP transition. We accordingly disagree with Verizon's recent suggestion that a review of these plans prior to a complete analysis of the special access data collection would "jump the gun" with respect to that separate rulemaking proceeding. *See* Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (Verizon Oct. 7, 2015 *Ex Parte* Letter).

[28] *See Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al., PS Docket No.14-174 et al.,* Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15014-15, para. 113 (2014) (*Emerging Wireline Network and Services NPRM*). In the past, the Commission similarly has evaluated transition issues through the framework of sections 201 and 202 of the Act. *See, e.g.*, *Administration of the North American Numbering Plan, Carrier Identification Codes (CICs)*, CC Docket No. 92-237, Second Report and Order, 12 FCC Rcd 8024, 8043-44, para. 32 (1997) (determining that a transition is needed, rather than a flash cut to seven
(continued…)

12. At the heart of competitive LECs' concerns with incumbent LECs' terms and conditions are the percentage commitments that are a condition of participation in many incumbent LEC tariff plans. The percentage commitments require purchasers to commit a high percentage of their historical or existing purchases when they enter into an incumbent LEC tariff plan. These commitments commonly range from 80 to 95 percent of the buyer's previous purchase levels. XO asserts that "price cap LECs' Commitment Plans . . . effectively lock up demand not only in areas where the price cap LECs provide the only facilities-based option . . . but extend into those areas where other providers do have network facilities."[30] Competitors allege that these commitments, both by themselves and in conjunction with other terms and conditions that amplify their effect, serve to lock up a large percentage of the demand for these services. Sprint states: "Because the incumbent LECs have long dominated the special access market, customers' current special access purchases from the incumbent typically amount to the vast majority of their total special access purchases."[31] In a joint filing, Cbeyond and other competitive LECs state that percentage commitments "shrink[ ] the addressable market for competitive wholesale special access providers (thereby preventing them from achieving minimum viable scale), and cause[ ] special access prices to remain higher than would otherwise be the case . . . ."[32]

13. Competitive LECs also challenge the assertions by ILECs (summarized below) that the market for DS1s and DS3s is a declining market in absolute terms. Competitive LECs assert that, even with the growth of Ethernet services, TDM-based special access services continue to play an important role in the overall market for special access, both as stand-alone products and as inputs to competitive LEC Ethernet offerings, and are likely to remain the basic building blocks of business data services for the foreseeable future. For example, XO states that its "TDM purchases still represent a significant percentage of XO's in-service DS1 and DS3 circuits as well as its new installs."[33] Windstream states that "many business service customer locations continue to rely on TDM special access services for network connectivity. . . ."[34]

14. Preliminary analysis of the results of the Commission's special access data collection confirms that TDM-based special access services continue to be a significant part of the market for business data services. Initial data show that in 2013, TDM-based special access sales totaled

(Continued from previous page)
digit carrier access codes, and adopting a particular transition as reasonable under sections 201 and 202 of the Act); *Southwestern Bell Telephone Company Revisions To Tariff F.C.C. No. 6 et al.*, Transmittal Nos. 1629 et al., Memorandum Opinion and Order, 6 FCC Rcd 3760, 3764, para. 35 (1991) (investigating the LECs' provision of access services using alternate switching technologies, including "whether the practice of using alternate technologies to provide equal access is just and reasonable" under sections 201 and 202); *Local Exchange Carriers' Individual Case Basis DS3 Service Offerings; GTE Telephone Operating Companies; Revisions to Tariff F.C.C. No. 1*, CC Docket Nos. 89–305 et al., Memorandum Opinion and Order, 4 FCC Rcd 8634, 8643-44, paras. 77-78 (1989) (while having allowed individual case basis (ICB) pricing when DS3 services were newly introduced, concluding that it was necessary to transition to general pricing and relying on section 202(a) to weigh the timing and details of that transition).

[29] *See generally Emerging Wireline Network and Services NPRM* ; *Technology Transitions et al.,* GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433 (2014) (*Technology Transitions Order*).

[30] XO Sept. 23, 2015 *Ex Parte* Letter at 3.

[31] Comments of Sprint, WC Docket No. 05-25, RM-10593, at 24 (filed Feb. 11, 2013) (Sprint Feb. 11, 2013 Comments).

[32] Letter from Thomas Jones, Counsel, Cbeyond et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 2 (filed Oct. 28, 2014) (Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter).

[33] XO Sept. 23, 2015 *Ex Parte* Letter at 12.

[34] Windstream Sept. 24, 2015 *Ex Parte* Letter at 1.

approximately $25 billion or about 60 percent of the total special access market of about $40 billion. Other preliminary analysis of the data collection in conjunction with the Commission's 2010 voluntary data collection shows that for some of the largest price cap incumbent LECs, DS1 and DS3 channel termination sales actually increased from 2010 to 2013. Additionally, Vertical Systems Group estimates that on the basis of total actual bandwidth delivered, use of legacy business services will remain stable at least through 2017.[35]

15. *Overview of ILEC Response to Allegations*. Incumbent LECs dispute competitive LECs' characterizations of their pricing plans on a number of fronts. They assert that pricing plans that contain percentage commitments are not loyalty contracts since they are not based on a customer's total purchases, only those it makes with the incumbent LEC. AT&T, arguing that its SWBT Term Payment Plan is not a loyalty contract, states that a "true *loyalty* contract . . . is a contract that requires either 'exclusive dealing or a volume commitment referencing the customer's total purchases including those from rivals.'"[36] Verizon states that its pricing plans "do not link discounts to commitments to purchase from Verizon a percentage of the customer's total purchases from all sources."[37] Incumbent LECs also note that competitive LECs offer provisions in their special access contracts – including lower rates for term commitments, circuit portability, and early termination fees – similar to those they complain of in incumbent LEC pricing plans.[38]

16. The incumbent LECs assert their pricing plans are not anticompetitive because such plans are voluntary, purchasers have a number of options to meet their needs, and competitive LECs' characterization of those plans as "lock-in" plans is inaccurate.[39] AT&T contends that its tariff pricing plans are "only one of many ways in which customers can obtain dedicated access from AT&T and other ILECs."[40] Other options it cites include pricing flexibility contract tariffs, non-tariff Ethernet services, UNEs and combinations of these options.[41] Verizon states that its plans are "entirely voluntary" and "do not restrict customers' ability to obtain high-capacity services from Verizon's competitors or through self-supply."[42] Verizon also asserts that its pricing plans "offer customers a range of options when their voluntary discounts expire, including migrating some or all of their circuits away from Verizon."[43]

17. Incumbent LECs also contend that their pricing plans are efficient and procompetitive. Verizon states that "volume discounts in exchange for commitments of term and volume are

[35] *See* Vertical Systems Group *New Global Milestone For Carrier Ethernet: Ethernet Bandwidth Projected to Exceed 75% of Total Global Business Bandwidth by 2017* (October 23, 2013), http://www.verticalsystems.com/vsgpr/new-global-milestone-for-carrier-ethernet/.

[36] AT&T Oct. 10, 2014 *Ex Parte* Letter at 3 (emphasis in original); *see also* AT&T Oct. 13, 2015 *Ex Parte* Letter at 3-5 (noting reasons AT&T's SWBT tariff and portability option are not loyalty contracts).

[37] Verizon Oct. 7, 2015 *Ex Parte* Letter at 2. *See also* Verizon Mar. 2, 2015 *Ex Parte* Letter at 3.

[38] *See, e.g.,* Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 12-13 (filed Aug. 8, 2012) (AT&T Aug. 8, 2012 *Ex Parte* Letter); Reply Comments of CenturyLink, WC Docket 05-25, RM-10593, at 28-29 (CenturyLink Mar. 12, 2013 Reply Comments).

[39] *See, e.g.,* Verizon Mar. 2, 2015 *Ex Parte* Letter at 3 ("plans do not 'lock in' amounts previously purchased"); AT&T Mar. 12, 2013 Reply Comments at 34 ("Substantial volumes of special access demand can be shifted to AT&T's rivals.") (original in italics); Verizon July 16, 2012 *Ex Parte* Letter at 2; CenturyLink Mar. 12, 2013 Reply Comments at 21-27 (noting its plans provide customer options, are responsive to their needs, and are not anti-competitive).

[40] AT&T Mar. 12, 2013 Reply Comments at 22.

[41] *See, e.g., id*. at 22-24.

[42] Verizon July 16, 2012 *Ex Parte* Letter at 2. *See also* Verizon Mar. 12, 2013 Reply Comments at 19, 21; Verizon Oct. 7, 2015 *Ex Parte* Letter at 2.

[43] Verizon Mar. 2, 2015 *Ex Parte* Letter at 1. *See also* Verizon Oct. 7, 2015 *Ex Parte* Letter at 2.

commonplace because they enhance efficiencies and reduce transaction costs and risk for both the buyer and the seller."[44] They claim that their plans benefit both parties– customers receive lower prices and the incumbent LEC seller receives "some certainty about its expected revenues and network utilization."[45]

18. Incumbent LECs assert further that the competitiveness of the special access market, particularly the Ethernet market, undermines competitive LEC claims of anticompetitive conduct and contend it is inappropriate to conduct a tariff investigation prior to analyzing the data submitted in the Commission's special access data collection.[46] Incumbent LECs point to the rapid growth of Ethernet services and the relative decline of TDM-based special access as a portion of the special access market, effectively questioning the utility of conducting an investigation into TDM-based special access services.[47] Incumbent LECs claim further that their pricing plans have not foreclosed entry by competitive LECs in the special access market, citing evidence of competitive LECs' entry into the special access market and investment in and expansion of their networks.[48] They assert that competitive LECs are positioned equally with incumbent LECs to compete in the Ethernet market and that incumbent LECs take steps to assist their customers in migrating from TDM to IP-based services.[49] And they claim that evidence of cable providers' entry into the special access market further demonstrates the competitiveness of that market.[50] Finally, incumbent LECs such as AT&T claim that if the Commission were to impose changes in their tariff pricing plans, it would effectively represent a revocation of those contracts which "would require[ ] a particularly clear and compelling justification."[51]

19. *Past Commission Statements*. The Commission has consistently expressed concern about the potential of incumbent LECs' tariff pricing plans to harm competition. In 2005, the Commission stated that it "has long been concerned about dominant carriers offering their services on terms and conditions that weaken or harm the competitive process sufficiently to reduce consumer welfare."[52]

---

[44] Verizon Mar. 2, 2015 *Ex Parte* Letter at 1, 5-6. *See also* Verizon Mar. 12, 2013 Reply Comments at 19-23.

[45] *See, e.g.,* Verizon Mar. 2, 2015 *Ex Parte* Letter at 2.

[46] *See, e.g.,* AT&T Oct. 10, 2014 *Ex Parte* Letter at 7; CenturyLink Mar. 12, 2013 Reply Comments at 17-18. *But see supra* n.27.

[47] *See, e.g.,* AT&T Oct. 10, 2014 *Ex Parte* Letter at 1-2; AT&T June 6, 2012 *Ex Parte* Letter at Attach. ("TDM-Based DS1 and DS3 Are Legacy Services in Decline"); Verizon June 6, 2012 *Ex Parte* Letter at 5-6.

[48] *See, e.g.,* CenturyLink Mar. 12, 2013 Reply Comments at 1-4; AT&T Mar. 12, 2013 Reply Comments at 26; AT&T Oct. 10, 2014 *Ex Parte* Letter at 3, 5 (noting AT&T loss of special access customers as further evidence of market entry by competitors); Letter from Curtis L. Groves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, Appx. at 14-41, (filed Sept. 24, 2015) (Verizon Sept. 24, 2015 *Ex Parte* Letter); AT&T Oct. 13, 2015 *Ex Parte* Letter at 7 ("If there were any merit to [competitive LEC] 'lock-in' theories, one would expect to see decreased entry and a contraction of competitive offerings during the past decade. And one would have expected Sprint to be stalled in its effort to migrate its backhaul circuits to Ethernet. The opposite has occurred.").

[49] *See, e.g.,* Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-1 et al., at 2-3 (filed Jul. 14, 2015) (citing Vertical Systems Group data on Ethernet market share); AT&T Oct. 13, 2015 *Ex Parte* Letter at 1, 5 ("AT&T has modified its generally available offerings so that AT&T now waives ETF's as a matter of course for customers who migrate DSn circuits to AT&T Switched Ethernet Service.").

[50] *See, e.g.,* Verizon Sept. 24, 2015 *Ex Parte* Letter at 1-4; Opposition of CenturyLink, WC Docket No. 05-25, RM-10593, at 41-46, (filed Apr. 16, 2013).

[51] AT&T Mar. 12, 2013 Reply Comment at 53.

[52] *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2029, para. 115 (2005) (*2005 Special Access NPRM*). *See also, e.g.*, *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, As Amended (47 U.S.C. § 160(c)), For Forbearance From Certain Dominant Carrier*

(continued…)

Consistent with antitrust precedent[53] and economic literature,[54] the Commission has also stated that "[t]he

(Continued from previous page)
Regulation of Its Interstate Access Services, and For Forbearance From Title II Regulation of Its Broadband Services, In the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, 22 FCC Rcd 16304, 16343-44, para. 87 (2007) (recognizing concerns that even if ACS's special access rates were just and reasonable, "ACS would still have the incentive and ability to increase its rivals' costs by manipulating the terms and conditions under which it offered and provisioned such services").

[53] *See e.g. ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *Complaint, Intel Corp.,* FTC Docket No. 9341 paras. 53, 55 (Dec. 16, 2009), *FTC v. Intel* (2010) CIS at 3-4; *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.,* 253 F.2d 34 (D.C. Cir. 2001); *see generally* Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802e (2d ed. 2002)); In the Matter of Intel Corp., Decision and Order, Docket No. 9341 (FTC, Oct. 29, 2010); Analysis of Proposed Consent to Aid Public Comment (Aug. 4, 2010); Federal Trade Commission and Department of Justice, Joint Public Workshop: Conditional Pricing Practices, June 23, 2014 (transcript, presentations and public comments available at http://www.justice.gov/atr/events/public-workshop-conditional-pricing-practices and https://www.ftc.gov/news-events/events-calendar/2014/06/conditional-pricing-practices-economic-analysis-legal-policy) (FTC/DoJ Workshop).

[54] *See, e.g.*, Aghion, Philippe and Patrick Bolton, "Contracts as a Barrier to Entry," *American Economic Review*, Vol. 77, No. 3, June 1987 ("an incumbent seller who faces the threat of entry… will sign long term contracts that prevent entry of some lower cost producers even though they do not preclude entry completely"). This paper showed that buyers could be given an incentive to sign long term contracts that could prevent some subsequent efficient entry. Specifically, an incumbent could successfully offer a contract that shared monopoly rents between itself and existing buyers to the detriment of an efficient entrant and excluded buyers, including future buyers not yet in existence. This could be relevant to the case at hand for at least two reasons. First, incumbent LECs make substantial sales to incumbent LEC-affiliated competitive LECs, and may be willing to do so at the expense of other LECs and purchasers. Second, this strategy is likely to be more effective where entry into multiple markets may be efficient, for example, due to economies of scope, but all markets cannot be entered simultaneously (Carlton, Dennis and Michael Waldman, "The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries", *Rand Journal of Economics*, vol. 33, No. 2, Summer 2002, 194-220 (CW 2002). In that circumstance, even customers that would prefer to see more entry, for example, in different geographic regions, have no choice in the short term but to buy from an incumbent on terms that postpone or lock out efficient future entry.

The more recent literature on exclusive contracts is also relevant here. It shows that if coordination among buyers is costly, then buyers may fail to coordinate on contracts that guarantee efficient entry, enabling an incumbent to effect anticompetitive exclusive contracts (in contrast to the papers just discussed, against the buyers' best interests). This literature generally requires that entrants must obtain a minimum efficient scale to be profitable (as does CW 2002). *See, e.g.*, Segal, Ilya R. and Michael D. Whinston, "Naked Exclusion: Comment", *American Economic Review*, Vol. 90, Issue 1, Mar., 2000, pp. 296-309 (correcting and extending Rasmusen, Eric B., J. Mark Ramseyer, and John S. Wiley, Jr., "Naked Exclusion," *American Economic Review*, Vol. 81, Issue 5, Dec., 1991, pp. 1137-45 (the original paper's "intuition… is valid… an incumbent… may… exclude rivals profitably using [exclusive contracts] because it can exploit buyers' lack of coordination" at 296; even with "partially exclusionary contracts (stipulated damages) as in Aghion and Bolton (1987)" at 297, where "stipulated damages" refer to exclusive contracts that allow purchase from a third party subject to a penalty fee); see also Rasmusen, Eric B., J. Mark Ramseyer, and John S. Wiley, Jr., "Naked Exclusion: Reply" *American Economic Review*, Vol. 90, Issue 1, Mar., 2000, (RRW reply) 310-11, "exclusionary contracts can be profitable, effective, and socially inefficient [when]… firms… operate only at or above some minimum efficient scale… [and] the victims—customers or suppliers—must expect that the exclusionary tactic will succeed, and must be unable to coordinate their actions to defeat the tactic..." at p. 310; and Simpson, John and Abraham L. Wickelgren,"Naked Exclusion, Efficient Breach, and Downstream Competition" *American Economic Review*, Vol. 97, Issue 4, Sep., 2007, pp. 1305-22.

It can, however, be reasonably objected that the tariffs under consideration are not exclusive. They do not expressly forbid buyers from purchasing from third parties, or require a buyer to source any specific fraction of its needs from the tariff. Instead, in exchange for a discount specified in the tariff, they require the buyer to purchase over a period of time no less than a quantity equal to a certain percentage of the total quantity of the services the purchaser initially signed up to buy. That is, there is no requirement that the purchaser meet all or even a particular fraction of its total need from the incumbent LEC. Indeed, in practice exclusivity is not observed. The largest customers of

(continued…)

existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of [special access competition]."[55] More generally, the Commission has long recognized the role sections 201 and 202 play in guarding against competitive harms.[56]

(Continued from previous page)
incumbent LECs both self-supply and purchase from competitive LECs unaffiliated with an incumbent LEC. However, (1) exclusion of efficient entry can arise under only partial exclusive contracts ("[m]arket share discount[s] [where] the buyer will receive a discount on all purchased units if it buys some threshold (e.g., 90 percent) or more of its needs from the seller offering the contract" (Morton, Fiona Scott "Contracts that Reference Rivals", *Antitrust*, Vol. 27, No. 3, Summer 2013, 72-79 (Morton 201) at 73); and (2) exclusion can arise without a requirements contract (such as that just described), for example, if a seller offers a discount that in effect locks up an equivalent amount of demand as that which would be purchased under a fully or partially exclusive contract with exclusionary effects (*see, e.g.*, Morton 2013, at 73-74 and endnote 4).

That being said, exclusive contracts can serve pro-competitive purposes (RRW reply, 310; Morton 2013, endnotes 5 and 25), thus any contract found to be expressly or in effect to be (possibly partially) exclusive, must be examined carefully, and in the context of the market in question. For example, there is a consensus that exclusive contracts "are most likely to harm competition or consumers when they involve dominant firms possessing market power and a high market share" (Morton 2013 at 73).

There have also been significant recent developments in the economics profession on conditional pricing, including loyalty discounts and bundling. *See, e.g.*, FTC/DoJ Workshop. An example is the literature that has begun to emerge on how loyalty discounts may be used to maintain monopoly prices—*see, e.g.*, Elhauge, Einer and Abraham L. Wickelgren, "Robust Exclusion and Market Division Through Loyalty Discounts," Harvard Law School and University of Texas at Austin Working Paper, April 2014 "show[ing] that loyalty discounts create an externality among buyers because each buyer who signs a loyalty discount contract softens competition and raises prices for all buyers." Or more expansively, a buyer that has accepted a loyalty discount is more difficult for a competitor to woo, thus firms are less likely to cut prices as the number of customers on rivals' loyalty discount plans rise. However, buyers in deciding whether to sign up for a loyalty discount do not account for the negative impact of competition softening signing up has on all other customers, but rather only focus on the direct benefits and costs the individual purchaser experiences. As a result, loyalty discounts create an externality that firms can exploit, in an extreme case, by setting list prices above monopoly levels and offering discounts so the monopoly price is paid. For an example in the real world, see Lederman, Mara, "Are Frequent-Flyer Programs a Cause of the 'Hub Premium'?," *Journal of Economics and Management Strategy*, Vol. 17, No. 1, Spring 2008, demonstrating that airline frequent flyer programs can have the effect of reducing competition and raising prices, but also noting that frequent flyer programs, and by implication, loyalty discounts in general, can be procompetitive (at 35-36).

[55] *See Expanded Interconnection With Local Telephone Company Facilities et al.*, CC Docket No. 91-141 et al., Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7463, para. 201 (1992) (*Special Access Expanded Interconnection Order)*; *Access Charge Reform et al.*, CC Docket No. 96-262 et al., Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, at 21437, para. 190 (1996) (*Access Charge Reform NPRM and Order*) ("By 'locking in' customers with substantial discounts for long-term contracts and volume commitments before a new entrant that could become more efficient than the incumbent can offer comparable volume and term discounts, it is possible that even a relatively inefficient incumbent LEC may be able to forestall the day when the more efficient entrant is able to provide customers with better prices.").

[56] *See, e.g.*, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, WC Docket Nos. 02-112 et al., Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007) (citing the continued applicability of section 202(a) of the Act in guarding against competitive concerns associated with the provision of special access services); *Policy and Rules Concerning the Interstate, Interexchange Marketplace et al.*, CC Docket Nos. 98-183 et al., Report and Order, 16 FCC Rcd 7418 (2001) (citing sections 201 and 202 as "safeguard[s] against anticompetitive conduct"); *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221, 14289-91, paras. 125, 127 (1999) (*Pricing Flexibility Order*), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) (citing the continued availability of sections 201 and 202 to address competitive concerns associated with special access volume and term discount offerings); *1998 Biennial Regulatory Review -- Repeal of Part 62 of the Commission's Rules*, CC Docket No. 98-195, Report and Order, 14 FCC Rcd
(continued…)

20. *Initiation of Investigation*. Nothing has yet been decided on the merits. Through this investigation, the Bureau will seek additional data from the incumbent LECs on which to base an objective evaluation of the reasonableness of the tariff pricing plan terms and conditions that are designated for investigation here. We emphasize that the inquiry we initiate today is concerned with the effects of the terms and conditions at issue on competition, innovation, and end-user consumers. While, as would be expected, the current allegations and evidence largely arise from competitive LECs, the ultimate question is not whether a particular competitive LEC is harmed but whether there is harm to competition.[57]

II. INITIATION OF INVESTIGATION AND DESIGNATION OF ISSUES

A. Order to Initiate Investigation

21. As we detail below, the Bureau concludes that the record raises sufficient questions regarding the lawfulness of certain terms and conditions contained in certain special access tariff pricing plans offered by AT&T, CenturyLink, Frontier and Verizon to warrant their investigation. Across these four companies, the investigation concerns eighteen such plans.[58] The Bureau's longstanding practice when it finds that there are questions concerning the lawfulness of tariff plans is to initiate an investigation.[59] Consistent with that prior practice, we initiate an investigation into the pricing plans specified in the Appendix with regard to the lawfulness of certain terms and conditions, both as they operate individually and in concert with other pricing plan provisions and further order that the issues identified in section III below be designated for investigation.

22. This investigation of incumbent LEC special access tariff pricing plans is based on the Commission's statutory grant of authority over tariffed rates. Under section 205 of the Act, the Commission may "after full opportunity for hearing . . . under an order for investigation and hearing made by the Commission on its own initiative" investigate the lawfulness of a charge or practice included in a tariff and, upon a finding that a charge or practice violated any provision of the Act, the Commission is authorized to prescribe a just and reasonable charge or practice.[60] Under sections 201 and 202 of the Act, the Commission has the duty to ensure that "charges, practices, classifications, and regulations" for interstate communication service are just and reasonable, and free of unjust or unreasonable discrimination.[61] Section 203 of the Act and the Commission's rules generally require that for the kind of business data services that are the subject of this investigation, incumbent LECs must file with the Commission tariffs specifying the rates, terms, and conditions governing their service offerings.[62]

(Continued from previous page)
16530, 16540, para. 14 (1999) ("Section 201(b) of the Act addresses the harms that may arise from anticompetitive conduct by requiring that carriers' charges, practices, and classifications be just and reasonable"); *Proposed 708 Relief Plan and 630 Numbering Plan Area Code By Ameritech—Illinois*, IAD File No. 94–102, Declaratory Ruling and Order, 10 FCC Rcd 4596, 4608, 4611-12, paras. 27-28, 35 (1995) (rejecting numbering proposals that would result in competitive disparities in violation of sections 201 and 202).

[57] *C.f. Brown Shoe Co. v. U.S.*, 370 U.S. 294, 344 (1962) (explaining that "[i]t is competition, not competitors, which the [Clayton] Act protects").

[58] *See* Appendix for a list of the eighteen plans under investigation.

[59] *See, e.g., Suspension and Investigation of AT&T Special Access Tariffs, et al.*, WC Docket No. 13-299 et al., Order, 28 FCC Rcd 16525 (2013); *July 3, 2012 Annual Access Charge Tariff Filings*, WCB/Pricing No. 12-09, Order, 27 FCC Rcd 7322 (2012); *July 1, 2007 Annual Access Charge Tariff Filings*, WCB/Pricing No. 07-10, Order, 22 FCC Rcd 11619 (2007).

[60] 47 U.S.C. § 205(a).

[61] 47 U.S.C. §§ 201(b), 202(a).

[62] 47 U.S.C. § 203; 47 C.F.R. Part 61.

23. This investigation is rooted in a significant body of comment and data on issues related to incumbent LEC special access tariff pricing plan terms and conditions filed over a period of years in response to a number of Commission notices released in the Commission's special access proceeding.[63] The investigation is also consistent with previous action taken by the Commission to reform its special access rules. In 2012, the Commission suspended its pricing flexibility rules, questioning the predictive judgment it made in the *Pricing Flexibility Order* that the existence of sunk investment in the form of collocation by competitors would ensure that "there [was] irreversible investment sufficient to discourage exclusionary pricing behavior."[64] The Commission relied on the same predictive judgment in allowing price cap LECs to offer term and volume discounts in that order – that the competitive pressures that the Phase I triggers were intended to reflect would ensure that price cap LEC pricing plan terms and conditions would remain just and reasonable.[65] An investigation of special access tariff pricing plan terms and conditions will enable the Commission to reevaluate further whether that predictive judgment has been borne out in practice.

B. Designation of Issues

24. Pursuant to section 205, the Bureau designates for investigation the following issues:

(1) whether the use of percentage commitments based on a purchaser's historical or existing (at point of entry into the plan) levels of purchases in certain incumbent LEC tariff pricing plans is a just and reasonable practice under section 201(b) of the Act or is unreasonably discriminatory under section 202(a) of the Act;
(2) whether the use of shortfall fees in certain incumbent LEC tariff pricing plans is a just and reasonable practice under section 201(b) of the Act;
(3) whether the use of upper percentage thresholds in certain incumbent LEC tariff pricing plans is a just and reasonable practice under section 201(b) of the Act or is unreasonably discriminatory under section 202(a) of the Act;
(4) whether the use of overage penalties in certain incumbent LEC tariff pricing plans is a just and reasonable practice under section 201(a) of the Act;

---

[63] *See Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2031-34, paras. 114-125 (2005) (*2005 Special Access NPRM*)(seeking comment on the reasonableness of terms and conditions included in incumbent LECs' special access tariff pricing plans); *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 24 FCC Rcd 13638, 642-43 (2009) (*Analytical Framework Public Notice*) (seeking comment on the appropriate analytical framework for examining the issues that the *Special Access NPRM* raised, including data and other information on issues related to special access tariff pricing plan terms and conditions); *Competition Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, 26 FCC Rcd 14000 (2011) (*Special Access Competition Data Public Notice*) (voluntary data request seeking submission of special access competition and pricing data, including data on special access tariff pricing plan terms and conditions); *Special Access Data Collection Order* (seeking comment and data on various special access issues, including incumbent LECs' special access tariff pricing plan terms and conditions); *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899 (2014) (*Reconsideration Order*)(seeking data on a wide range of special access issues, including data related to the terms and conditions of the incumbent LECs' special access tariff pricing plans).

[64] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557, 10595-98, paras. 66, 68-71 (2012) (*Special Access Pricing Flexibility Suspension Order*) (citing *Pricing Flexibility Order* 14 FCC Rcd at 14262, para. 78).

[65] *Pricing Flexibility Order*, 14 FCC Rcd at 14288-91, paras. 123-27.

(5) whether the use of certain long term commitments in tariff pricing plans at issue is a just and reasonable practice under section 201(b) of the Act;
(6) whether the use of early termination fees in certain incumbent LEC tariff pricing plans is a just and reasonable practice under section 201(b) of the Act; and
(7) whether certain commercial agreements for special access services contain discounts, credits, waivers, refunds, or other provisions that directly or indirectly affect charges for tariffed special access services and should thus be subject to the filing requirements of section 203 of the Act and the Commission's rules.

25. With respect to each of the issues concerning the tariff pricing plans offered by the identified incumbent LECs that we designate for investigation, the Bureau summarizes below the allegations raised in the record of the special access proceeding and identifies data and information that will enable a thorough review of the issue by the Commission. The Bureau will investigate the issues both individually, as they operate in coordination with each other, and the totality of their impact on the business data services market. We emphasize that in designating the tariff pricing plans for investigation, the Bureau does not make any finding concerning the lawfulness of the plans. Instead, we merely find that sufficient questions have been raised to justify an investigation. Moreover, we do not place any weight on the fact that thus far competitive LECs have placed more detailed or voluminous information on some of the issues into the record than have incumbent LECs. By seeking specific data and answers, the Bureau intends to compile a record that will allow for an objective evaluation of the issues designated for investigation.

C. Direct Case and Required Data

26. While the Commission received certain information regarding the incumbent LECs' special access tariff pricing plans in response to the mandatory data collection, those data do not address in sufficient detail the tariff pricing plan terms and conditions being investigated herein and are insufficient for the conduct of this investigation.[66] It is therefore necessary for us to seek additional, more targeted data from AT&T, CenturyLink, Frontier and Verizon on the tariff pricing plan terms and conditions designated for investigation in this Order. The carriers' responses to these data and information requests will provide the Commission with the objective foundation necessary to assess the reasonableness of the tariff pricing plan terms and conditions, both individually and collectively, that are under investigation. Confidential data and information submitted in response to requests in this designation order will be subject to a protective order that will be released subsequent to the release of this Order.

27. Bureau staff have prepared a data request template that provides a format that enables incumbent LECs to submit complete and uniform responses to certain data and information requested here.[67] We require that the incumbent LECs utilize this template in responding to these data requests which is accessible on the Commission's website.[68] Data requests in this Order contain cross references to the tables in the data request template, where applicable. Conversely, the tables of the template cross-reference the relevant paragraphs in the Order that contain the data requests. Some information requests in this Order are not included in the template because they seek responses that are principally narrative in

[66] *See Reconsideration Order* 29 FCC Rcd at 10916-921 (Appx. A (Data Collection) at 9-14).

[67] The information we request includes data on DS1 and DS3 channel terminations. DS1 channel terminations and DS3 channel terminations here refer to all channel terminations that are not part of the transport function between switching offices. TDM business data services other than DS1/DS3 channel terminations are referred to as "all other TDM business data services." This category includes dedicated transport (which includes, for example, channel mileage and channel mileage termination).

[68] The link to access the template is: https://www.fcc.gov/encyclopedia/tariff-investigation-special-access-tariff-discount-plans. Incumbent LECs' responses to each of the data and information requests in this Order must be in spreadsheet format that is accessible to Bureau staff for analytical purposes and not in a .PDF format.

nature. Responses to those and other narrative requests are to be submitted in a single, separate Word document in the sequence in which they appear in this Order. The responses to all data and narrative questions must be submitted in accordance with the instructions in this Order and the data request template.

28. As an initial matter, we seek background information on each of the pricing plans under investigation. The incumbent LECs must submit as part of their direct cases the following tariff pricing plan-level data and information on Table I of the data request template annually for calendar years 2012 through 2014 for each tariff pricing plan they offer that is under investigation in this proceeding: (1) the tariff name, (2) the pricing plan name, (3) the section number of the pricing plan within the tariff, (4) indicators of whether participants in the plan are (i) required to make a percentage commitment, and (ii) given an option to make a percentage commitment, and (5) an indicator of whether participants in the plan are required to make all of their purchases within the plan, rather than being permitted to purchase similar services in the region from the incumbent LEC out of another pricing plan at the same time.

29. In addition, the incumbent LEC must submit the following agreement-level data and information for each instance of an agreement or subscription made by a customer to purchase services under the pricing plans under investigation, using Table III of the data request template: (1) an agreement ID, i.e., a unique identifier for each instance of an agreement by a customer to purchase services under a tariff pricing plan under investigation that was in effect during any part of calendar years 2012 through 2014, (2) the start date of the agreement, (3) the end date of that agreement, (4) the tariff name from Table I associated with this agreement ID, (5) the pricing plan name from Table I associated with this agreement ID, (6) the section number of the tariff from Table I, specifying the tariff pricing plan associated with this agreement ID, (7) the purchaser name, (8) indicators of whether the purchaser is: (i) an end user, (ii) a competitive provider purchaser, and/or (iii) a mobile wireless service provider,[69] and (9) a unique identifier for the purchaser. In the event that a large number of agreements occur under any one pricing plan under investigation, we limit the number of agreements an incumbent LEC must include in its submission in the following fashion. Where more than 20 agreements are associated with end user purchasers for any one pricing plan, the incumbent LEC shall file data only for the 20 largest end user purchase agreements in dollar terms, or for end user purchase agreements that account for at least 80 percent of all end user purchases under the pricing plan, whichever includes fewer purchase agreements.[70]

III. ISSUES DESIGNATED FOR INVESTIGATION

A. Whether the Use of Percentage Commitments in Certain Tariffed Pricing Plans is a Just and Reasonable Practice Under Section 201(b) or is Unreasonably Discriminatory Under Section 202(a) of the Act.

30. The first issue we designate for investigation under section 205 of the Act is the question whether the use of percentage commitments in certain tariff pricing plans based on a relatively high proportion of a customer's historical or existing (at point of entry into the plan) level of purchases, either by themselves or in concert with other pricing plan provisions, is a just and reasonable practice under section 201(b) of the Act and/or is unreasonably discriminatory under section 202(a) of the Act. The

[69] Wholesale providers include competitive local exchange carriers (CLECs), interexchange carriers, cable operators, wireless providers other than mobile wireless providers (such as a wireless Internet service provider) or any other entity that is subject to the Commission's jurisdiction under the Communications Act that purchase communications service in order to resell such service either to other wholesale providers or to end users. End Users include business, institutional, governmental, and other entities that purchase a communications service for their own purposes and do not resell such service. Mobile wireless service providers include commercial mobile radio service (CMRS) providers.

[70] This limitation applies to purchase agreements or subscriptions that involve retail customers. Incumbent LECs are required to file information on all agreements with customers that are carriers (either competitive LECs or mobile wireless providers).

percentage purchase commitments in the tariff pricing plan provisions that are the subject of this investigation are set at high levels of purchasers' previous or existing (at point of signing) purchases from the incumbent LEC – from 80 percent to 95 percent. While some commenters commonly refer to these commitments as volume discounts, the commitments that are under investigation do not reflect the actual volume of services purchased but instead a percentage of a purchaser's prior or existing (at point of signing) purchases with the incumbent LEC. The pricing plans under investigation in this section, referred to by some commenters as loyalty discounts, require customers to commit to buy, over the term of the plan, a high percentage of the amount of services they elect to purchase when initiating or renewing purchases through a tariff pricing plan.[71]

31. Competitors complain that these percentage or "lock-in" commitments serve to lock in the vast majority of the demand for special access services for the incumbent LECs. They note that a large proportion of the business locations nationwide are served only by the incumbent LECs, rendering much of the market in practice not servable or non-addressable by competitive LECs.[72] Competitors claim that incumbent LECs use percentage or lock-in commitments that require a high percentage of buyers' existing purchases to the incumbent LECs to effectively expand the portion of the special access services market to the exclusion of competitors.[73] XO describes the effect of percentage commitments:

> [T]he geographic reach of the price cap LEC facilities are considerably more extensive, such that alternative sources of supply are often not currently available. This situation is exacerbated beyond what XO would expect in a competitive environment because of price cap LECs' Commitment Plans, which effectively lock up demand not only in areas where the price cap LECs

[71] The pricing plans establish the following percentage purchase thresholds (commitment levels): Discount Commitment Plan (DCP) of the Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13 (A) and (B) (90 percent of in-service local distributions channels by state and service for a term of either 3 or 5 years; DS1 Term Payment Plan (DS1 TPP) of the Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E)(2) (40 channel terminations in-service each month and 80 percent of initial monthly commitment level of DS1 channel terminations for the plan's portability option); DS1 Term Payment Plan (DS1 TPP) of the Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(E)(2) (40 channel terminations in-service each month and 80 percent of initial monthly commitment level of DS1 channel terminations for the plan's portability option); Special Access Term Discount Plan (TDP) of the CenturyLink Operating Companies Tariff F.C.C. No. 9 § 7.4.11(A), (B) and (C) (committing all or a portion of in-service circuits to a minimum term of 3 years or maximum of 5 years and commitment threshold of 90 percent of the committed circuits); Regional Commitment Program (RCP) of the CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3(B)(3) (95 percent of monthly recurring revenue of total in-service DS1 channel terminations); DS1 Term Volume Plans (DS1 TVPs) of the Frontier Telephone Companies Tariff F.C.C. No. 5 § 5.6.14(F) (90 percent of actual in-service DS1 special access lines at time of enrollment for the Eight- and Ten-Year DS1 Term Volume Plans or ETTVPs); three or five year DS1 Optional Payment Plans (DS1 OPPs) of Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(D)(2) (40 channel terminations in-service each month and 80 percent of DS1 channel terminations in-service for the DS1 OPP Portability Commitment); Commitment Discount Plans (CDPs) of the Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.1.3(A)(5) and Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.1.3(A)(5) (75 percent of DDS II channel terminations in-service and 90 percent for all other channel terminations in-service type or combined service types in-service at time of subscription to the CDP (as expressed in DS0 equivalents)); DS1 Term Volume Plans (DS1 TVPs) of the Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.14(F) (90 percent of DS1 channel terminations in service for the Eight- and Ten-Year DS1 Term Volume Plans or ETTVPs); and the National Discount Plan (NDP) of the Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.3.4(C)(1)-(3), Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.2.4(C)(1)-(3), Verizon Telephone Companies Tariff F.C.C. No. 14 § 23.1.4(C)(1)-(3), and Verizon Telephone Companies Tariff F.C.C. No. 16 § 22.1.4(C)(1)-(3) (85, 90, or 92 percent of equivalent DS1 channel terminations and channel mileage, depending on commitment matrix option selected). This list is not intended to exclude any other related tariff provisions.

[72] *See, e.g.,* Windstream Sept. 24, 2015 *Ex Parte* Letter at 2-3; XO Sept. 23, 2015 *Ex Parte* Letter at 3-4.

[73] *See, e.g., id*.

provide the only facilities-based option (apart from a new build by XO itself) but extend into those areas where other providers do have network facilities.[74]

32. Other competitive LECs concur that percentage commitments "shrink[ ] the addressable market for competitive wholesale special access providers (thereby preventing them from achieving minimum viable scale), and cause[ ] special access prices to remain higher than would otherwise be the case."[75] Competitors assert that they have no choice but to enter the incumbent LECs' nominally voluntary tariff pricing plans since they typically can only serve their customers' needs through a combination of their own facilities and resold incumbent LEC facilities.[76] They also claim they are obliged to enter into these arrangements to obtain competitive pricing since the incumbent LECs' non-discounted, month-to-month rates are too high to allow them to compete and significantly higher than rates offered by other competitors.[77]

33. Competitors assert that percentage or lock in commitments cause harms to competitors and end users. Level 3 states that "incumbents' lock-up plans – plans that only the incumbents have the power to impose – are causing significant harm to the overall market for special access. Level 3's retail and wholesale customers pay more than they would in a truly competitive market."[78] Other competitive LECs state that "[t]hese commitments have the effect of excluding wholesale competitors from the market, which in turn slows the deployment of fiber to commercial buildings, slows the deployment of Ethernet, and prevents competition from driving down prices. . . . Addressing these issues will result in significant increases in consumer welfare."[79]

34. We note that while Pacific Bell Telephone's and Southwestern Bell Telephone's Term Payment Plans (TPPs) do not impose a percentage commitment on purchasers, each TPP contains a circuit portability option that imposes such a requirement.[80] Circuit portability provides customers, particularly competitive LEC customers, flexibility to disconnect circuits and replace them with others to meet their commitments and thereby not incur early termination penalties. By most accounts, circuit portability provides a crucial non-rate benefit for competitive LECs serving retail customers whose terms of service rarely coincide with the competitive LECs' underlying pricing plan term commitments with incumbent LECs.[81] Given the importance of circuit portability to competitive LECs, it appears that most, if not all of them elect that option when purchasing special access services from incumbent LECs. We

[74] XO Sept. 23, 2015 *Ex Parte* Letter at 3.

[75] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 2.

[76] Sprint Sept. 23, 2015 *Ex Parte* Letter at 2 ("In particular, incumbent local exchange carriers present their competitors with two choices, each of which undermine competition…").

[77] *See* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 2 (undiscounted rates for special access services "are unreasonably high and cost-prohibitive for wholesale buyers like Level 3 that wish to serve retail business customers); XO Sept. 23, 2015 *Ex Parte* Letter at 5 and 9; Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 5; *see also infra* section III.A.4.

[78] Level 3 Sept. 23, 2015 *Ex Parte* Letter at 6.

[79] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 1.

[80] In both cases, the circuit portability option is entitled the "DS1 High Capacity Service Portability Commitment"). *See* Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E); SWBT Tariff F.C.C. No. 73 § 7.2.22(E).

[81] *See, e.g.,* Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 12 (filed June 27, 2012) (Level 3 June 27, 2012 *Ex Parte* Letter) ("In reality, the only way a customer **really** gets the ability to move circuits with AT&T – meaning cancelling the circuit and replacing it with a new one – is to agree to lock-up 100% of its existing circuits with AT&T, which then gives the customer the flexibility to terminate 20% of them without termination liability.") (emphasis in original); BT Americas et al. Feb. 11, 2013 Comments at 24 ("Often, the volume commitment that a competitor must make in order to receive this benefit is equal to a high percentage of the competitor's historic special access purchase volume from the incumbent LEC.").

also note that Verizon distinguishes its term-only pricing plans from its term-and-volume pricing plans, only the latter of which contain percentage commitments and provide circuit portability.[82]

35. Competitive LECs allege a number of grounds on which high percentage or lock-in commitments in incumbent LEC tariff pricing plans represent unreasonable practices, either by themselves or in combination with other pricing plan provisions, including the allegations that they (1) are not tied to economies of scale or other valid business justifications, (2) are anticompetitive, (3) impede investment and deployment of facilities-based competitive networks, (4) are in practice involuntary in nature, (5) make shifting purchases out of pricing plans economically impractical, and (6) impede investment in next generation technologies.[83] These carriers also allege that high percentage commitments in incumbent LEC tariff pricing plans inhibit the transition to packet-based networks and services.

36. Incumbent LECs disagree and make a number of responsive assertions. They contend that their special access pricing plans "are completely voluntary" and customers can select from several options.[84] They also argue that some of their plans provide flexibility for customers to shift circuits to alternative providers where the plans provide for the option of shifting a percentage of special access demand to rivals or allow customers to buy circuits with a range of terms.[85] They assert that term-and-volume plans are reasonable because they allow incumbent LECs to minimize risks associated with revenue, realize scale economies, and spread fixed costs over a larger customer base, while customers benefit from lower prices, decreased volatility, and increased predictability.[86] Incumbent LECs maintain that, contrary to competitive LEC assertions, the competitive marketplace for business data services, including Ethernet, is thriving, dispelling claims that incumbent LECs are able to lock up demand through their pricing plans.[87] And finally, incumbent LECs reason that their pricing plans are facilitating the technology transition by providing customers with the ability to upgrade to new technology services.[88]

---

[82] *See* Letter from Donna Epps, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 4-6 (filed Mar. 27, 2012) (Verizon Mar. 27, 2012 *Ex Parte* Letter) (comparing Verizon's term-only plans with its term-and-volume plans). This investigation is concerned with the reasonableness of Verizon's term-and-volume plans (Commitment Discount Plans (CDPs), DS1 and DS3 Term Volume Plans (DS1 TVPs and DS3 TVPs), and National Discount Plans (NDPs)).

[83] While competitive LECs consistently assert the unreasonable nature of high percentage commitments, they also at times suggest that percentage commitments set at lower percentage levels may represent reasonable practices. *See, e.g.,* Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 8 ("Cap special access percentage volume commitments at no higher than 50 percent of total historic spend.").

[84] *See, e.g.,* CenturyLink Mar. 12, 2013 Reply Comments at 22. CenturyLink, for example, states that it offers a variety of plans, including a diverse assortment of terms and conditions, so customers can select one that best meets their needs. *Id.* at 22-23.

[85] *See, e.g.,* AT&T Mar. 12, 2013 Reply Comments at 32. AT&T asserts that competitive LECs are not compelled to agree to the longest term (seven year) rate for special access services to compete in the retail marketplace, but may select from terms as short as three years with "very substantial discounts." *Id.* at 31 (referencing AT&T's Term Payment Plan and noting that under the portability option, "a carrier can shift 20 percent of its existing traffic, as well as any new demand, to alternatives over the term of the plan (3 years) without incurring any liability). *See also* Verizon Mar. 2, 2015 *Ex Parte* Letter at 3-4 (listing customer options when a term plan ends).

[86] *See, e.g.,* Verizon Mar. 2, 2015 *Ex Parte* Letter at 7.

[87] *See, e.g.,* AT&T Mar. 12, 2013 Reply Comments at 5 ("The challenged terms and conditions have been in place for a decade, and far from being foreclosed, special access competitors have thrived, expanding their local networks and capturing increasing levels of special access business. . . . Many of the complaining carriers in fact are leaders in providing Ethernet services and in winning business away from ILECs.").

[88] *See, e.g.,* Verizon Mar. 2, 2015 *Ex Parte* Letter at 4.

37. We address the allegations concerning high percentage or lock-in commitments in incumbent LEC tariff pricing plans below and find that they individually and collectively raise sufficient questions regarding their lawfulness to merit investigation.

1. Volume vs. percentage commitments

38. Competitive LECs assert that pricing plans that are conditioned on meeting a high percentage of a purchaser's prior or at point-of-signing purchase levels are fundamentally different from classic volume discounts that are based on a commitment to purchase an absolute quantity or dollar amount of services.[89] A volume discount would typically be based on an absolute number of services purchased or dollars spent, not on a percentage of a customer's purchase levels and would therefore reflect scale economies.[90] With discounts based on a percentage of a customer's purchase levels, such as those at issue in this investigation, however, the same percentage discounts apply to customers with larger and smaller purchase levels, leading to a wide disparity in quantity of circuits associated with a given discount and suggesting that discounts do not reflect scale economies.[91] Level 3 distinguishes tariff pricing plans that include percentage commitments from volume discounts, stating that the "discount, therefore, is not a volume discount, but, rather, a 'loyalty' discount in which the customer is rewarded for buying little or nothing from competitors."[92] Sprint states that "[t]he loyalty plans at issue here are entirely different from traditional volume discounts. They do not depend on a purchaser buying a high volume; rather, they are based on a customer's agreement to be loyal, i.e. not to substantially reduce its current or recent purchases from the incumbent LEC. And unlike . . . *volume* discounts . . ., these loyalty discounts do not reflect a reduction in the incumbent LECs' cost of providing service."[93] Competitive

---

[89] *See, e.g.,* Level 3 June 27, 2012 *Ex Parte* Letter at 10-11.

[90] *See* Carlton, Dennis W. and Waldman, Michael, *Safe Harbors for Quantity Discounts and Bundling*, Department of Justice, Antitrust Division, Economic Analysis Group Discussion Paper at 3 (2008) ("Quantity discounts are ubiquitous in practice. They can reflect efficiency savings arising from a variety of sources such as savings in shipping costs or from being able to plan production.").

[91] *See, e.g.,* Letter from Donna Epps, Vice President Federal Regulatory Affairs, Verizon to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 8 (filed Aug. 16, 2010) (Verizon Aug. 16, 2010 *Ex Parte* Letter) ("Under Verizon's CDP, a customer who purchases just fourteen DS1 channel terminations from Verizon can receive the same level of discounts as larger volume customers who subscribe to the CDP for the same term of years."). Level 3 further asserts that the discount cited by Verizon is also dependent on the percentage of a customer's prior purchases it commits to Verizon. *See* Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 10 (filed Feb. 22, 2012) (Level 3 Feb. 22, 2012 *Ex Parte* Letter) ("What Verizon failed to tell the FCC is that while the customer previously purchasing 14 DS1s can get a discount for purchasing 14 DS1s, the customer previously purchasing 16 DS1s (or 100 or 1000 DS1s) cannot get a discount for purchasing 14 DS1s."); *id*. at 23. We note that Frontier's DS3 Term Volume Plan and Verizon's DS3 Term Volume Plan and National Discount Plans are exceptions among the discount plans being investigated in that they vary discounts based on quantity purchased. *See* Frontier Telephone Companies Tariff F.C.C. No. 5 § 5.6.19(C), Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.19(C), and *see, e.g.,* Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.3.4(B).

[92] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 10.

[93] Sprint Feb. 11, 2013 Comments at 26 (emphasis in original). *See also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 2 (Incumbent LECs offer circuit portability "only if purchasers agree to buy a large percentage of their historic purchase volumes from the incumbent LEC for several years."); BT Americas et al. Feb. 11, 2013 Comments at 34 ("under many exclusionary purchase arrangements, circuit portability and other benefits are conditioned on a competitor committing to maintain a certain *percentage* of its historic purchase volume in service with the incumbent LEC, rather than a certain *number* of circuits.") (emphasis in original); Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 4-5, n.4 (filed Sept. 17, 2014) (XO Sept. 17, 2014 *Ex Parte* Letter) ("pricing is based on a volume commitment measured by each individual customer's historic spend levels and not against some objective measure applicable to all existing or potential customers.").

providers also assert that "[t]o the extent that there are economies of scale in the provision of special access, those economies are more likely to depend on the *number* of circuits purchased by a customer than on the *percentage* of the customer's historic purchases that these circuits represent."[94] XO also notes that in its "arrangements with competitive providers, there is no imposed volume or term commitment, and there are no lock-in provisions."[95] Incumbent LECs defend the high percentage purchase commitments in their pricing plans as legitimate volume discounts[96] but have generally not addressed the distinction between traditional volume discounts based on commitments to purchase an absolute quantity or dollar amount and those based on percentage purchase commitments.[97]

39. Cbeyond and other competitive LECs also allege that percentage commitments are unreasonably discriminatory and advocate that "incumbent LECs should be required to demonstrate why it is that volume commitments set (either explicitly or effectively) to capture a high percentage of an individual buyer's historic demand are . . . not unreasonably discriminatory."[98] More specifically, certain competitive LECs assert it is unreasonably discriminatory that "two customers that purchase the same *percentage* of their historic levels from the ILEC receive the same percentage discount or other benefits even if the *numbers* of circuits that they purchase are vastly different."[99]

40. Incumbent LECs assert in response to the above claims that percentage purchase commitments included in some pricing plans are not anticompetitive requirements contracts based on a purchaser's total demand, they are linked to the services which the purchaser previously purchased or purchases from the incumbent LEC at the time of signing.[100] AT&T rejects assertions that incumbent

---

[94] *Id*. Appendix A at 24 (emphasis in original). *See also* Level 3 Feb. 22, 2012 *Ex Parte* Letter at 9 ("While there are legitimate business justifications for selling 1,000 circuits at a lower per-unit price than ten circuits, the price-cap LECs' discounts are not derived from cost-savings based on an *absolute* measure of volume. Rather, the discounts are linked solely to the customer's past purchases.") (emphasis in original); Sprint Feb. 11, 2013 Comments at 26 ("[T]he terms and conditions at issue here are *not* volume discounts. A volume discount is a discount for purchasing a higher quantity of a product. Such discounts reflect the reality that in some industries, the average per-unit cost of providing a high volume of a product to a single customer is lower than the average per-unit cost of providing a small volume of the same product.") (emphasis in original); Reply Comments of Sprint, WC Docket No. 05-25, RM-10593, at 19 (filed Mar. 12, 2013) (Sprint Mar. 12, 2013 Reply Comments) ("Volume discounts are discounts for purchasing higher *volume* of product – independent of the customer's past purchases. They reflect real efficiencies associated with selling a larger bundle of goods to a single customer.") (emphasis in original).

[95] Comments of XO, WC Docket No. 05-25, RM-10593, Exh. 2 (Dobbins Decl.) at 10 (filed Feb. 11, 2013) (XO Feb. 11, 2013 Comments), Exh. 2 (Dobbins Decl.) at 10 ("XO's arrangements with competitive providers are more reflective of what I would expect from providers under competitive conditions. The fact that price cap LECs do not offer such terms and conditions strongly suggests that they do not feel competitive pressure from their rivals in the market.").

[96] *See, e.g.*, Letter from Maggie McCready, Vice President, Federal Regulatory Affairs, Verizon to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 5 (filed Mar. 2, 2015) (Verizon Mar. 2, 2015 *Ex Parte* Letter).

[97] *See, e.g.,* Verizon Mar. 27, 2012 *Ex Parte* Letter at 7.

[98] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 3.

[99] BT Americas et al. Feb. 11, 2013 Comments, Appx. A ("Anticompetitive Provisions of ILEC Special Access Arrangements") (Besen and Mitchell Decl.) at 23-24 ("Alternatively, two other customers that purchase the same *number* of circuits can obtain vastly different discounts or benefits if the *percentages* of their historic purchase levels are vastly different.") (emphasis in original).

[100] *See, e.g.,* Verizon Mar. 27, 2012 *Ex Parte* Letter at 2, 5. In response, Sprint asserts that "[b]ecause the incumbent LECs have long dominated the special access market, customers' current special access purchases from the incumbent typically amount to the vast majority of their total special access purchases."[100] Sprint Feb. 11, 2013 Comments at 24.

LEC special access tariffs "impose an anticompetitive 'loyalty' mandate."[101] It specifically defends its Southwestern Bell Telephone Company Tariff F.C.C. No. 73 from allegations that it constitutes either a loyalty contract[102] or a de facto loyalty arrangement.[103] Verizon states that "term and volume commitments are common in many industries" and states that "its term-and-volume plans . . . not only minimize[ ] risks associated with revenue but also realize[ ] scale economies and spread[ ] fixed costs over a larger customer base."[104]

2. Impact of percentage purchase commitments on competition

41. Competitive LECs generally contend that incumbent LEC pricing plans that require purchasers to commit to a high percentage of their prior purchase levels, either by themselves or in combination with other pricing plan provisions, limit competition in the provision of business data services. They claim that by unreasonably keeping demand for these services captive, these percentage or loyalty plans decrease the demand available to encourage entry or expansion by competitors. These provisions impact both competitive providers and business end users as purchasers of business data services. For example, BT Americas and other competitive LECs believe that the high percentage purchase commitments included in the pricing plans under investigation "all have the same intent and effect – to encourage customers of special access to purchase a very large share of their requirements from the ILEC – or, equivalently, to discourage these customers from purchasing a significant share of their special access requirements from ILEC rivals."[105] Comptel states that high percentage commitments "limit competition by effectively requiring wholesale customers to purchase a large proportion of their past or current special access needs from the incumbent LEC."[106] By contrast, XO states that "other providers' plans generally do not have minimum commitments" at all—yet their rates are "typically lower than what XO obtains from price cap LECs even given the discounts."[107]

42. According to Comptel, such pricing plans "have impeded competition in the multi-billion dollar special access market and undermined investment in broadband networks."[108] tw telecom states that high percentage commitments result in "a far smaller addressable market for existing or potential

[101] AT&T Mar. 12, 2013 Reply Comments at 21.

[102] *Id*. at 27-30.

[103] *Id*. at 30-35; AT&T Oct. 13, 2015 *Ex Parte* Letter at 3-5 (stating SWBT Tariff No. 73 and its portability *option* are not loyalty contracts for several reasons: (1) The tariff contains *no volume discounts at all*, customers can purchase individual circuits for one of six terms, and they can obtain the maximum discounts under this tariff regardless how many circuits they purchase. (2) Under the TPP, the early termination fee liability is only a fraction (40 percent of the remaining monthly charges for the circuit. (3) "The volume commitment for the portability feature is set by reference only to the customer's DS1 channel termination volumes *with* AT&T – not rivals, so customers can buy as much service from AT&T's competitors as they choose." (4) "[C]ustomers are not required to maintain their initial volumes; rather a customer can disconnect up to 20 percent of its initial DS1 circuit commitment (including disconnects made to move them to another carrier) over the term of the portability plan without paying any ETFs. Any customer that chooses the portability option thus retains substantial flexibility.") (emphasis in original).

[104] Verizon Mar. 2, 2015 *Ex Parte* Letter at 5.

[105] BT Americas et al. Feb. 11, 2013 Comments, Appx. A (Besen and Mitchell Decl.) at 7. *See also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 1 ("incumbents use a combination of devices to lock up the market").

[106] Comptel Sept. 10, 2014 *Ex Parte* Letter at 3.

[107] XO Sept. 23, 2015 *Ex Parte* Letter at 9-10 (noting "XO never requires a customer making a volume commitment to purchase…a percentage of its in-service circuits in place at the start date").

[108] *Id*. at 2.

alternative wholesale providers than would otherwise be the case."[109] Level 3 states that "[w]hen the vast majority of large buyers of special access are committed in this way . . . effective competition will not emerge, as there is inadequate demand for competitors to enter on any sort of viable scale."[110] XO states "these commitments are holding demand hostage . . . which would in normal marketplace conditions spur entry . . . thereby preventing the emergence of competition."[111] It further asserts:

> Effective competition simply cannot emerge, despite the high overall demand, when the potential purchasers have such a large percentage of their needs locked up in inflexible long-term agreements. Because purchasers cannot obtain more than an insubstantial fraction of service from competitive providers, there is not sufficient 'free' demand to create conditions for competitors to enter on a meaningful scale.[112]

Furthermore, competitive LECs argue that the incumbent LEC pricing plans thwart the technology transition because, by locking competitive LECs into the purchase of TDM connections, they discourage investment and deployment and limit the ability of competitive carriers to compete in the IP market.[113] Sprint also asserts the ILECs are unreasonably using their lock up of DS1 and DS3 demand to leverage their market share in the TDM market into the IP market, noting that incumbent LECs may waive shortfall and early termination penalties as long as the purchaser buys the upgraded services, such as Ethernet, from the incumbent LEC, this is how "the ILEC ensures that it captures demand for upgraded technologies."[114]

43. Incumbent LECs respond that the terms and conditions contained in their tariff pricing plans are reasonable and achieve economic efficiencies. AT&T states that "volume and term discounts offered by ILECs are legitimate pro-competitive responses to competition that benefit both providers and customers."[115] Verizon states that its "terms and conditions are properly understood from an economic perspective as efforts to reduce transaction costs and address risk-sharing issues, and not as practices designed to discourage entry or impede competition."[116] It further states that percentage commitment-

[109] Comments of tw telecom et al., WC Docket No. 05-25, RM-10593, at 41 (filed Feb. 11, 2013) (tw telecom et al. Feb. 11, 2013 Comments).

[110] Level 3 June 27, 2012 *Ex Parte* Letter at 8.

[111] Reply Comments of XO, WC Docket No. 05-25, RM-10593, at 12 (filed Mar. 12, 2013) (XO Mar. 12, 2013 Reply Comments). *See also id*. at 9 ("competition has been stymied because the majority of the demand in the industry is thereby effectively held hostage.").

[112] *Id*. at 15. See also *id*. at 13 (Such commitments "leav[e] less of the carrier's demand free to move so as to help establish a truly competitive market."); XO Sept. 23, 2015 *Ex Parte* Letter at 1, 4-5.

[113] Windstream Sept. 24, 2015 *Ex Parte* Letter at 1; Sprint Sept. 23, 2015 *Ex Parte* Letter at 8 ("The ILECs should not be allowed to use their historical market dominance in TDM services, achieved when they were not subject to the market opening measures in the Telecommunications Act of 1996, as a tool to achieve dominance in the new and evolving market for Ethernet backhaul and enterprise building access.").

[114] Sprint Sept. 23, 2015 *Ex Parte* Letter at 7.

[115] Letter from David L. Lawson, Attorney for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1-2 (filed Mar. 28, 2012) (AT&T Mar. 28, 2012 *Ex Parte* Letter). AT&T also asserts that the Commission "has long recognized that 'both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships.'" *Id*. at 2.

[116] Reply Comments of Verizon, WC Docket No. 05-25, RM-10593, at 20 (filed Mar. 12, 2013) (Verizon Mar. 12, 2013 Reply Comments). *See also* Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 3 (filed July 16, 2012) (Verizon July 16, 2012 *Ex Parte* Letter) ("the added efficiencies associated with a customer making a volume commitment on top of a term commitment – in

(continued…)

based pricing plans "benefit both Verizon and its customers because they reflect the economic efficiencies associated with the additional predictability and certainty they provide."[117] CenturyLink states that the high percentage purchase commitments in its tariff pricing plans "are economically justified because they protect a level of revenue necessary to ensure that the company recovers its risk-adjusted capital costs."[118]

44. Competitive LECs dispute the claimed efficiencies of these plans.[119] Level 3 states that "the BOCs'[Bell Operating Companies'] 'discounts' do not appear to be based in any way on their own cost structure (i.e., the savings the BOCs realize by providing service in bulk) . . . . [They] appear to be driven more by the BOCs' desire to limit customers' purchases from competing providers than by the savings involved in serving larger volume customers."[120] Level 3 also states that "price-cap LECs' 'predictability' justification for high percentage commitment levels also fails because it conflicts with their actual cost structure and practices. . . . [T]he price-cap LECs have not shown that commitment levels are necessary to support their investment and they cannot do so. Most of these circuits already exist . . . and the 85% to 100% commitment levels appear to be far higher than necessary to capture any incremental costs."[121] Level 3 cites Qwest's 2010 increase in its "lock-up percentages" and states that the increase "does not coincide with a suddenly-realized increased need to predict Quest's volume utilization for internal planning purposes . . . Instead, the increase coincides with increased threat of competition from Level 3 and other CLECs, and is likely explained as an anticompetitive response to that factor."[122]

45. Incumbent LECs also assert that pricing plans predicated on high percentage purchase commitments provide lower rates that benefit purchasers and the public generally.[123] But, as noted above, competitive LECs respond that even the incumbent LECs' heavily discounted rates are in many cases much higher than competitors' rates. Level 3 states that "[a]lmost ubiquitously, the pricing Level 3 observes in the marketplace from the price-cap LECs is dramatically higher for the same services to the exact same locations than the pricing Level 3 could obtain from competitive providers in those locations where competition is present."[124] XO states that "[w]here XO has agreements with competitors . . . the

(Continued from previous page)
terms of greater certainty and predictability – are what make it possible for Verizon to offer additional benefits such as circuit portability"); Verizon Mar. 27, 2012 *Ex Parte* Letter at 1, 7; Verizon Mar. 2, 2015 *Ex Parte* Letter at 1, 2.

[117] Verizon Mar. 27, 2012 *Ex Parte* Letter at 1.

[118] Comments of CenturyLink, WC Docket No. 05-25, RM-10593, at 27 (filed Mar. 12, 2013) (CenturyLink Mar. 12, 2013 Reply Comments). *But see* Letter from Thomas Jones, Attorney for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 6-7 (filed June 5, 2012) (tw telecom June 5, 2012 *Ex Parte* Letter) ("There is simply no way in which the discounts offered pursuant to such Prior Purchase-Based Discount arrangements have any rational basis in economics. They serve only to lock up customer demand and prevent the development of competition."); *see also id*. at 8-10.

[119] *See, e.g.,* Level 3 June 27, 2012 *Ex Parte* Letter at 10 ("almost every successful, competitive business in America manages to achieve certainty and predictability without using anticompetitive lock-up arrangements that are based on a customer's prior purchase volume.").

[120] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 23.

[121] *Id*. at 24.

[122] *Id*. at 23.

[123] *See, e.g.,* Verizon Aug. 16, 2010 *Ex Parte* Letter at 1 ("these discount plans provide pro-competitive alternatives that serve to lower the prices a variety of different types of customers pay"); Reply Comments of AT&T, WC Docket No. 05-25, RM-10593, at 62 (filed Feb. 24, 2010) (AT&T Feb. 24, 2010 Reply Comments) ("it promotes competition, benefits consumers, and advances the public interest when ILECs reflect the efficiencies of their operations in the prices that they charge.").

[124] Letter from Michael J. Mooney, General Counsel, Regulatory Policy, Level 3, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 5-7 (filed June 8, 2012) (Level 3 June 8, 2012 *Ex Parte* Letter) (including confidential data comparing incumbent LEC and competitive provider rates in certain markets).

price per circuit typically is already lower than what XO obtains from the price cap LECs on a discount plan, often as much as 40-60% less."[125] Sprint cited an example where an incumbent LEC's wholesale prices were high enough allegedly to enable "price squeeze behavior" by the incumbent LEC.[126] It stated that it "lost a longtime enterprise broadband customer because an ILEC undercut Sprint's pricing by nearly $1 million per year because the ILEC's *retail rates* were less than the inflated wholesale access *costs* that Sprint must pay for last-mile special access circuits, including circuits from the same ILEC."[127]

3. Impact of percentage purchase commitments on investment and deployment

46. Competitive LECs claim that the incumbent LEC pricing plans that include commitments of a high percentage of a purchaser's prior or existing at-time-of-entry demand, either by themselves or in combination with other pricing plan provisions, "impede[ ] investment in and deployment of facilities-based competitive networks."[128] Level 3 states that "[i]nvestment, innovation, competition and job creation in connection with construction and operation of competitive fiber networks [are] suppressed by these unreasonably restrictive practices."[129] Level 3 supports this contention by explaining that it "would construct fiber to many more buildings that are near its network, if AT&T's (and the other price cap LECs') lock-up arrangements did not hinder it from doing so."[130] Level 3 further states that "[b]usinesses (and investors) will not commit the substantial capital necessary to build facilities to targeted special access customers when only a small fraction of the customer' special access demand will be available."[131] Likewise, XO asserts that when it does a build/buy analysis, it has been forced to decide not to deploy fiber solely due to provisions in incumbent LEC pricing plans that substantially raise the cost of deployment.[132] They claim this has "a chilling effect on XO's plans to deploy new fiber to buildings,"[133] the impact of which "extends beyond the buildings in question."[134] Other competitive LECs also claim that high percentage purchase commitments prevent competitors from achieving viable scale, preventing challenges to the non-addressable portion of the market.[135]

---

[125] XO Mar. 12, 2013 Reply Comments at 14.

[126] Sprint Sept. 23, 2015 *Ex Parte* Letter at 2.

[127] *Id*. at 5 (emphasis in original).

[128] Level 3 June 27, 2012 *Ex Parte* Letter at 6; Sprint Sept. 23, 2015 *Ex Parte* Letter at 8 (arguing these commitment plans divest "scarce financial resources away from competitive infrastructure investment to…entrenched incumbents."); XO Sept. 23, 2015 *Ex Parte* Letter at 8 (stating the threat of being unable to meet minimum purchase commitments in these plans and the resulting shortfall penalties have a "chilling effect" on fiber deployment to new buildings and overall competition.).

[129] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 2-3.

[130] Level 3 June 27, 2012 *Ex Parte* Letter at 5; Level 3 Sept. 23, 2015 *Ex Parte* Letter at 4 (explaining that freeing Level 3 from lock-up plans would produce millions of dollars in savings that would make more funds available for investment and accelerate competition).

[131] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 5.

[132] XO Sept. 23, 2015 *Ex Parte* Letter at 9 ("These locations otherwise met XO's criteria to build fiber and to bring them on-network.").

[133] *Id*. at 8.

[134] *Id*. at 9.

[135] *See, e.g.,* Comptel Sept. 10, 2014 *Ex Parte* Letter at 2 ("the Commission should not delay in addressing unjust and unreasonable terms and conditions imposed by the incumbent LECs that effectively lock-up competitors, preclude them from using facilities/services of other carriers (to the extent such an alternative exists) and disincentivize them from building their own facilities in the limited portion of the last mile where overbuilding could become economically viable"); Level 3 Feb. 22, 2012 *Ex Parte* Letter at 5 ("The significance of price-cap LECs' lock-up terms cannot be overstated – they prevent facilities-based competitors from entering the multi-billion dollar

(continued…)

47. The incumbent LECs observe that marketplace conditions have not stopped competitive providers from entering and increasing their presence.[136] AT&T states that "CLECs have been able to enter the market and substantially expand their networks"[137] and cites evidence of competitive providers' investments.[138] Competitive LECs respond that there would have been greater investment in competitive facilities but for the restrictive terms and conditions of incumbent LEC special access pricing plans. For instance, Level 3 states that it "is forced to sit out more often than it would like not because it wants to, but because if it did incur the expense to build to these buildings, its prospective, large customers would be unable to buy more than a fraction of their demand from Level 3 as they are already locked in to buying from AT&T and the other price cap LECs instead."[139] Level 3 cited an example of a customer that could have saved $65,000 annually by moving to Level 3 but which purchased services "from incumbent LECs under lock-up plans that prevent it from [doing so]."[140]

4. Voluntary or involuntary nature of percentage purchase commitments

48. Incumbent LECs contend that competitive providers have multiple options for obtaining alternative business data services and that they voluntarily entered into the agreements at issue here.[141] AT&T, for example, asserts that "substantial volumes of special access demand" are available from other providers.[142] CenturyLink states that "[c]ustomers set their own spend/volume threshold when they enter into an RCP [Regional Commitment Plan]."[143] Competitive LECs counter that, as a practical matter, they are locked in to the incumbent LECs' pricing plans. Windstream asserts that incumbent LECs retain "overwhelming control" of last-mile special access facilities, or channel terminations, which can "dictate terms and conditions to disadvantage and raise the costs of their competitors that must purchase these services in order to bring an integrated competitive service package to the small or medium-sized business or governmental customer."[144] Sprint states that "lowering purchases substantially below the commitment level triggers a massive 'shortfall penalty.' These fees and charges are uneconomic for buyers, and as a result, buyers typically maintain their commitments at the same high levels, even at contract renewal."[145] Level 3 states that a "customer needing to buy some connections from Verizon (and

(Continued from previous page)
special access market on a viable scale, thus preventing them from providing meaningful competition to the price-cap LECs for special access.").

[136] *See, e.g.,* AT&T Oct. 10, 2014 *Ex Parte* Letter at 2-3.

[137] Reply Comments of AT&T, WC Docket No. 05-25, RM-10593, at 20 (filed Mar. 12, 2013) (AT&T Mar. 12, 2013 Reply Comments).

[138] *Id*. at 26. *See also* Verizon 2013 Reply Comments at 24.

[139] Level 3 June 27, 2012 *Ex Parte* Letter at 5. Level 3 also states that the incumbents' lock-in plans result in higher costs and "lost revenue opportunities [that] directly implicate Level 3's ability to support further network deployment." Level 3 Sept. 23, 2015 *Ex Parte* Letter at 6.

[140] Level 3 Sept. 23, 2015 *Ex Parte* Letter at 5.

[141] *See, e.g.,* AT&T Oct. 10, 2014 *Ex Parte* Letter at 5; Verizon July 16, 2012 *Ex Parte* Letter at 2 ("These plans do not restrict customers' ability to obtain high-capacity services from Verizon's competitors or through self-supply.").

[142] AT&T 2013 Reply Comments at 34. *See also* Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 2 (filed June 6, 2012) (AT&T June 6, 2012 *Ex Parte* Letter); Verizon July16, 2012 *Ex Parte* Letter at 4 ("When a customer's plan expires, the customer has many options, including migrating all of its circuits away from Verizon.").

[143] Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 3 (filed Apr. 20, 2012) (CenturyLink Apr. 20, 2012 *Ex Parte* Letter) ("RCP" references the Regional Commitment Program in CenturyLink Operating Companies Tariff F.C.C. No. 11).

[144] Windstream Sept. 24, 2015 *Ex Parte* Letter at 4.

[145] Sprint Feb. 11, 2013 Comments at 25.

every large customer does given that Verizon is the only game in town for large portions of its territory) will see its overall pricing skyrocket unless it commits to buy nearly all of its connections from Verizon in exchange for the discount."[146] It further states:

> Each customer faces a choice: purchase essentially all of the relevant services from the price-cap LEC at a 'discount,' or purchase from competitors in some areas and the price-cap LEC services elsewhere – but pay the price-cap LEC rack rates. The latter approach is not economically tenable . . . .[147]

49. Level 3 cites CenturyLink's decision in 2010 to raise the minimum percent of purchase commitment in its RCP tariff pricing plan from 90 percent to 95 percent of their monthly recurring revenue for DS1 channel terminations and DS3 channel terminations purchased from CenturyLink's in its fourteen state legacy Qwest region as another example of how purchasers are forced into high commitment levels.[148] Level 3 also states that once a purchaser "signs an RCP with CenturyLink, it is very difficult for a customer to extricate itself from the grip of the plan" since "all plan discounts are lost instantaneously on expiration of the plan, unless the plan is immediately renewed."[149] tw telecom states "there are no realistic alternatives to ILEC Special Access Plans for competitors . . . because ILECs control the only last mile facilities serving the vast majority of business customer locations."[150] tw telecom also highlights the role circuit portability plays in leaving competitive LEC customers with no practical alternative but to enter into high percent-of-purchase commitment pricing plans.[151]

5. Impact of percentage purchase commitments on ability to shift purchases from pricing plans

50. Competitive LECs claim that high percentage purchase commitments and other pricing plan constraints, including shortfall penalties, have made it impractical to shift significant volumes of purchases away from the incumbent LECs' tariff pricing plans. Comptel, in addition, cites "loyalty provisions that limit competition by effectively requiring wholesale customers to purchase a large proportion of their past or current special access needs from the incumbent LEC, and requirements that persist into successor agreements."[152] Further, BT Americas and other competitive LECs assert that "once

---

[146] Letter from Erin Boone, Senior Corporate Counsel, Federal Regulatory Affairs, Level 3 Communications to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 5 (filed Aug. 23, 2012) (Level 3 Aug. 23, 2012 *Ex Parte* Letter) ("Given this 'choice,' it is not surprising that most large customers commit to buy the vast majority of their special access service from Verizon in region").

[147] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 17. *See also* GAO Report at 30 ("Unless a competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and to purchase additional circuits from the incumbent, rather than to switch to a competitor . . . even if the competitor is less expensive.").

[148] Level 3 June 8. 2012 *Ex Parte* Letter at 14 (citing Qwest Tariff No. 1 (currently CenturyLink Tariff No. 11), § 7.1.3.B.3.a; *see also* Qwest Corporation Transmittal No. 419, Tariff No. 1 (filed May 17, 2010)).

[149] Level 3 June 27, 2012 *Ex Parte* Letter at 14.

[150] *See, e.g.,* tw telecom June 5, 2012 *Ex Parte* Letter at 3-4.

[151] *See id*. at 5 ("without a sufficiently robust circuit portability solution, it is virtually impossible for a competitor to compete on a meaningful level in downstream retail markets. Yet circuit portability is often only available from an ILEC if tw telecom agrees to purchase a large volume of special access under an ILEC Special Access Plan. In these circumstances, tw telecom again has no choice but to enter into such a plan.").

[152] Comptel Sept. 10, 2014 *Ex Parte* Letter at 3; XO Sept. 23, 2015 *Ex Parte* Letter at 5 (explaining that XO "has had no choice but to renew its Commitment Plans when they expire" because of the lack of competitive alternatives and the substantial price increase it would face if it had to buy undiscounted service from the incumbent LEC) and 10 (noting competitive providers do not typically use higher rate provisions when an agreement expires "to force a new long-term commitment.").

a competitor agrees to a volume commitment with the incumbent LEC, it is virtually impossible for the competitor to shift any of its committed special access demand to an alternative provider."[153]

51. Incumbent LECs, however, maintain that their customers are able to transition their purchases without constraint. Verizon states that after customers' plans expire, "they are free not only to choose another provider, but also to enter into another Verizon plan at the same ***or lower*** volume."[154] AT&T asserts that "[s]ubstantial volumes of special access demand can be shifted to AT&T's rivals."[155] Regarding its Term Payment Plan circuit portability option, AT&T states:

> Under the TPP portability option these customers are free to shift substantial volumes of circuits to CLECs (or their own networks) but have chosen not do so [sic]. In aggregate, customers that have selected the TPP portability option have 'headroom' of over 20 percent of the associated minimum TPP portability commitments. All of this substantial demand is 'portable' and can be shifted without incurring an ETF.[156]

52. Competitive LECs dispute this characterization. They assert that "[i]ncumbent LECs have argued that competitors can simply shift all or a subset of their purchases to an alternative wholesale provider at the end of an incumbent LEC purchase arrangement's term, but this is rarely, if ever, a realistic option."[157] According to competitive LECs, "[a]t best, a competitor could only attempt to shift a subset (likely a small subset) of its demand to an alternative wholesale provider and keep the remaining portion of its demand in service with the incumbent LEC under a new purchase arrangement."[158] Sprint also notes that some incumbent LECs constrain purchasers' ability to migrate circuits to other special access vendors by imposing unreasonable charges and limits on the number of circuits that can be migrated on a daily basis.[159] With regard to the CenturyLink RCP, Level 3 states that "as a practical matter, once it signs an RCP with CenturyLink, it is very difficult for a customer to extricate itself from the grip of the plan."[160] Competitive LEC commenters generally agree with Level 3's assessment:

> Thus, in order to sign up for a new purchase arrangement at a lower volume commitment level, the competitor must have already begun purchasing a subset of its special access volume from an alternative wholesale provider. Of course, if the competitor attempted to do so during the term of its original purchase arrangement, it would incur extremely high shortfall penalties and early termination penalties . . . .[161]

---

[153] BT Americas et al. Feb. 11, 2013 Comments at 26. *See also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 2 (providing an example of high percentage loyalty commitments that, if missed, result in monthly per circuit penalties of $900).

[154] Verizon Mar. 12, 2013 Reply Comments at 21 (emphasis in original); *see also* Verizon Mar. 27, 2012 *Ex Parte* Letter at 2-3.

[155] AT&T Mar. 12, 2013 Reply Comments at 34.

[156] *Id*. at 35.

[157] BT Americas et al. Feb. 11, 2013 Comments at 28.

[158] *Id*.

[159] Sprint Feb. 11, 2013 Comments at 35-36. *See also* Windstream Sept. 24, 2015 *Ex Parte* Letter at 4. ("[E]ven when an ILEC arrangement theoretically permits some Ethernet purchases to be counted toward spend commitments, Windstream has concerns about a competitive carrier's ability to meet ILEC-prescribed manual conversion process successfully and in a timely fashion.").

[160] Level 3 June 27, 2012 *Ex Parte* Letter at 15.

[161] *Id*. at 29.

53. In its report analyzing special access services, the Government Accountability Office made similar observations about the effect of high percentage purchase commitments on purchasers' ability to choose alternative providers. As noted above, it stated: "These types of contracts may inhibit choosing competitive alternatives because the customer does not receive the applicable discount, credit, or incentive if the revenue targets are not met and additional penalties may also apply."[162] It further concluded that "[u]nless a competitor can meet the customer's entire demand, the customer has an incentive to stay with the incumbent and to purchase additional circuits from the incumbent, rather than switch to a competitor or purchase a portion of their demand from a competitor – even if the competitor is less expensive."[163]

6. Impact of percentage commitments on the IP transition

54. Competitive LECs claim that high percentage commitment provisions in some incumbent LEC special access tariff pricing plans, either by themselves or in combination with other pricing plan provisions such as long term commitments, force purchasers to continue buying TDM services, limit competitors' (and incumbents') ability to migrate DSn services to Ethernet services, and inhibit competitive deployment of and competition for IP-based services generally.[164] If correct, this would be of particular concern as (1) incumbent and competitive LECs seek to transition their networks and service offerings in response to increasing demand for Ethernet services and (2) the Commission considers technology-neutral, procompetitive policies to ensure a successful IP-technology transition and migration path for incumbent and competitive LECs and their customers.[165] We therefore will also investigate the question of whether incumbent LEC tariff pricing plan percentage commitment and technology migration provisions not only constrain competition for TDM services but also impede the transition from TDM- to IP-based networks. As a result, we seek to examine whether tariff pricing plans that prohibit Ethernet sales from counting toward the fulfillment of a purchaser's percentage commitment or otherwise limit or restrict the counting of such sales in such a fashion represent an unjust and unreasonable practice under section 201(b) of the Act.[166]

---

[162] GAO Report at 30.

[163] *Id*.

[164] *See, e.g.,* Sprint Sept. 23, 2015 *Ex Parte* Letter at 2, 7-8; Windstream Sept. 24, 2015 *Ex Parte* Letter at 1, 4; BT Americas et al. Feb. 11, 2013 Comments at 41. *See also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 2-3 ("AT&T's TPP does not permit Level 3 (or any other customer) to count Ethernet purchases toward its TPP volume commitments . . . . Thus AT&T's TPP by its terms imposes a massive 'technology transitions tax . . . .'").

[165] *See generally Technology Transitions Order*, 29 FCC Rcd 1433.

[166] The relevant provisions of the tariff pricing plans under investigation include Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13(F) ("Upgrading a DCP [Discount Commitment Program] Service" (Higher Level Speeds not defined)); BellSouth Tariff F.C.C. No. 1 § 2.4.8(B) (explaining upgrading services under an Area Commitment Plan); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(B) ("Conversion of service to a new DS1 TPP [Term Payment Plan] or Higher Speed Service"); SWBT Tariff F.C.C. No. 73 § 7.2.22(B) ("Conversion of service to a new DS1 TPP [Term Payment Plan] or Higher Speed Service"); CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3(B)(5)(c) (migration of DS1 and DS3 channel terminations in a Regional Commitment Plan); CenturyLink Operating Companies Tariff F.C.C. No. 9 § 7.4.11(J) ("Upgrading a TDP [Term Discount Plan] Service"). Embarq has provisions for upgrades to DS1 and DS3 and to Gateway SONET Ring or other SONET level services. Embarq also has specific provisions for upgrading a DS1 or DS3 to Ethernet Transport or Ethernet Virtual Private Line service; Frontier Telephone Companies Tariff F.C.C. No. 5 §§ 5.6.14(N) ("Upgrades to Higher Speed Services" for DS1 Term Volume Plans) and 5.6.19(J) ("Upgrade to Equal or Higher Speed Services" for DS3 Term Volume Plans; Frontier Tariff F.C.C. No. 6 § 7.2.1(G)(12) ("Upgrade to Higher Speed Service" for DS1 Term Payment Plan; Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.7(A) ("Network Upgrades to [H]igher [S]peed Access Services" for DS1 or DS3 Optional Payment Plans); Verizon Telephone Companies Tariff F.C.C. No. 1 §§ 2.9, 25.1.3(B) ("Upgrades" for Commitment Discount Plans) and 25.3.7(H) ("Upgrades" for National Discount Plan); Verizon Telephone Companies Tariff F.C.C. No. 11 §§ 2.10,

(continued…)

55. Competitive LECs, as discussed in detail above, assert that a significant consequence of percentage commitment plans is the inhibition of competitive deployment. Competitive LECs that are investing in infrastructure deployment are deploying facilities to be used to provide IP-based services. Competitive LECs assert the terms and conditions have a direct effect on limiting deployment. For example, as described by XO and other competitive LECs, the shortfall penalties and early termination fees, which are the enforcement mechanisms attached to percentage commitments, can be decisive in a build/buy analysis because it results in fiber that is otherwise cost justified by the location and services sold *not* being deployed and therefore continued reliance on incumbent LEC TDM-based facilities.[167] This creates a ripple effect in that locations along the fiber route that never was built also will now *not* become cost effective for the competitive LEC to serve with its own facilities.[168] Competitive LECs further assert that the limitation on the addressable market that percentage commitments cause works to limit deployment by constraining the potential revenue opportunities.[169] That is, where there are fewer potential customers along a fiber route under consideration, the decision not to build is made more often and less fiber (and the next generation services that run over them) is deployed and more customers deprived of the opportunity to access next generation services and often lower prices.[170]

56. Competitive LECs further argue that incumbent LECs' tariff pricing plan percentage commitments are structured in a manner that does not allow, or unreasonably limits, the ability of competitive LECs to count Ethernet business data services purchases from the incumbent LECs toward fulfillment of their TDM-based DS1 and DS3 channel termination percentage commitments.[171] Competitive LECs state that "by effectively requiring competitors to continue purchasing large volumes of DS1 and DS3 special access services, incumbent LEC exclusionary purchase arrangements delay the adoption of Ethernet and other packet-mode services."[172] Moreover, Windstream asserts that these incumbent LEC TDM lock-up provisions "both slow the wholesale purchasers' IP transitions and raise their costs – which then allow the large ILECs to ward off competition and raise their own retail prices."[173] Competitive LECs assert that by requiring purchasers to meet high percentage commitments,

(Continued from previous page)
25.1.3(B)(1) ("Upgrades" for Commitment Discount Plan) and 25.2.7(H) ("Upgrades" for National Discount Plan); Verizon Telephone Companies Tariff F.C.C. No. 14 §§ 2.10, 5.6.14(N) ("Upgrades" to Higher Speed Service and Technology Migrations for DS1 Term Volume Plans) and 5.6.19(J) ("Upgrades" to Higher Speed Service and Technology Migration for DS3 Term Volume Plan) and 23.1.7(H) ("Upgrades" for National Discount Plan); and Verizon Telephone Companies Tariff F.C.C. No. 16 §§ 2.9, 22.1.7(H) ("Upgrades" for National Discount Plan). This list is not intended to exclude any other related tariff provisions.

[167] *See, e.g.,* XO Sept. 23, 2015 *Ex Parte* Letter at 8; Comptel Sept. 10, 2014 *Ex Parte* Letter at 4-5.

[168] *Id.*, *see also* BT Americas et al. Feb. 11, 2013 Comments, Appx. C at 3 ("[I]n the majority of build scenarios there must be at least one larger business customer who has committed to a level of service that can meet [tw telecom's] minimum [revenue] threshold to justify a build.").

[169] *See, e.g.,* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 1; *see also* BT Americas et al. Feb. 11, 2013 Comments at 21, 33 & Appx. A at 20-23 (Besen and Mitchell Decl.) (discussing the effects of incumbent LEC special access loyalty plans to discourage competition, including denying economies of scale to rivals to deter their entry or expansion).

[170] *See, e.g.,* XO Sept. 23, 2015 *Ex Parte* Letter at 8.

[171] *See, e.g.,* XO Sept. 17, 2014 *Ex Parte* Letter at 3; XO Feb. 11, 2013 Comments, Exh. 2 (Dobbins Decl.) at 6, para. 13 ("Changes in technology are exacerbating XO's constraints under the price cap LECs' special access commitment plans. The demand for Ethernet services is increasing among XO's carrier and commercial customers. As more XO customers seek to move to Ethernet circuits, maintaining the minimum numbers of circuits under special access commitment plans with price cap LECs is becoming increasingly difficult. XO possesses a very limited ability under its special access commitment plans with Verizon and AT&T to move TDM circuits to Ethernet platforms to meet increasing demand and have Ethernet purchases count against its volume commitments.").

[172] BT Americas et al. Feb. 11, 2013 Comments at 41.

[173] Windstream Sept. 24, 2015 *Ex Parte* Letter at 1-2.

incumbent LEC tariff plans "lock in" buyers to purchasing TDM-based transmission technologies instead of more efficient Ethernet services.[174] Competitive LECs argue that even where pricing plans contain technology migration provisions, those provisions are often limited by restrictions or in some cases impose significant fees for shifting their purchases to Ethernet.[175]

57. XO asserts that it is not only more difficult to meet DS1 and DS3 channel termination commitment levels as more of its customers move to Ethernet services, but incumbent LEC tariffs also impede the ability of competitive LECs to transition customers using TDM-based services to an Ethernet solution.[176] For example, XO states that "the large ILECs' special access volume commitments . . . penalize XO just when the industry is poised to accelerate the transition to IP-based services."[177] tw telecom argues that the lack of sufficient technology migration provisions in these tariffs creates a situation where it must either offer services based on less efficient legacy DSn technology or incur shortfall penalties for shifting its purchases to Ethernet.[178] tw telecom further states "[c]ustomers have 21st century needs, but we are faced with having to purchase 20th century technology. We are in a squeeze – paying supra-competitive rates for outdated technology; having to commit our growth revenues; and overpaying for special access reduces our ability to buy new off-net technology."[179]

58. Competitive LECs also assert that, even if incumbent LEC tariff pricing plans provide some ability to transfer DS1 and DS3 channel terminations to Ethernet products to fulfill a purchaser's percentage commitment, other restrictions in the tariffs effectively prevent competitive LECs from doing so. For example, XO states that restrictions on technology migration provisions render them "operationally infeasible."[180] Level 3 adds that some incumbent LEC tariffs may provide for a technology migration, but "this option [is] very difficult to use" because a number of conditions related to the new, upgraded service have to be met, including requirements regarding length of service, bandwidth,

---

[174] *See, e.g.,* Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 5 (citing CenturyLink Operating Companies Tariff F.C.C. No. 11, § 7.1.3(B) establishing a volume commitment based on a customer's DS1 and DS3 channel termination purchase volumes); *but see* CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3.B.c (regarding technology migration).

[175] *See, e.g.,* Sprint Sept. 23, 2015 *Ex Parte* Letter at 7; Comptel Sept. 10, 2014 *Ex Parte* Letter at 5-6 n.24.

[176] *See, e.g.,* XO Sept. 17, 2014 *Ex Parte* Letter at 3; BT Americas et al. Feb. 11, 2013 Comments at 5 (alleging that "the incumbent LEC's exclusionary purchase commitments" have the effect of "stifling competitive deployment of local fiber transmission facilities and suppressing demand for Ethernet and other packet-mode special access services.").

[177] XO Sept. 17, 2014 *Ex Parte* Letter at 3.

[178] Letter from Thomas Jones, Counsel, tw telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593. at 8-9 (filed Aug. 21, 2012) (tw telecom Aug. 21, 2012 *Ex Parte* Letter).

[179] tw telecom Feb. 27, 2012 *Ex Parte* Letter, Attach. at 3.

[180] XO Sept. 17, 2014 *Ex Parte* Letter at 3 (citing restrictions in Verizon's Commitment Discount Plans Tariff F.C.C. No. 1 § 2.9.6 including requirements on terminating locations, length of service terms, bandwidth, and revenue commitments). *See also* Level 3 Feb. 22, 2012 *Ex Parte* Letter at 21 (noting timing and notification restrictions); tw telecom Aug. 21, 2012 *Ex Parte* Letter at 8-9 (noting the following conditions would place it "at risk of incurring shortfall penalties if it were to attempt to transition a large number of end users" to Ethernet in Verizon tariffs – "provisions [that] require that the new service be provided to the same service address as the existing service, that the commitment term for the new service term be longer than the commitment term for the existing service, and that Verizon's revenue attributable to the new service be greater than its revenue attributable to the existing service"). These conditions in a tariff would prevent a competitive LEC from receiving the benefit of technology migration provisions if it transitions an end user to Ethernet for a shorter term or at less revenue than the DS1 or DS3 channel termination services being replaced.

revenue commitments, terminating locations, and notification.[181] XO states that it is not "seeing a transition to an environment where DS1 and DS3 purchases are truly fungible with Ethernet service for purposes of meeting volume commitments."[182] Moreover, competitive LECs assert that where a tariff provision allows a competitive LEC to count upgraded circuits toward fulfillment of its percentage commitment, it often only applies to upgrades for existing customers. In contrast, when a competitive LEC that has circuit portability under a pricing plan replaces a former customer's demand with that of a new customer, the new customer's demand will only count toward the competitive LEC's percentage commitment if it is served via TDM-based services.[183] tw telecom contends that not allowing purchases by new customers to count toward percentage commitments is a significant problem for competitive LECs as they seek to remain effective competitors able to respond to growing Ethernet demand.[184]

59. Incumbent LECs deny that customers are "locked-in" to purchasing TDM-based special access services under their tariff pricing plans and assert that the Ethernet marketplace is "intensely competitive."[185] AT&T, for example, maintains that its customers may "choose discount plans with both volume and term discounts covering only a fraction of their overall volumes," and that "[t]his allows significant volumes that can be readily moved to competitive providers."[186] Incumbent LECs also argue that "the marketplace [is] rapidly transitioning to Ethernet and other IP-based services that are offered by a broad array of competitors, with CLECs and cable companies being among the leading providers."[187] This demonstrates, according to AT&T, that "the terms and conditions under which ILECs provide TDM-based services have not materially affected [competitive LECs'] ability to migrate to other providers or to other types of services, including Ethernet services."[188]

60. Verizon contends that it "permits its customers to switch from DS1 and DS3 services to higher-capacity services (including Ethernet) regardless of the number of circuits the customers wants to transition."[189] CenturyLink denies that incumbent LEC tariffs "have onerous circuit migration charges and restrictions" and asserts that "[c]harges for facility moves are common in the industry, given there are expenses involved with moving or migrating circuits."[190]

---

[181] *See, e.g.,* Level 3 Feb. 22, 2012 *Ex Parte* Letter at 21 (citing Verizon Telephone Companies Tariff F.C.C. No. 1 §§ 2.9 and 7.4.13D (90-day advance notice requirement for disconnection of a DS3)); *see also* Level 3 Sept. 23, 2015 *Ex Parte* Letter at 3.

[182] XO Sept. 17, 2014 *Ex Parte* Letter at 3.

[183] *See* tw telecom Aug. 21, 2012 *Ex Parte* Letter at 9 (referencing Verizon Telephone Companies Tariff F.C.C. No. 1 § 2.9.6); s*ee also* BellSouth Tariff F.C.C. No. 1, § 2.4.8(B) (allowing a customer to "request a reduction in [its commitment under the] Area Commitment Plan without incurring a termination liability" for upgrades).

[184] *See* tw telecom Aug. 21, 2012 *Ex Parte* Letter at 9.

[185] *See, e.g.,* Letter from Robert W. Quinn, Jr., Senior Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, Attach. 1 at 1 (filed June 19, 2012) (AT&T June 19, 2012 *Ex Parte* Letter).

[186] *Id*., Attach. 1 at 2.

[187] AT&T Aug. 8, 2012 *Ex Parte* Letter at 3, 5.

[188] AT&T Mar. 28, 2012 *Ex Parte* Letter at 1; *see also* AT&T Oct. 10, 2014 *Ex Parte* Letter at 5.

[189] Verizon July 16, 2012 *Ex Parte* Letter at 3 (citing Telephone Companies F.C.C. No. 1 § 2.9.6; Verizon Telephone Companies Tariff F.C.C. No. 11 § 2.10.5; Verizon Telephone Companies Tariff F.C.C. No. 14 § 2.10.5; and Verizon Telephone Companies Tariff F.C.C. No. 16 § 2.9.4). Verizon disputes tw telecom's assertions that "ILEC Special Access Plans limit tw telecom's ability to upgrade DSn services to Ethernet services" (citing tw telecom June 5, 2012 *Ex Parte* Letter at 13).

[190] CenturyLink April 20, 2012 *Ex Parte* Letter at 5.

7. "All or nothing" commitments

61. Some of the incumbent LEC tariff pricing plans under investigation include requirements that customers that elect to participate make all of their special access purchases from that incumbent LEC in that region solely through that one pricing plan.[191] Under these "all or nothing" requirements, when a customer elects to participate in a pricing plan, it must typically terminate any purchases it makes under another plan offered by the incumbent LEC in that region and aggregate those purchases under the one pricing plan chosen.[192] It must also incorporate any new purchases into the pricing plan. Competitive LECs note that such requirements decrease customers' ability to manage their special access purchases and are "problematic."[193] Such requirements may, for example, constrain competitive LECs' ability to choose alternatives to the incumbent LEC commitment pricing plans and restrict their ability to respond to customers' requests for Ethernet and other IP-based services.[194] For example, when there is an all-or-nothing provision in a tariff pricing plan with a percentage commitment, a customer cannot simultaneously purchase from that plan and from a different plan, such as a shorter term plan with a smaller discount but without a percentage commitment. If the customer requires circuit portability at all, the customer may be induced to choose the plan with a percentage commitment. An all-or-nothing provision in this context would prevent the customer from splitting its purchases between the two or more plans, thereby precluding it from lowering the amount of volume subject to a percentage commitment in order to reduce subsequent purchase commitment levels. We therefore also investigate the reasonableness of such requirements.

8. Direct Case and Required Data

62. As the foregoing demonstrates, sufficient questions have been raised in the record of the special access proceeding regarding the reasonableness of incumbent LEC tariff pricing plans based on percentage purchase commitments to warrant further investigation of those commitments. To enable an assessment of the reasonableness and potentially discriminatory nature of percentage commitments, we require the incumbent LECs subject to this investigation to respond to the following data and information

---

[191] *See, e.g.,* Verizon Mar. 2, 2015 *Ex Parte* Letter at 3 ("Verizon's customers that subscribe to a CDP must include in the CDP all of the DS1 and DS3 channel terminations that they choose to purchase from Verizon in the region in which they enroll."); *see also, e.g.,* Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.1.2 (A)(1) ("At the time of subscription to CDP [Commitment Discount Plan], the subscribing customer must include all of its ACNAs [Access Customer Name Abbreviations] in the CDP plan.").

[192] *See, e.g.,* Telephone Companies F.C.C. No. 1 § 25.1.2 (C)(2) ("For Switched Access or Special Access Services which are eligible for inclusion under the CDP, the TPPs [Term Payment Plans] will be cancelled in order to include the service(s) in the CDP.").

[193] Letter from Thomas Cohen, Counsel for XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 3-4 (filed May 11, 2015) (XO May 11, 2015 *Ex Parte* Letter) ("[B]ecause of the 'all or nothing' provision, XO has no flexibility to hold back some new installs, if XO chooses, toward the end of an agreement's term to throttle the volume that would go into the CDP, to keep the level of the Minimum Commitment in the successor CDP [with Verizon] lower. . . . XO could not afford to take more of a reduction than the Minimum Commitment provisions allow – i.e., 90% of the spend on DSn circuits with channel terminations at the time of the expiration of the previous agreement – by reducing the number of such circuits in advance because of the unreasonably large shortfall penalties that would apply." XO also explained that there are "substantial practical difficulties in moving circuits off a CDP plan." *Id.* at 4 n.4.

[194] Id. at 4-5. ("Verizon's Tariff F.C.C. No. 1 appears on its face to allow CDP carrier customers some ability to transfer DS1 and DS3 channel terminations to Ethernet products without immediate impact on volume commitments, but the relevant conditions and requirements that apply to such 'Technology Migrations' are so restrictive that replacement under these conditions is operationally infeasible.") (arguing this impedes competition and the IP technology transition, and "[p]rovisions that establish volume commitments should be set aside if they fail to allow a customer's purchase of Ethernet services from an ILEC to act as a substitute or replacement for ILEC special access services in calculating satisfaction of the volume commitment").

requests in their direct cases. For the purposes of the tariff pricing plans under investigation, these data and information requests vary in subject matter and scope from those previously made in the mandatory data request in the special access proceeding.[195]

63. *Circuit portability and percentage commitments.* We require the incumbent LECs to identify for each pricing plan under investigation, the following tariff pricing plan-level data and information on Table I of the data template: (1) an indicator of whether circuit portability is mandated as part of the tariff pricing plan, (2) an indicator whether circuit portability is offered as an option separate from the tariff pricing plan, (3) a narrative description of any circuit portability provisions included in the tariff pricing plan and the actual text of those provisions, (4) a narrative description of any business reason for a percentage commitment in the context of (i) cost justification in cases where all purchases are required to be made within that plan only, i.e., there is an "all-or-nothing" provision, (ii) efficiency justification when there is an all-or-nothing provision, (iii) cost justification when circuit portability is offered as part of the plan or as an additional option, (iv) efficiency justification when circuit portability is offered as part of the plan or as an additional option, and (v) for tariff pricing plans that require a percentage commitment or offer a percentage commitment as an option, require all purchases to be made within that plan only, and that offer circuit portability as part of the plan or as an additional option, the business purpose, if any, of predicating the availability of circuit portability on purchasers making a percentage commitment in the context of an all-or-nothing provision, (5) the minimum percentage of the volume commitment that must be maintained in order to avoid a shortfall penalty, denominated as applicable, separately for: (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) other TDM business data services, and (iv) if applicable, a narrative description of the percentage commitment for other TDM business data services, and (6) data and information concerning limitations and restrictions on circuit migration, including (i) the maximum number of circuits that the ILEC can migrate in one day for each customer, (ii) citations and the full text (which may be searchable PDF) of all provisions in the tariff concerning such limits and restrictions, (iii) the dollar amount charged for migrating a circuit, and (iv) where applicable, a narrative description of the circuit migration charge, including the types of TDM business data service circuits involved and how they are charged.

64. *Volume commitments*. The incumbent LECs subject to this investigation must also provide the following agreement-level data and information on Table III of the data request template: (1) the purchaser's volume commitment, separately, in terms of (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) where applicable, the quantity or number of units of other TDM business data services, and (iv) if applicable, a narrative description of the types of other TDM business data services involved, (2) information regarding the basis for setting volume commitments, including (i) whether the volume commitments are set equal to the quantity of purchases on the start date (i.e., the date of signing), or (ii) if not, then a narrative explanation of the basis for setting the volume commitment including the date for which the quantity of TDM business data services previously purchased may have been used to set the volume commitment, and (3) if applicable, a narrative description and explanation of any change in policy regarding the basis for setting volume commitments during calendar years 2012 through 2014. For agreements under a tariff pricing plan that do not include purchases by competitive providers or mobile wireless providers (i.e., those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

65. *Sales volumes under tariff pricing plans*. Commenters note that most of incumbent LEC TDM business data service sales take place through pricing plans.[196] In order to evaluate the impact of

[195] *Cf Reconsideration Order*, 29 FCC Rcd at 10920-21 (Appx. A (Data Collection) at 13-14).

[196] *See, e.g.,* Peter Bluhm with Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, Revised Edition at 20 (2009) (NRRI Report) at 20; Level 3 Feb. 22, 2012 *Ex Parte* Letter at

(continued…)

high percentage commitments on sales volumes, we seek to quantify the sales that have taken place subject to pricing plans that include such commitments. This will enable us to assess trends in sales and the relative stability of such sales volumes, and the extent to which percentage purchase commitments in pricing plans influence actual sales volumes. The incumbent LECs must submit in their respective direct cases for each tariff pricing plan under investigation and for the geographic region of each pricing plan, the following total sales data for calendar years 2012 through 2014, not including any penalties or fees charged in connection with discounted TDM business data service purchases, in Table IIA of the data request template: (1) the tariff name, (2) the tariff pricing plan name, (3) the section of the tariff that includes the pricing plan, (4) the calendar year in which the sales occurred, (5) the average quantity or number of in-service units sold at a discounted rate under the tariff pricing plan, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) all other TDM business data services, and (iv) a narrative description of the types of all other TDM business data services included, (6) the revenues from sales at a discounted rate under the tariff pricing plan, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) all other TDM business data services, and (iv) all TDM business data services. In addition, the incumbent LEC must submit in Table IIB the following data and information: (1) the tariff name, (2) the calendar year, (3) the average quantity or number of in-service units sold at an undiscounted rate, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) all other TDM business data services, and (iv) a narrative description of the types of all other TDM business data services involved, how they are denominated, and the relevant units of measure, and (4) the revenues from sales at an undiscounted rate, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) all other TDM business data services, and (iv) all TDM business data services.

66. *Methodology for calculating percent-of- purchase thresholds*. Commenters question the methodology used by incumbent LECs to calculate the level of the percentage purchase commitments required to qualify for the tariff pricing plans. For example, tw telecom states that "Verizon fails to defend the actual percentage *level* that it requires customers to commit" and "provides zero evidence as to why 85 percent, 90 percent, and 92 percent are the commitment levels that Verizon requires in order to offer such benefits."[197]

67. To enable an assessment of the reasonableness of the thresholds for percentage purchase commitments, the incumbent LECs subject to this investigation must submit in their direct cases the methodology and calculations used to determine the percentage thresholds in the relevant pricing plans. They must also submit the business justification for the percentage commitments included in each relevant plan under investigation. The incumbent LECs must state whether other threshold values were considered at the time the percentage threshold was established and, if so, explain the basis for selection of the threshold in the pricing plan. We also seek data on the potential relationship between percentage commitments and incumbent LECs' costs. The incumbent LECs affirm the relevance of cost to percentage commitments (and other terms and conditions) in their advocacy. For example, CenturyLink asserts percentage commitments play a role in ensuring cost recovery.[198] Verizon states that such terms and conditions are "efforts to reduce transaction costs and address risk-sharing issues."[199] Where, as here, the incumbent LECs have asserted that the practices in question are related to their costs, we seek cost data that will provide an objective measure by which to assess the reasonableness of such commitments. We therefore seek any evidence and data demonstrating whether the level of the volume commitment was related to cost recovery.

(Continued from previous page)
20 ("price-cap LECs fail to provide any evidence there is much demand for unrestricted "rack rate" offerings . . . . Indeed, while such non-lock-up offerings may be available, the demand is likely small.").

[197] tw telecom Aug. 21, 2012 *Ex Parte* Letter at 4 (emphasis in original).

[198] CenturyLink Mar. 12, 2013 Reply Comments at 27 ("volume commitments protect a level of revenue necessary to ensure that the company recovers its risk-adjusted capital costs").

[199] Verizon Mar. 12, 2013 Reply Comments at 20.

68. *Percentage commitment in CenturyLink's RCP*. CenturyLink Tariff F.C.C. No. 11 currently requires a percentage purchase commitment of 95 percent to qualify for participation in its Regional Commitment Program (RCP) special access tariff pricing plan.[200] CenturyLink raised the level of the percentage purchase commitment required for participation in its RCP from 90 percent to the current 95 percent in 2010.[201] As part of our investigation, we seek additional information about this change in the percentage purchase commitment level in the RCP. CenturyLink must submit as part of its direct case all evidence and data concerning the methodology and calculations used in making this change, including all analysis it conducted on the impact such change would have on CenturyLink's sales or revenues as well as any evidence or data demonstrating that this change was effected to ensure cost recovery.

69. *Renewal of Purchase Agreements.* Competitive LECs cite the practical difficulties they encounter in attempting to lower their volume commitments under a tariff pricing plan even when their agreement under a pricing plan expires. As discussed above, they claim they are typically constrained by contractual and practical difficulties to renew their purchase agreements with the incumbent LEC at the same or similar volume commitments. To assess the impact of high percentage purchase commitments on customers' ability to reduce their level of purchases upon expiration and renewal of a purchase agreement, for each instance of renewal by a customer of a purchase agreement under a pricing plan with a percentage commitment, the incumbent LEC must provide in Table IV the following agreement-level data and information:[202] (1) the unique agreement ID (which must match its agreement ID in Table III) for an agreement which is the successor of a previous agreement between an incumbent LEC and a customer, i.e., an agreement that: (i) involves the same seller and the same purchaser as the predecessor agreement; (ii) is under the same pricing plan as the predecessor agreement; and (iii) has a start date that is within 13 months of the end date of the predecessor agreement and which may reflect a continuing relationship between the ILEC and the purchaser, (2) the start date of the successor agreement, (3) the unique agreement ID of the predecessor agreement, (4) the end date of the predecessor agreement, (5) the volume commitment of the successor agreement as of its start date, denominated as applicable, separately, in terms of (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) the quantity or number other TDM business data services, and (iv) if applicable, a narrative explanation of the other TDM business data services, including the type, how they are denominated, and the relevant units of measure, (6) the volume commitment of the predecessor agreement as of its start date, denominated as applicable, separately, in terms of (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) the quantity of other TDM business data services, and (iv) if applicable, a narrative description of the other TDM business data services involved, including the type, how they are denominated, and the relevant units of measure, (7) the volume commitment of the predecessor agreement as of its end date, denominated as applicable, separately, for (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) the quantity or number other TDM business data services, and (iv) if applicable, a narrative explanation of the other TDM business data services, including the type, how they are denominated, and the relevant units of measure, and (8) as of the end date of the predecessor agreement, the minimum percentage of the volume commitment that must be maintained in order to avoid incurring a shortfall fee according to the predecessor agreement. For agreements under a tariff pricing plan that do not include purchases by competitive providers or mobile wireless providers (i.e, those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or

[200] CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3(B)(3).

[201] *See* Qwest Transmittal No. 419, Tariff F.C.C. No. 1 at 1 (filed May 17, 2010) ("[Modifying] Section 7, Private Line Transport Service, to grandfather [Qwest's] existing unit based Regional Commitment Program (RCP) and replace it with a new revenue based RCP. The new RCP will have a 95% commitment level.").

[202] Note that, for ease of reference, some of the following data requests are repetitive of earlier requests.

the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

70. *Impact on IP Transition.* As part of our investigation, we seek to examine whether and, if so, to what extent the incumbent LEC tariff pricing plans under investigation allow purchasers to count Ethernet purchases toward DS1, DS3 or other TDM business data services (as applicable) percentage commitments. To enable an assessment of these provisions and their impact on the IP transition, for each pricing plan under investigation, each incumbent LEC is required to provide in its direct case the following data and information requested in Table I of the template: (1) an indicator of whether the pricing plan permits Ethernet purchases to be counted toward percentage commitments, where applicable, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) other TDM business data services, and, (iv) if applicable, a narrative description of the types of other TDM business data services, (2) the full text of (which may be attached in a searchable PDF format) and citations to all provisions in the tariff that may have the effect of constraining purchasers' ability to count Ethernet sales toward the fulfillment of their percentage commitments (for example, a limitation that only active TDM circuits that are being upgraded can be counted toward fulfilling percentage commitments), where applicable, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) other TDM business data services, and (iv) if applicable, a narrative description of the types of TDM business data services involved, and (3) a narrative explanation of the business rationale for each provision that conditions or has the effect of qualifying the use of technology migration, such as counting Ethernet purchases toward fulfillment of TDM percentage commitments, and any cost, engineering, or other justification for such conditions or qualifications.

71. To measure the practical impact of technology migration provisions and any conditions or exceptions to those provisions, the incumbent LECs must submit in their direct cases as instructed in Table V of the data request template, the following data and information for each agreement under a pricing plan under investigation containing such provisions: (1) the agreement ID, which must match the agreement ID for the same agreement in Table III, and (2) the tariff name, (3) the pricing plan name, (4) the section number or numbers of the tariff that specifies the associated pricing plan, (5) the calendar year, (6) information on the Ethernet purchases that offset percentage commitments, separately for (i) the capacity (in Mbps) of Ethernet purchases that offset the DS1 percentage commitments, (ii) a narrative description of the type and quantity (measured in units) of these Ethernet purchases including how they are denominated and the relevant units of measure, (iii) the capacity (in Mbps) of Ethernet purchases that offset the DS3 percentage commitments, (iv) a narrative description of the type and quantity (measured in units) of these Ethernet purchases including how they are denominated and the relevant units of measure, (v) where applicable, the capacity (in Mbps) of Ethernet purchases that offset the percentage commitments for other TDM business data services, and (vi) if applicable, a narrative description of the type and quantity (measured in units) of these Ethernet purchases that offset the other TDM business data services percentage commitments, (7) information on the quantity of Ethernet purchases that offset percentage commitments, measured in dollars, separately for (i) the dollar amount of Ethernet revenue that offset the percentage commitments for DS1, (ii) the dollar amount of Ethernet revenue that offset the percentage commitments for DS3, (iii) where applicable, the dollar amount of Ethernet purchases that offset percentage commitments for other TDM business data services, and (iv) if applicable, a narrative explanation of the other TDM business data services whose percentage commitment was offset by Ethernet purchases, (8) the quantity of TDM business data services offset by Ethernet purchases, measured in units, separately for (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) where applicable, the quantity (using an equivalency unit of measure) of other TDM business data services, and (iv) if applicable a narrative explanation of the other TDM business data services which were offset by Ethernet purchases, (9) the quantity of TDM business data services offset by Ethernet purchases, measured in dollars, separately for (i) the dollar amount of DS1 channel terminations, (ii) the dollar amount of DS3 channel terminations, (iii) where applicable, the dollar amount of other TDM business data services, and (iv) if applicable, and if not already reported above, a narrative description of the other TDM business data services which were offset by Ethernet purchases, whose dollar amount was reported above. For agreements under a tariff pricing plan that do not include

purchases by competitive providers or mobile wireless providers (i.e, those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

B. Whether the Use of Shortfall Fees in Certain Incumbent LEC Tariff Pricing Plans is a Just and Reasonable Practice Under Section 201(b) of the Act.

72. We designate for investigation pursuant to section 205 of the Act the question whether the use of shortfall fees in certain incumbent LEC tariff pricing plans, either by themselves or in conjunction with other pricing plan provisions such as percentage commitments, is a just and reasonable practice under section 201(b) of the Act. Shortfall fees are charges assessed on a purchaser under special access tariff pricing plans if a buyer's purchases fall below the percentage commitment level it must meet to obtain the pricing plan's discount.[203] The incumbent LEC special access pricing plans under investigation include such shortfall fees.[204]

73. Competitive LECs assert that shortfall fees can be set at unreasonably high levels, which can distort marketplace behavior and represent an unreasonable practice.[205] For example, Level 3 states that a "customer that fails to meet its revenue commitment is subject to severe penalties that are not reasonably related to the damages (if any) that such a failure would cause the price-cap LEC."[206] It adds "[s]ome penalties are so large, in fact, that they provide customers an incentive to purchase or leave in place circuits they do not even use – 'channel terminations to nowhere.'"[207] Competitive LECs cite "shortfall penalties that can be as much as ten times the monthly rate that [they] would otherwise pay for a circuit."[208] XO references "substantial" and "excessive" shortfall payments which cause it to "make the seemingly irrational economic decision – because of the onerous shortfall penalties it would face – to continue to purchase DS1 or DS3 special access 'for' a customer which will not be used or resold by

---

203 *See generally* Sprint Feb. 11, 2013 Comments at 30-32; Verizon Mar. 19, 2010 Reply Comments, Attach. B (Declaration of Quintin Lew and Anthony Recine) at 13-15, paras. 29-32. Termination fees, as distinguished from shortfall fees, are assessed if the customer exits the plan prior to the expiration of the applicable service term. *Id.*

204 The relevant provisions of the pricing plans under investigation include Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13(B), (C) and (E; BellSouth Tariff F.C.C. No. 1 § 2.4.8(B) (commitment is not a percentage commitment); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E); SWBT Bell Tariff F.C.C. No. 73 § 7.2.22(E)(4)(b); CenturyLink Tariff F.C.C. No. 11 § 7.1.3(B)(3)(c); CenturyLink Operating Companies Tariff F.C.C. No. 9 § 7.4.11(B), (E), (G) and (H); Frontier Tariff F.C.C. No. 5 §§ 5.6.14(G) and (I) and 5.6.19(F); Frontier Telephone Companies Tariff F.C.C. No. 6 § 7.2.1(G)(6) and (8); Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(D); Verizon Telephone Companies Telephone Companies Tariff F.C.C. No. 1 §§ 25.1.7(B) and 25.3.7(C); Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.1.7(B) and 25.2.7(C); Verizon Telephone Companies Telephone Companies Tariff F.C.C. No. 14 §§ 5.6.14(G) and (I), 5.6.19(F) and 23.1.7(C); Verizon Telephone Companies Tariff F.C.C. No. 16 § 22.1.7(C). This list is not intended to exclude any other related tariff provisions.

205 *See, e.g.*, Letter from Sheba Chacko, Senior Counsel and Head, Americas Regulation and Global Telecoms Policy, BT Americas Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (filed Dec. 3, 2014) (BT Americas Dec. 3, 2014 *Ex Parte* Letter) ("shortfall penalties . . . are excessive and further dis-incentivize spend with competing wholesale access service providers.").

206 Level 3 Feb. 22, 2012 *Ex Parte* Letter at 11.

207 *Id*. at 11-12.

208 BT Americas et al. Feb. 11, 2013 Comments, Appx. A (Besen and Mitchell Decl.) at 11, para. 16.

XO."[209] XO also observes that "shortfall penalties typically are not present in . . . competitive providers' agreements."[210] Level 3 states that "[t]he competitive significance of the shortfall penalties is that, because they are so large and so vigorously enforced, they make a customer wary about buying *any* circuits from other providers or engaging in *any* self-supply, lest a miscalculation or decrease in demand throw the customer into a lower-volume condition that would trigger a penalty.[211] Level 3 also asserts that customers must purchase an additional "cushion" to avoid the risk of triggering high shortfall fees.[212] Level 3 further states that "incumbents use a combination of devices [including shortfall fees] to lock up the market for special access services, shrinking the addressable market [for competitors]."[213] XO explained that it is in a lawsuit with Verizon regarding special access Commitment Discount Plans that XO had with Verizon, which includes a dispute over "millions" of dollars in shortfall penalties.[214]

74. Competitive LECs generally argue that lowering their purchases significantly below their commitment levels to establish a lower baseline for setting the percentage commitment in future contracts is not a viable option because it triggers substantial shortfall fees that act as a "penalty," resulting in "buyers typically maintain[ing] their commitments at the same high levels, even at contract renewal."[215] These fees, according to competitive LECs, are significant constraints on their ability to shift special access purchases away from incumbent LECs to existing or potential non-incumbent LEC providers, reducing the capacity of the competitive LECs to extend facilities-based competition.[216] Likewise, competitive LECs also assert that the manner in which shortfall fees are assessed by incumbent LECs in their pricing plans inhibits competitive LECs from migrating TDM-based services to packet-based services such as Ethernet, inhibiting their and their customers' transition to IP-based networks and services.[217]

75. Incumbent LECs contend that, if the customer exits the plan prior to expiration of the service term or falls short of the volume or revenue commitment, shortfall and termination fees are needed to "recover the costs associated with deploying facilities" and providing service to the customer,

[209] XO Sept. 17, 2014 *Ex Parte* Letter at 3 ("As a consequence, XO is forced to pay *twice* – and, where XO uses the ILEC's Ethernet service, *the ILEC is paid twice* – simply to provide the service to the customer *once*.") (emphasis in original); *see also id*. (describing such unused circuits as 'phantom DS1 and DS3 circuits').

[210] XO Feb. 11, 2013 Comments at 9.

[211] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 12 (emphasis in original).

[212] *Id*. ("Faced with the real threat of a penalty for low volume, a customer will err in the other direction and ensure that it purchases an additional 'cushion' from the price-cap LEC over and above whatever it has committed. . . . A customer with a 90% commitment may, because of the need for a cushion, have zero volume available for competition.").

[213] Level 3 Sept. 23, 2015 *Ex Parte* Letter at 1.

[214] XO May 11, 2015 *Ex Parte* Letter at 1 n.1 (citing *Verizon Virginia, LLC, et al., v. XO Communications, LLC, and XO Virginia, LLC*, Case No. 3:15cv171 (REP) (E.D. VA docketed Mar. 19, 2015)). XO claims that Verizon's penalties "overstate the proper shortfall penalty calculation," "are excessive because of the methodology Verizon uses," and are "unjust and unreasonable in violation of the Communication Act." *Id*. at 1-3.

[215] *See* Sprint Feb. 11, 2013 Comments at 25. *But see* Letter from Donna Epps, Vice President, Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM 10593, at 12 (filed Mar. 27, 2012) (Verizon Mar. 27, 2012 *Ex Parte* Letter) (arguing that special access purchasers that want the benefits of significant discounts "need to accept the trade-offs that come with [these plans], which make those discounts possible in the first place").

[216] *See, e.g.,* BT Americas et al. Feb. 11, 2013 Comments at 26.

[217] *See, e.g.,* XO Sept. 17, 2014 *Ex Parte* Letter at 3; Sprint Sept. 23, 2015 *Ex Parte* Letter at 7 (asserting that shortfall and early termination fees enable incumbent LECs "to exploit their historical dominance of DSN services to capture the rising demand for Ethernet services").

and reflect the failure to "receive the predictability for which it bargained."[218] Verizon argues that, at the same time, it "recognizes that customers need a certain degree of flexibility" and without "undermin[ing] the predictability benefits that Verizon receives," it offers term and volume plans "structured so that customers can decrease their purchases by up to 3-25 percent, depending on the plan, without incurring shortfall charges."[219] Verizon also asserts that even when customers pay shortfall charges, "in practice they generally retain a significant amount of the discounts they had already received, and these shortfall charges typically result in the customer paying only what it would have paid had it not been for the shortfall."[220]

76. Competitive LECs, however, contend that these fees bear no relationship to the service costs incurred by the incumbent LEC.[221] For example, Sprint asserts that these fees may be as much as ten times the monthly rate under the pricing plan.[222] XO asserts that if it fails to meet volume commitments, a shortfall charge may exceed the price of the special access circuit itself, resulting in irrational economic choices.[223] Neither Sprint nor tw telecom disputes Verizon's claim that it needs to

---

[218] Verizon Mar. 19, 2010 Reply Comments, Attach. B (Declaration of Quintin Lew and Anthony Recine) at 12-13, para. 28 ("The use of termination and shortfall liabilities enables providers to recover their facility costs and up-front costs involved in provisioning special access services to a customer. Similarly, when a customer agrees to a term commitment in exchange for greater discounts, termination and shortfall liabilities assure that the service provider gets the benefit of the bargain if the customer exits the plan prior to the expiration of the selected term or falls short of the volume commitment level."); *see also* Letter from Maggie McCready, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 4 (filed June 6, 2012) (Verizon June 6, 2012 *Ex Parte* Letter).

[219] Verizon Mar. 27, 2012 *Ex Parte* Letter at 8 (citing Telephone Companies F.C.C. No. 11 § 7.4.10; Verizon Telephone Companies Tariff F.C.C. No. 14, § 5.6.14(G)).

[220] Verizon June 6, 2012 *Ex Parte* Letter at 4-5. Verizon states the shortfall liability charges under its generally available pricing plans are based on the amount of the shortfall and not on the plan's entire base. *See id*. at 4. Verizon also explains that customers can have both a generally available pricing plan (e.g., Commitment Discount Plan in Verizon F.C.C. Tariff Nos. 1 and 11) and contract-tariff or other individually negotiated commercial agreement that provides an added discount in exchange for an incremental benefit to Verizon, such as a minimum revenue commitment. *See id*. at 5. In that case, "[i]f the customer does not meet its minimum revenue commitment, the revenue-related shortfall charge could apply across the subscribed base." *Id*.

[221] *See, e.g.,* Sprint Feb. 11, 2013 Comments at 35 (citing Southwestern Bell Telephone Company, Tariff FC.C. No. 73 §§ 7.3.10(F)(1) and 7.3.10(F)(10.2)(a)).

[222] Sprint Feb. 11, 2013 Comments at 31 & n.88 (noting that these fees "may be billed as a non-recurring charge ("NRC") per channel termination below the required volume, or as the monthly rate per circuit below the minimum, depending on the region"). Sprint asserts that shortfall fees are billed at $900 per month per channel termination in AT&T's West and Southwest Regions and that "[t]his charge is several times greater than even the rack rates ($195-$205/month depending on zone plus additional mileage charges) and is ten times more than the $90 monthly rate" for the five-year commitment plan rate in zone 1. Sprint Feb. 11, 2013 Comments at 31 (citing Southwestern Bell Telephone Company, Tariff F.C.C. No. 73 §§ 7.3.10(F)(1), 7.3.10(F)(10.2)(a)). Sprint also asserts that if it incurs shortfall penalties for several consecutive months, it may lead to an incumbent LEC's termination of the purchase agreement under the tariff pricing plan resulting in early termination fees. Sprint Feb. 11, 2013 Comments at 31.

[223] XO Sept. 17, 2014 *Ex Parte* Letter at 3. This also raises implications regarding competitive LEC complaints that incumbent LEC tariffs inhibit the IP transition, as noted above. *See supra* section III.A.6. Sprint asserts that it cannot "buy down" its commitment level as an economic option because the fee can exceed the cost of maintaining the commitment level. Sprint Feb. 11, 2013 Comments at 32; *see also* Sprint Jan. 19, 2010 Comments, Attach. A (Declaration of Bridger M. Mitchel) at 32, para. 129 ("[U]nder several AT&T FCC tariffs, the shortfall penalty for failing to meet a volume commitment far exceeds the rack rate of purchasing another channel termination in order to meet the commitment," thus providing customers with "an incentive to purchase 'channel terminations to nowhere' simply to avoid paying the penalty") (citing tariffs including Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, § 7.2.22, and Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18).

"recover the costs associated with deploying facilities," but they assert that the determination of whether customer shortfall and termination charges are justified depends on an understanding of whether the costs incurred in serving the customer are "customer-specific sunk costs" or other kinds of costs, the magnitude of those costs, and the manner in which they are recovered.[224]

1. Direct Case and Required Data

77. To enable the Commission to ascertain the frequency with which shortfall penalties are assessed and to assess their magnitude, the incumbent LECs subject to this investigation must submit in their direct cases for calendar years 2012 through 2014, the following data and information as instructed in Table VI for each shortfall occurrence under each tariff pricing plan under investigation: (1) the start date (month and year) of the shortfall period, i.e., the time period relevant to calculate the shortfall penalty, (2) the end date (month and year) of the shortfall period, (3) the unique agreement ID associated with the shortfall occurrence, (4) the tariff name, (5) the pricing plan name, (6) the section number of the pricing plan within the tariff, (7) the volume commitment in effect at the start date of the shortfall occurrence, separately for (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) where applicable, the quantity of other TDM business data services, and, (iv) if applicable, a narrative description of the other TDM business data services relevant to this volume commitment, (8) information about the amount of the shortfall penalty assessed in connection with this shortfall occurrence, including (i) the dollar amount of the shortfall penalty and (ii) a narrative description of how the shortfall penalty was calculated for this shortfall occurrence, (9) the shortfall volume, measured in units, separately, in terms of (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) where applicable, the quantity of other TDM business data services, and (iv) if applicable, a narrative description of the shortfall of other TDM business data services, the types of services involved, how these are denominated, and the relevant units of measure, and (10) the shortfall volume, measured in dollars, separately, in terms of (i) the dollar amount of DS1 channel terminations, (ii) the dollar amount of DS3 channel terminations, and (iii) where applicable, the dollar amount of other TDM business data services. For agreements under a tariff pricing plan that do not include purchases by competitive providers or mobile wireless providers (i.e, those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

78. In our inquiry into the reasonableness of incumbent LEC shortfall fees, the incumbent LECs subject to this investigation must also submit in their direct cases for the plans under examination the following information: (1) tariff and plan names and specific section numbers where shortfall provisions are found in the tariffs, (2) an explanation of the justification of the shortfall penalties and their amounts, (3) a description of the methodologies used to calculate the levels of the shortfall penalties along with showing the calculations, (4) all relevant information and data inputs used to calculate these, (5) an explanation of how each shortfall charge provision in the plan reflects costs incurred by the incumbent LEC as a result of the shortfall, and (6) a detailed description and quantification of such costs that are incurred by the incumbent LEC in a shortfall situation, including any relevant calculations performed to

[224] BT Americas et al. Feb. 11, 2013 Comments, Appx. A (Besen and Mitchell Decl.) at 32-34, paras. 56-60. "[C]ustomer-specific sunk costs . . . are the costs of facilities that (a) are used to serve a particular customer, i.e., they must be 'sunk' in order to serve that customer irrespective of the amount of service taken by that customer, and (b) cannot be shifted to serve a different customer if the first customer ceases taking the service, i.e., the facilities are specific to a customer. Customer-specific sunk costs are thus distinguished both from costs that can be avoided if the purchases by a customer are reduced and from costs for facilities that can potentially be used by a different customer if the first customer ceases taking the service." *Id.* at 32, para. 56. *See also* Sprint Feb. 11, 2013 Comments at 42-43 ("[T]he Commission should prohibit ETFs [early termination fees] – as well as shortfall penalties . . . associated with shifting circuits away from the incumbent – that exceed the unrecovered sunk costs that an incumbent incurred to provide a special access circuit to a customer.") (citing Level 3 Feb. 22, 2012 *Ex Parte* Letter).

derive such costs. The incumbent LECs subject to this investigation have asserted that these fees are at least in part designed to recover their costs. To the extent shortfall penalties are intended to recover costs that would not have been incurred but for the shortfall, the incumbent LECs must also submit in their narrative responses: (7) all cost data that explains and justifies the level of the shortfall penalties, (8) a description and quantification of the costs that incumbent LECs incur in a shortfall situation, and (9) the mathematical calculations used to derive that cost.

C. Whether the Use of Upper Percentage Thresholds is a Just and Reasonable Practice Under Section 201(b) or is Unreasonably Discriminatory Under Section 202(a) of the Act.

79. The next issue we designate for investigation pursuant to section 205 of the Act is the question whether the use of upper percentage thresholds in certain incumbent LEC tariff pricing plans, either by themselves or in conjunction with other pricing plan provisions, is a just and reasonable practice under section 201(b) of the Act and/or is unreasonably discriminatory under section 202(a) of the Act. Certain of the tariff pricing plans under investigation include one or more upper percentage thresholds. If a buyer's purchases increase more than a set percentage above their initial volume commitment during the term of the plan, they are required either to commit to an increased purchase volume or to pay an overage penalty.[225] Competitive LECs dispute the reasonableness of upper percentage thresholds.[226] Competitive LECs contend that upper percentage thresholds, or "ratcheting volume commitments,"[227] create an incentive for a customer "to increase its commitment level as its requirements increase, which then has the effect of reducing the size of the market available to incumbent LEC rivals in subsequent periods. This, in turn, has the effect of severely limiting, or foreclosing entirely, the ability of rival suppliers of special access services to compete for any growth in a customer's requirements."[228] Additionally, as with

[225] The relevant provisions of the pricing plans under investigation include Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13(B), (C) and (D); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E)(4)(c) – (d) (the portability commitment option of the DS1 Term Payment Plan sets an upper percentage threshold of 124 percent of the initial portability commitment level); Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(E)(4)(c) – (d) (the portability commitment option of the DS1 Term Payment Plan sets an upper percentage threshold of 124 percent of the initial portability commitment level); CenturyLink Operating Companies Tariff F.C.C No. 9 § 7.4.11(B), (E), (F) and (H); Frontier Telephone Companies Tariff F.C.C. No. 5 § 5.6.19(E)(5) (setting upper percentage threshold of 30 percent over the commitment quantity); Frontier Telephone Companies Tariff F.C.C. No. 6 § 7.2.1(G)(3) (setting an upper percentage threshold of five percent over initial commitment level); Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(D)(3) (the portability commitment option of the DS1 Optional Payment Plan sets an upper percentage threshold of 124 percent of the initial portability commitment level); Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.1.3(A) and Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.1.7(A) (setting upper percentage thresholds of 156 percent of the purchaser's minimum commitment level for DDS II services and 130 percent of the purchaser's minimum commitment level for all other services as measured in DS0 equivalents); Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.19(E)(5) (setting upper percentage threshold of 30 percent over the commitment quantity), and Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.3.7(B)(2)(b), Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.2.7(B)(2)(b), Verizon Telephone Companies Tariff F.C.C. No. 14 § 23.1.7(B)(2)(b), and Verizon Telephone Companies Tariff F.C.C. No. 16 § 22.1.7(B)(2)(b) (setting an upper percentage threshold of 160 percent of DS1 channel termination equivalents or DS1 channel mileage equivalents of the initial commitment level) (automatically adjusts a customer's commitment level upward if the customer's purchase volume exceeds 160 percent of its commitment level). This list is not intended to exclude any other related tariff provisions.

[226] *See, e.g.,* Level 3 Feb. 22, 2012 *Ex Parte* Letter at 12-13; BT Americas et al. Feb. 11, 213 Comments at 27; Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 4.

[227] Cbeyond, et al. Oct. 28, 2014 *Ex Parte* Letter at 4.

[228] BT Americas et al. Feb. 11, 2013 Comments, Appx. A (Besen and Mitchell Decl.) at 17-18, paras. 29-30; *see also* XO Feb. 11, 2013 Comments at 11-13; Level 3 Feb. 22, 2012 *Ex Parte* Letter at 13 ("if a customer spends too much money with the price-cap LEC, it must pay even more money as a penalty, unless it agrees to lock in the additional expenditure prospectively").

the percentage commitments discussed above, competitive LECs argue that upper percentage thresholds may not exhibit the characteristics of classic volume discounts where increased discounts for higher volumes are related to the supplier's economies of scale.[229] With upper percentage thresholds, the same percentage threshold applies to large and small customers alike, leading to a wide disparity in the quantity of circuits associated with any given threshold percentage. Competitive LECs claim this disparity is unreasonably discriminatory.[230] They also claim that upper percentage thresholds potentially impede the IP transition and deployment of advanced services by creating incentives for purchasers to satisfy their new demand using TDM-based services instead of migrating to IP-based services.[231]

1. Direct Case and Required Data

80. In order to enable an assessment of the reasonableness and potentially discriminatory nature of upper percentage thresholds, the incumbent LECs subject to this investigation must submit in their direct cases all information and data regarding the methodology and calculations used to determine upper percentage thresholds. Incumbent LECs are required to answer the following questions: What business justifications are there for using upper percentage thresholds? How were these thresholds set? Were other thresholds considered and, if so, on what basis was the specific threshold in the pricing plan selected? Is there an efficiency rationale for requiring a buyer to increase percentage commitments to retain the discount credit or other benefit offered under the pricing plan? To the extent that percentage thresholds are related to economies of scale, we require incumbent LECs to submit as part of their direct cases an explanation of how and to submit all evidence demonstrating such relationship. The incumbent LECs must also submit any evidence and data showing whether the thresholds are calculated to recover any additional costs incurred in providing the increased number of services or are in any way related to cost recovery.

81. To determine the timing and the frequency with which upper percentage thresholds are exceeded, we require the incumbent LECs subject to this investigation to submit in their direct cases for all tariff pricing plans under investigation, in Table I, the following tariff pricing plan-level data and information: (1) an indicator of whether the pricing plan includes an upper percentage threshold, (2) the full text (which may be attached in a searchable PDF format) and a citation to the section in the pricing plan that includes the upper percentage threshold, (3) the maximum percentage of the volume commitment that the customer may purchase without triggering an overage penalty, separately, for any applicable category including (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) other TDM business data services including the type of TDM business data services, how they are denominated, the relevant units of measure, and how each type of TDM business data service counts toward the overage calculation, and (iv) if applicable, a narrative description of the type of other TDM business data services involved, (4) an indicator of whether the pricing plan includes a provision for automatic increase of the volume commitment in the event of an overage, and (5) if the pricing plan requires an automatic increase of the volume commitment of a purchaser that exceeds an upper percentage commitment, incumbent LECs must provide the full text (which may be attached in a searchable PDF format) and a citation to the relevant section of the pricing plan.

---

[229] *See supra* section III.A.1.

[230] *See, e.g.,* Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 4-5 ("[C]onsider a situation where buyer A has a volume commitment of 100 units and buyer B has a volume commitment of 1000 units, and both buyers receive a 40 percent discount under a plan. Why is it reasonably discriminatory to require each buyer to ratchet up their volumes if they exceed the applicable commitment by 25 percent (i.e., 25 units for A and 350 units for B) where both buyers receive the same 40 percent discount under the plan?").

[231] *See, e.g.,* BT Americas et al. Feb. 11, 2013 Comments at 41.

D. Whether the Use of Overage Penalties in Certain Incumbent LEC Pricing Plans is a Just and Reasonable Practice Under Section 201(b) of the Act.

82. We designate for investigation under section 205 of the Act the question whether the use of overage penalties in certain incumbent LEC tariff pricing plans, either by themselves or in conjunction with other pricing plan provisions, is a just and reasonable practice under section 201(b) of the Act.[232] Certain of the pricing plans under investigation impose overage penalties when a customer's purchases exceed its initial commitment by a set percentage unless the customer increases its initial commitment to account for the increased demand.[233] Overage penalties effectively function as the enforcement mechanism for the upper volume thresholds addressed in the previous section. For example, under the Verizon Commitment Discount Plan, Verizon charges the customer the undiscounted month-to-month rate for each circuit in excess of 130 percent of the customer's commitment level unless the customer

---

[232] The relevant provisions of the pricing plans under investigation include Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13(B), (C) and (D); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(E)(4)(c) and (d) (the portability commitment option of the DS1 Term Payment Plan charges purchasers a nonrecurring channel termination charge for each channel termination above 124 percent of the initial commitment level unless the purchaser increases its commitment level to ensure the number of in-service rate elements does not exceed 124 percent of the new commitment level); Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(E)(4)(c) and (d) (the portability commitment option of the DS1 Term Payment Plan charges purchasers a nonrecurring channel termination charge for each channel termination above 124 percent of the initial commitment level unless the purchaser increases its commitment level to ensure the number of in-service rate elements does not exceed 124 percent of the new commitment level); CenturyLink Operating Companies Tariff F.C.C No. 9 § 7.4.11(B), (E), (F) and (H); CenturyLink Operating Companies Tariff F.C.C No. 11 § 7.1.3(B)(4) (automatically adjusts a customer's commitment level upward if the customer's purchase volume exceeds its commitment level); Frontier Telephone Companies Tariff F.C.C. No. 5 § 5.6.14(G) (purchasers that do not incorporate increases in DS1 channel termination purchases into their commitment level must convert increases into a monthly plan or a second TVP plan); Frontier Telephone Companies Tariff F.C.C. No. 5 § 5.6.19(E)(5) (automatically resets existing commitment quantity to an amount equal to the existing commitment quantity plus 50 percent of the increase); Frontier Telephone Companies Tariff F.C.C. No. 6 § 7.2.1(G)(6) (charges purchaser standard payment plan rates for circuits in excess of commitment level if purchaser does not elect to increase commitment level; after 30 days' notice, the commitment level will be automatically changed to the number of Term Plan DS1 circuits in effect at the anniversary date; Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(D)(3) (the portability commitment option of the DS1 Optional Payment Plan charges purchasers a nonrecurring channel termination charge for each channel termination above 124 percent of the initial commitment level unless the purchaser increases its commitment level to ensure the number of in-service rate elements does not exceed 124 percent of the new commitment level); Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.1.7(D) (charging purchasers standard instead of discounted rates for DDS services that exceed 156 percent of the minimum commitment level and for all other services (in DS0 equivalents) that exceed 130 percent of the minimum commitment level unless the customer elects to increase its minimum commitment to at least 75 percent for DDS services and 90 percent for all other service types); Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.1.7(D) (similar provisions as in Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.1.7(D) above); Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.14(G) (purchasers that do not incorporate increases in DS1 channel termination purchases into their commitment level must convert increases into a monthly plan or a second TVP plan); Verizon Telephone Companies Tariff F.C.C. No. 14 § 5.6.19(E)(5) (automatically resets existing commitment quantity to an amount equal to the existing commitment quantity plus 50 percent of the increase); and the National Discount Plan (NDP) of Verizon Telephone Companies Tariff F.C.C. No. 1 § 25.3.7(B)(2)(b), Verizon Telephone Companies Tariff F.C.C. No. 11 § 25.2.7(B)(2)(b), Verizon Telephone Companies Tariff F.C.C. No. 14 § 23.1.7(B)(2)(b), and Verizon Telephone Companies Tariff F.C.C. No. 16 § 22.1.7(B)(2)(b) (automatically adjusts a customer's commitment level upward if the customer's purchase volume exceeds 160 percent of its commitment level for DS1 channel terminations and channel mileage). This list is not intended to exclude any other related tariff provisions.

[233] BT Americas et al. Feb. 11, 2013 Comments at 27, Appx. A (Besen and Mitchell Decl.) at 17-18, paras. 29-30; *see also, e.g.*, Comptel Sept. 10, 2014 *Ex Parte* Letter at 4; Sprint Feb. 11, 2013, Comments at 30-32; Level 3 June 27, 2012 *Ex Parte* Letter; Level 3 Feb. 22, 2012 *Ex Parte* Letter at 5, 11-13; XO Mar. 12, 2013 Comments at 7; BT Americas, et al. Feb. 11, 2013 Comments at 27.

increases its commitment level to encompass the overage.[234] Competitive LECs allege that overage penalties that enforce upper percentage thresholds represent unreasonable practices[235] which have the effect of unreasonably reducing the size of the market subject to competition and inhibiting the IP transition.[236] These carriers also assert that overage penalties are designed to lock up future demand and prevent competition[237] by compelling "buyers to increase their commitments soon after demand increases, thereby diminishing the opportunities for competitors to capture the increased demand."[238] Level 3 states that "AT&T extracts greater commitments from its customers by waiving 'overage' penalties . . . but only if customers agree to 'ratchet-up' their commitments to AT&T to higher levels, thereby impeding their future flexibility to move circuits to an AT&T competitor."[239] We also investigate incumbent LEC pricing plans that in lieu of overage penalties automatically increase a purchaser's volume commitment.[240] While the incumbent LECs generally do not address the reasonableness of overage penalties in the record, Verizon has stated: "If a customer exceeds the maximum commitment level, the customer can choose to increase its commitment level to 90% of its new base or pay an overage charge. The overage charge covers the difference, on average, between the rates the customer actually paid and the month-to-month rates for the excess circuits."[241]

1. Direct Case and Required Data

83. To enable an assessment as to whether overage penalties are reasonable or reasonably discriminatory, the incumbent LECs under investigation must submit in their direct cases a narrative description of the methodology for calculating the level of the overage penalty. In addition, the carriers must respond to the following questions: Were other levels or types of penalties considered and, if so, on what basis was the overage penalty in the pricing plan selected? Is there an efficiency rationale for the overage penalty? To what extent are overage penalty levels designed to recover incumbent LECs' costs? If so, the incumbent LECs must identify the costs they would incur in serving such increases in demand that would not otherwise be recoverable through their tariffed rates under the plan at issue.

84. To enable a determination of the timing and the frequency with which incumbent LECs assess overage penalties, incumbent LECs must submit in their direct cases, in Table VII, the following data and information for each instance in which a customer incurred an overage penalty during calendar years 2012 through 2014: (1) the start date of the overage period, i.e., the time period relevant for

---

[234] *See* Verizon Telephone Companies F.C.C. Tariff No. 1 § 25.1.7(D); Verizon Telephone Companies F.C.C. Tariff No. 11 § 25.1.7(D).

[235] *See, e.g.,* BT Americas, et al. Feb. 11, 2013 Comments, Appx. A at 18 (For example, under AT&T's TPP, AT&T imposes a $900 monthly 'overage' penalty for each circuit in excess of 124% of a customer's initial purchase commitment unless the customer increases its commitment to make up for the overage."); XO Feb. 11, 2013 Comments at 14 ("XO's customers for its special access services will not accept shortfall penalties.").

[236] *See, e.g.,* BT Americas, et al. Feb. 11, 2013 Comments, Appx. A at 18 (overage penalties "create[ ] an enormous incentive for a customer to increase its commitment level as its requirements increase, which then has the effect of reducing the size of the market available to ILEC rivals in subsequent periods. This, in turn, has the effect of severely limiting, or foreclosing entirely, the ability of rival suppliers of special access services to compete for any growth in a customer's requirements.").

[237] *See, e.g.,* Sprint Feb. 11, 2013 Comments at 32; Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 5.

[238] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 5.

[239] Level 3 June 27, 2012 *Ex Parte* Letter at 12; *see also* Level 3 Feb. 22, 2012 *Ex Parte* Letter at 13 (overage penalties "make[ ] no commercial sense, aside from simply limiting competition.").

[240] *See, e.g.,* CenturyLink Operating Companies Tariff F.C.C No. 11 § 7.1.3(B)(4) (automatically adjusts a customer's commitment level upward if the customer's purchase volume exceeds its commitment level).

[241] *See* Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, Attach. at 17 (filed Dec. 5, 2011).

calculating the overage penalty, (2) the end date of the overage period, (3) the agreement ID, (4) the tariff name, (5) the pricing plan name, (6) a citation to the section of the tariff that contains the overage penalty provision, (7) if applicable, i.e., if there are multiple upper percentage thresholds in the relevant agreement, indication of which upper percentage threshold was exceeded, which triggered the overage occurrence, (8) information on the overage penalty, including (i) the total overage penalty in dollars assessed or the total overage penalty that would have been assessed if the purchaser had not increased its volume commitment after an overage occurrence was triggered, and (ii) a narrative description of how the overage penalty was calculated for this overage occurrence, (9) the overage, i.e., the amount by which actual purchase volumes exceeded the upper percentage threshold, measured in units, separately, for (i) DS1 channel terminations, and (ii) DS3 channel terminations, (iii) where applicable, the quantity of other TDM business data services, and (iv) if applicable, a narrative description of the other TDM business data services involved, (10) the overage, measured in dollars, separately, for (i) the dollar amount of DS1 channel terminations, (ii) the dollar amount of DS3 channel terminations, (iii) where applicable, the dollar amount of other TDM business data services, and (iv) if applicable, and if not already included above, a narrative description of the other TDM business data services involved and how the dollar amount of overage for other TDM business data services was calculated, (11) an indicator of whether the volume commitment was increased as a result of the overage event, whether through contract renegotiation or automatically, (12) where applicable, the amount of the increase in the volume commitment, measured in units, separately, for (i) DS1 channel terminations, (ii) DS3 channel terminations, (iii) other TDM business data services, (iv) a narrative explanation of the other TDM business data services involved, (13) where applicable, the dollar amount of the increase in the volume commitment, separately, for (i) the dollar amount of DS1 channel terminations, (ii) the dollar amount of DS3 channel terminations, (iii) the dollar amount of other TDM business data services, and (iv) if applicable, and if not already provided above, a narrative explanation of how the dollar amount of other TDM business data services was calculated, including a description of the types of services included, (14) an indicator of whether an overage penalty was actually paid by the purchaser, (15) the dollar amount of overage penalty actually paid by the purchaser, and (16) in instances where the overage penalty was not actually paid, a narrative description of how the overage penalty was ultimately resolved. For agreements under a tariff pricing plan that do not include purchases by competitive providers or mobile wireless providers (i.e, those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

E. Whether the Use of Certain Long Term Commitments in Tariff Pricing Plans at Issue is a Just and Reasonable Practice Under Section 201(b) of the Act.

85. We designate for investigation under section 205 of the Act the question whether the use of certain long term commitments in incumbent LEC tariff pricing plans at issue, either by themselves or in conjunction with other pricing plan provisions, is a just and reasonable practice under section 201(b) of the Act.[242] Incumbent LECs, as discussed below, assert that offering longer term pricing plans is a recognized business practice that is beneficial to them and purchasers. Competitive LECs, however,

[242] The relevant provisions of the pricing plans under investigation include Ameritech Operating Companies F.C.C. Tariff No. 2 § 7.4.13 (A), (B),(D) and (E); BellSouth Telecommunications, LLC F.C.C. Tariff No. 1 § 2.4.8(B); CenturyLink Operating Companies Tariff F.C.C. No. 9 § 7.4.11(A), (B), (C), (F), (G), (H) and (I); CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3 B.1); Frontier Telephone Companies Tariff F.C.C. No. 5 §§ 5.6.14, 5.6.19; Frontier Telephone Companies Tariff F.C.C. No. 6 § 7.2.1(G)(1); Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(A); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(A); Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(A); Verizon Telephone Companies Tariff F.C.C. No. 1 §§ 25.1.4, 25.1.5, 25.3; Verizon Telephone Companies Tariff F.C.C. No. 11 §§ 25.1.4, 25.2.1(A), 25.2.5(B); Verizon Telephone Companies Tariff F.C.C. No. 14 §§ 5.6.14, 5.6.19, and 23.1; Verizon Telephone Companies Tariff F.C.C. No. 16 § 22.1.1(B)(23). This list is not intended to exclude any other related tariff provisions.

contend that pricing plans that include longer term commitments are unreasonable and multiply the effect of high percentage commitments that reduce the demand that would otherwise be subject to competition by prolonging the timeframe in which this demand is captive. According to XO, "special access competition simply has failed to emerge because most demand is locked up for long periods" with these incumbent pricing plans.[243] Competitive LECs complain that they have no choice but to enter into commitments for longer terms than they ordinarily would because, as tw telecom asserts, "[only] longer terms produce competitive pricing."[244] Cbeyond and other competitive LECs, for instance, have suggested limiting term commitments to no longer than three years, using their purchase terms with carriers other than incumbent LECs as a basis for the proposal.[245] By contrast, many of the incumbent LEC tariff pricing plans under investigation include longer term commitments that can last from five to ten years.[246] As a result, XO asserts that "the terms under which XO buys its wholesale inputs are less advantageous than the terms under which it sells the very same inputs to its customers . . . [which] puts tremendous economic pressure on XO."[247] Competitive providers also claim that longer term pricing plans may also inhibit the transition to IP-based services for buyers and sellers by significantly extending the timeframe in which TDM-based services must be sold or purchased.[248]

86. In particular, competitive LECs assert that many incumbent LEC tariffs "condition the availability of a discount, credit, or other benefit on the buyer's commitment to abide by the contract for an extremely long term" and that other "agreements and tariffs increase the size of the discount, credit, or benefit where the buyer commits to a longer term."[249] Competitive LECs contend that the combination of term and volume commitments "appears to be designed to force buyers to continue to commit a huge volume of their demand (90 percent of historic purchase levels under the [Verizon] CDPs) over as long a time period as possible, thereby excluding competitors for as long as possible."[250] Level 3 states that "price-cap LECs can extract term commitments that are not only longer but also much more ubiquitously applied as compared to their CLEC competitors (where competition is present)."[251] It further states that

[243] *Id*. at 5.

[244] tw telecom Feb. 27, 2012 *Ex Parte* Letter, Attach. at 7.

[245] *See, e.g.,* Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 8; XO Feb. 11, 2013 Comments at 9 ("An examination of what other carriers offer provides a stark contrast with the terms and conditions of the price cap LECs' special access commitment plans. XO normally does not have to commit to terms with other competitors longer than one year (sometimes two or three years) to get their best rates."); Level 3 Sept. 23, 2015 *Ex Parte* Letter at 5 ("[C]ompetitive wholesale providers generally offer services at affordable rates on one-year terms" and "do not force customers to commit to long terms.").

[246] *See, e.g.,* Telephone Companies F.C.C. No. 14, § 5.6.14(A) (Eight- and Ten-Year DS1 Term Volume Plans (ETTVP)).

[247] XO Sept. 23, 2015 *Ex Parte* Letter at 11.

[248] *See, e.g.,* BT Americas et al. Feb. 11, 2013 Comments at 41 ("requiring competitors to continue purchasing large volumes of DS1 and DS3 special access services . . . delay[s] the adoption of Ethernet and other packet-mode services"). In 2013, AT&T sought to grandfather certain longer terms in its special access pricing plans, ostensibly to facilitate its transition to an IP network. Oppositions to AT&T's tariff filings highlighted the rate implications of its proposal. The Bureau suspended AT&T's tariff transmittals and opened an investigation of them. *See Suspension and Investigation of AT&T Special Access Tariffs*, Ameritech Operating Companies Tariff F.C.C. No. 2, BellSouth Telecommunications LLC Tariff F.C.C. No. 1, Nevada Bell Telephone Company Tariff F.C.C. No. 1, Pacific Bell Telephone Company Tariff F.C.C. No. 1, The Southern New England Telephone Company Tariff F.C.C. No. 39, Southwestern Bell Telephone Company Tariff F.C.C. No. 73, WC Docket No. 13-299, Transmittal Nos. 1803, 71, 254, 498, 1061, and 3383, Order, 28 FCC Rcd 16525 (Pricing Pol. Div. 2013). AT&T subsequently withdrew its tariff transmittals.

[249] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 6.

[250] *Id*.

[251] Level 3 June 8, 2012 *Ex Parte* Letter at 14.

"the vast majority of special access circuits Level 3 orders with the price-cap LECs are ordered for much longer terms than with CLECs – generally 4 years with Qwest, 5 or more years with AT&T and 7 years with Verizon."[252] Level 3 contrasts the typical duration of its own circuit purchases from competitive LECs, stating that "the vast majority of the circuit term obligations Level 3 has with CLECs: 1) are month-to-month . . . or 2) are shorter in duration (considerably so in many cases) than with the price cap LECs."[253]

87. In addition, Comptel specifically asserts that "under AT&T's Term Payment Plan for the Southwestern Bell and Pacific Bell territories, wholesale customers can obtain special access services at 'discounted' rates off of AT&T's excessively high month-to-month rates only by committing to purchase circuits for a fixed term, and these customers can obtain critical 'benefits' such as 'circuit portability' . . . only by committing to maintain 80 percent of their historic special access purchase volumes with AT&T for three years."[254] Similarly, Comptel also asserts that, under Verizon's Commitment Discount Plan for the legacy Bell Atlantic and NYNEX territories, a wholesale customer can obtain DS1 circuit portability only by committing to maintain at least 90 percent of its historic purchase volume in service with Verizon for a period of between two and seven years and that "customers receive the most favorable discounts off of Verizon's inflated rack rates if they agree to maintain this purchase volume for seven years."[255] In short, competitive LECs maintain that these longer term agreements combined with substantial penalties for failure to meet certain terms and conditions operate to exclude incumbent LEC wholesale competitors from entering the market and harm consumer welfare.[256]

88. The incumbent LECs defend longer term commitments as reasonable practices. AT&T asserts without qualification that the Commission "has long recognized that 'both volume and term discounts [are] generally legitimate means of pricing special access facilities so as to encourage the efficiencies associated with larger traffic volumes and the certainty associated with longer-term relationships."[257] AT&T contends that "such discounts are commonplace in competitive markets," and that "competitive providers also offer volume and term discounts when they sell DS1, DS3 and Ethernet services."[258] As a result, AT&T believes that such plans necessarily offer a benefit to consumers.[259] AT&T also notes that "many customers that choose plans with both volume and term commitments can also choose to commit only a fraction of their volumes to those plans and thus have a significant amount of business that can readily be moved to competitive providers."[260]

89. Verizon asserts that term-based pricing plans are intended to ensure cost recovery and give Verizon "some certainty that the revenue from the leased circuits will help cover Verizon's up-front

[252] *Id*. at 12.

[253] *Id*.

[254] Comptel Sept. 10, 2014 *Ex Parte* Letter at 3-4.

[255] *Id*. The Commission is in the process of reviewing the special access market in WC Docket No. 05-25.

[256] *See, e.g.,* tw telecom June 5, 2012 *Ex Parte* Letter at 7-11.

[257] AT&T Mar. 28, 2012 *Ex Parte* Letter at 2 (citing *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Fourth Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 12979, 12984, para. 13 (1995) and *Special Access Expanded Interconnection Order*, 7 FCC Rcd at 7463, para. 199). *See also* AT&T Oct. 10, 2014 *Ex Parte* Letter at 4. AT&T, however, fails to acknowledge the Commission's contemporaneous statements qualifying its general assertions regarding the legitimacy of such pricing structures. *See, e.g., supra*. para. 11.

[258] AT&T Mar. 28, 2012 *Ex Parte* Letter at 2, 3.

[259] *Id*.

[260] *Id*.; *but see* Level 3 June 27, 2012 *Ex Parte* Letter at 12 ("AT&T's lock-up plans are not volume and term commitments, and its reliance on the Commission's endorsement of such plans is entirely misplaced.") (emphasis in the original).

provisioning costs, including labor and material costs."[261] Verizon contends that these plans "help ensure that Verizon can potentially earn a return on the investment required to provision the circuit."[262] Further, according to Verizon, "the added efficiencies associated with a customer making a volume commitment on top of a term commitment – in terms of greater certainty and predictability – are what make it possible for Verizon to offer additional benefits such as circuit portability."[263] Competitive LECs assert that notwithstanding the efficiency rationales offered by the incumbent LECs, the practical effect of longer duration term commitment obligations is to significantly reduce the demand subject to competition and inhibit the IP transition.[264]

1. Direct Case and Required Data[265]

90. The incumbent LECs must submit in their direct cases data and information on the methodology used to determine the pricing levels for each of the term commitments in the pricing plans under review in this investigation and the data and calculations used to determine those discount levels. To assess the prevalence and therefore the impact of longer term plans, for each pricing plan under investigation, the incumbent LECs must submit in their direct cases the following data and information in Table VIII, annually for 2012 to 2014: (1) the tariff name, (2) the pricing plan name, (3) the full text (which may be attached in a searchable PDF format) and citation to the section of the pricing plan that includes and describes the plan's term discounts, not including rate tables, (4) the calendar year, (5) the total dollar amount of business data service purchases by competitive provider purchasers for each term length from 1 year to 10 years, (6) the total dollar amount of business data service purchases by mobile wireless providers for each term length from 1 year to 10 years, and (7) the total dollar amount of business data service purchases by end user purchasers, separately for each term length from 1 year to 10 years. In addition, the incumbent LECs must submit a narrative explanation of the basis for the term discounts, including any cost or efficiency justifications supporting those justifications.

F. Whether the Use of Early Termination Fees in Certain Incumbent LEC Tariff Pricing Plans is a Just and Reasonable Practice Under Section 201(b) of the Act.

91. We designate for investigation under section 205 of the Act the question whether the use of early termination fees (ETFs) in certain incumbent LEC tariff pricing plans, either by themselves or in conjunction with other pricing plan provisions, is a just and reasonable practice under section 201(b) of the Act. Specifically, we investigate the incumbent LEC tariff pricing plans which include such fees.[266]

[261] Verizon Mar. 27, 2012 *Ex Parte* Letter at 2.

[262] *Id*. at 7-8.

[263] Verizon Feb. 11, 2013 Comments at 29-30; *see also* Verizon July 16, 2012 *Ex Parte* Letter at 3-4 (this "facilitates Verizon's ability to allow customers to move circuits from one location to another, because of the greater assurances that Verizon's network and resources will be sized to meet demand at different locations.").

[264] *See, e.g.,* XO Sept. 17, 2014 *Ex Parte* Letter at 1-2; Letter from Thomas Jones, Counsel for BT Americas, Inc., Cbeyond Communications, LLC, Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. to Marlene H. Dortch, Secretary, FCC, WC 05-25, RM-10593, at 1-2 (filed Sept. 11, 2014).

[265] These data and information requests vary in subject matter and scope from those made in sections II.B.4-5 and II.B.12 of the special access mandatory data request. *See Reconsideration Order*, 29 FCC Rcd at 10917-18, 10920-21 (Appx. A (Data Collection) at 10-11, 13-14).

[266] The relevant provisions of the pricing plans under investigation include Ameritech Operating Companies Tariff F.C.C. No. 2 § 7.4.13(E); BellSouth Telecommunications, LLC Tariff F.C.C. No. 1 § 2.4.8(B); CenturyLink Operating Companies Tariff F.C.C. No. 9 § 7.4.11(B), (G) and (H); CenturyLink Operating Companies Tariff F.C.C. No. 11 § 7.1.3.B.5.a; Frontier Telephone Companies Tariff F.C.C. No. 5 §§ 5.6.14(O), 5.6.19(K); Frontier Telephone Companies Tariff F.C.C. No. 6 § 7.2.1(G)(6) and (8); Frontier Telephone Companies Tariff F.C.C. No. 11 § 2.11.1.1(B); Pacific Bell Telephone Company Tariff F.C.C. No. 1 § 7.4.18(G); Southwestern Bell Telephone Company Tariff F.C.C. No. 73 § 7.2.22(G); Verizon Telephone Companies Tariff F.C.C. No. 1 §§ 25.1.9, 25.3.13; Verizon Telephone Companies Tariff F.C.C. No. 11 §§ 25.1.11, 25.2.13; Verizon Telephone Companies Tariff

(continued…)

92. Comptel asserts that "various types of excessive early termination penalties . . . limit a customer's ability to switch to an alternative provider" and "impede competition by creating additional barriers to entry and expansion in those instances where deploying last-mile connections otherwise could be economically viable and result in higher prices for those services."[267] Comptel asserts that "these terms and conditions have had – and continue to have – harmful effects on competition and consumer welfare as well as the transition to fiber and packet-based networks."[268]

93. Sprint states that "for certain significant special access plans, the ETF imposed on a purchaser that switches to an alternative provider is *higher than the cost of simply paying out the entire remaining contract,* because the penalty is calculated based on paying the rack rate for the balance of the term, rather than the contract rate."[269] Sprint further elaborates that "[t]his means that if Sprint reduces its commitment level, it must pay out the entire remaining contract at *rack rates* for the circuits it does not buy."[270] It concludes that "[f]acing these crippling ETFs, it is easy to see why purchasers sometimes must take the extreme and inefficient path of leasing unused or unneeded circuits – 'DS-1s to nowhere' – merely to avoid triggering a buy-down ETF."[271]

94. Competitive LECs' comments highlight the question of the purpose of early termination fees and therefore what the appropriate basis for setting those fees should be. They acknowledge that "early termination penalties can be justified as a means of recovering customer-specific, sunk costs associated with providing a circuit."[272] These carriers assert, however, that to "analyze whether a particular termination penalty is anticompetitive, one must begin by inquiring whether, and the extent to which the ILEC incurs sunk costs to serve the specific customer."[273] BT Americas and other competitive LECs state that "incumbent LECs often exploit this mechanism by imposing early termination penalties that are far greater than any unrecovered customer-specific, sunk costs in order to prevent competitors from purchasing services from an alternative wholesale provider."[274] Competitive LECs acknowledge that early termination fees are often based on the revenues that an incumbent LEC anticipates under its pricing plan but question the reasonableness of this approach given how much greater anticipated revenues may be than sunk costs.[275]

95. Sprint also focuses on price as a basis for setting early termination fees and contends that such fees "bear no relationship to the costs by the ILEC to serve these customers."[276] It states that in AT&T's Southeast Region, the DS1 termination liability is equal to "60% of all recurring charges for the

(Continued from previous page)
F.C.C. No. 14 §§ 5.6.14, 5.6.19, 23.1.13; Verizon Telephone Companies Tariff No. 16 § 22.1.13. This list is not intended to exclude any other related tariff provisions.

[267] Comptel Sept. 10, 2014 *Ex Parte* Letter at 4-5.

[268] *Id*. at 5.

[269] Sprint Feb. 11, 2013 Comments at 34 (emphasis in original).

[270] *Id*. at 34 (emphasis in original).

[271] *Id*. at 33.

[272] BT Americas et al. Feb. 11, 2013 Comments at 23 n.44.

[273] *Id.*, Appx. A (Besen and Mitchell Decl.) at 34.

[274] *Id*. at 23 n.44. *See also id*. at 33-34 ("Large and unjustified penalties for early contract termination . . . can 'lock in' a purchaser to the ILEC even if a superior competitive alternative were to arise").

[275] *Id.*, Appx. A (Besen and Mitchell Decl.) at 36 ("There is no efficiency justification for tying a customer's early termination penalty to the *revenues* that would have been received by the ILEC if the customer had completed its contract term, since those revenues may bear little or no relationship to the customer-specific sunk *costs* that the ILEC incurs in serving that customer.") (emphasis in original).

[276] Sprint Feb. 11, 2013 Comments at 34.

remaining months of the customer's term."[277] Sprint also alleges that in AT&T's Southwest and West Regions, the "DS1 termination liability is equal to 40% of all recurring charges for the remaining months of the customer's term."[278]

96. Competitive LECs assert that early termination fees "disproportionately harm competitors that use leased incumbent LEC special access as an input to services offered to retail customers" because "the length of time for which a competitor needs a special access circuit at a particular location depends on the length of time that a retail customer continues to purchase service from the competitor at that location."[279] The early termination fees are an enforcement mechanism of term commitments that competitive LECs assert are unreasonably long in duration, as discussed above. Competitive LECs contend that competitive pressure in the retail market precludes retail contracts of equal length to those in incumbent LECs' pricing plans they must purchase under to obtain an input price that will allow a competitive retail price. These carriers assert that given the incumbent LECs' dominance in the provision of these special access services, requiring purchasers to commit to long term agreements in exchange for a lower price is an unreasonable practice and that, by extension, we should also find its related enforcement mechanism – early termination fees – similarly unreasonable.[280]

97. Competitive providers allege that early termination fees also inhibit the IP transition. Level 3 asserts that "the upgrade provisions in Verizon's special access tariffs do not allow Level 3 to upgrade DSn services to Ethernet services without incurring substantial early termination fees."[281] Windstream believes that these "fees . . . penalize wholesale purchasers seeking to replace TDM services with IP services" and "should be not applied when a customer migrates to an IP offering."[282]

98. AT&T asserts that it and other incumbent LECs provide many different types of plans and that no customer is required to accept any plan.[283] As a result, AT&T claims that customers are not necessarily affected by early termination fees and could move "a significant amount of business . . . to competitive providers."[284] In addition, AT&T notes that under one of its tariff pricing plans, customers are allowed to cancel a portion of its circuits without the imposition of any early termination fees.[285] AT&T also contends that competitive LECs include similar terms and conditions in their access contracts.[286] Further, AT&T argues that early termination fees are "an essential part of the package of trade-offs that make term discounts possible" and that without them, "a customer would always obtain the long term rate" but would have no obligation to maintain service for the duration of that term.[287] AT&T asserts that without early termination fees to enforce buyers' term commitments, buyers would likely not comply with their term commitments, resulting in a loss for AT&T of revenues, demand certainty, and

[277] *Id*.

[278] *See id*. at 34-35.

[279] BT Americas et al. Feb. 11, 2013 Comments at 23-24.

[280] *Id*. at 23-24.

[281] Level 3 Feb. 22, 2012 *Ex Parte* Letter at 21.

[282] Letter from Eric Einhorn, Windstream, to Jonathan Sallet, General Counsel, FCC, et al., GN Docket Nos. 13-5 and 12-353, at 3, 7, 13 (filed April 28, 2014).

[283] AT&T Mar. 28, 2012 *Ex Parte* Letter at 3-4.

[284] *Id*.

[285] *Id*. at 5 (citing the 80 percent commitment level of the portability option of the SWBT Tariff F.C.C. No. 73).

[286] AT&T Mar. 12, 2013 Reply Comments at 7.

[287] *Id*. at 33.

other benefits.[288] AT&T also asserts that competitive providers "ignore the important role of ETFs as contract enforcement mechanisms."[289]

99. Verizon asserts that "even under term-only plans customers have the option to replace circuits without paying termination liability . . . [A] customer [may] disconnect a circuit at one location without penalty if the customer replaces it with a circuit obtained at another location."[290] Verizon contends that these termination liabilities are not penalties, and that they generally put the customer in the same position it would have been in had that customer initially enrolled in a term plan that covered the time period for which the customer actually purchased the service.[291]

1. Direct Case and Required Data

100. To assess the frequency of use of early termination fees to enforce longer term commitments, the incumbent LECs must submit in their direct cases for each pricing plan under investigation, data for calendar years 2012 through 2014 that document each instance in which an early termination fee was assessed in Table IX, for each early termination event provide the following data and information (1) the early termination date, (2) the end date of the agreement, (3) the agreement ID for the agreement under which an early termination fee was assessed, (4) information on the early termination penalty, including (i) the dollar amount of the early termination penalty and (ii) a narrative description of how the termination fee was calculated, (5) the term of the agreement (in months), (6) the quantity of business data service committed but not purchased and maintained due to early termination, measured in units, separately for (i) the number of DS1 channel terminations, (ii) the number of DS3 channel terminations, (iii) where applicable, the quantity of other TDM business data services, and (iv) if applicable, a narrative explanation of the other TDM business data services involved, how each service is denominated, and the relevant units of measure, and (7) the dollar amount of business data service committed but not purchased and maintained due to early termination, separately, for (i) the dollar amount of DS1 channel terminations, (ii) the dollar amount of DS3 channel terminations, (iii) the dollar amount of other TDM business data services, and (iv) if applicable, a narrative explanation of the other TDM business data services involved, how each service is denominated, and the relevant units of measure. For agreements under a tariff pricing plan that do not include purchases by competitive providers or mobile wireless providers (i.e, those that include only end-user purchases), incumbent LECs must provide this data and information for either the top 20 largest end-user customers (ranked by purchase revenue) or the customers with the greatest purchase revenue whose combined purchases constitute at least 80 percent of the incumbent LEC's end-user (i.e., retail) sales, whichever includes fewer purchase agreements.

101. In addition, the incumbent LECs subject to this investigation must submit in their direct cases for each tariff pricing plan under examination (1) a justification of the early termination fee and its amount, (2) a description of the methodology used to calculate the level of the early termination fee, (3) all relevant information and data used to calculate that fee, (4) to the extent early termination fees are intended to recover costs, the incumbent LECs must also produce all relevant cost data related to the setting of the early termination fees, (5)an explanation of the extent to which payments by a customer for service for a period of time prior to early termination offset an incumbent LEC's cost to deploy the

[288] *Id*.

[289] *Id*., Attach. A (Carlton/Shampine Reply Declaration) at 11; *see also id*. at 22 ("if breaking a contract had no consequences, there would be no reason to sign the contract in the first place, and the benefits of the arrangement would be lost.").

[290] Verizon July 16, 2012 *Ex Parte* Letter at 3-4.

[291] Letter from Donna Epps, Vice President, Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 2 (filed Apr. 25, 2012).

service, and (6) an identification of and explanation for any instances in which an early termination fee exceeds either the price or the cost of deploying the facilities used in providing the service.

G. Whether Special Access Commercial Agreements Contain Provisions That Affect Charges for Tariffed Special Access Services and Should Thus Be Filed Pursuant to Section 203 of the Act.

102. We designate for investigation under section 205 of the Act the question whether certain commercial agreements for special access services contain discounts, credits, waivers, refunds, or other provisions that directly or indirectly affect charges for tariffed special access services and should thus be subject to the filing requirements of section 203 of the Act and the Commission's rules.[292]

103. Cbeyond and other competitive LECs assert that "[s]ection 203(a) requires that tariffs 'show[ ] all charges' as well as 'the classifications, practices, and regulations affecting such charges' for services subject to tariff requirements."[293] They further cite the section 203(c) requirements that

> a carrier may not (1) 'charge, demand, collect, or receive a greater or less or different compensation' than is set forth in a tariff; (2) 'refund or remit by any means or device any portion of the charges' set forth in a tariff; or (3) 'employ or enforce any classifications, regulations, or practices affecting such charges' except 'as specified' in the tariff.[294]

104. Competitive LECs allege that commercial agreements that include "a discount, credit, or other benefit affecting a category of services that includes DSn special access services" or a "discount, credit, or other benefit in exchange for meeting a volume commitment that includes DSn-based special access services" trigger the section 203(c) tariffing requirement.[295] Level 3 states that "such contracts often contain provisions that provide purchasers with discounts on DS1 and DS3 special access circuits and thus are properly part of this proceeding."[296] While we do not conclude at this point that the inclusion of such provisions in commercial agreements necessarily trigger the tariffing requirement of section 203, we agree on the need to examine these agreements to assess their effect on tariffed special access services.

1. Direct Case and Required Data

105. We therefore direct the incumbent LECs under investigation to include in their respective direct cases the submission of all special access commercial agreements between them and competitive LECs that include tariffed special access services, the rates or terms of which impact, directly or indirectly, the rates paid for tariffed special access services. This includes agreements which contain discounts, credits, waivers, refunds, or other benefits for non-TDM services or other non-tariffed services that effectively impact the overall price paid for both tariffed special access services and other services offered in the agreement. In addition to the submission of these agreements, we also require incumbent LECs separately to identify as part of their direct cases all discounts, credits, waivers, refunds, or other benefits for purchasers included in each such commercial agreement submitted. For each discount, credit, waiver, refunds or other benefit, the incumbent LEC must also identify the basis for determining the amount of the benefit. Specifically, the incumbent LEC must identify all instances in which the amounts of any such benefits or credits approximate the amount a purchaser would otherwise have to pay in non-recurring charges or in circuit termination penalties under a tariff.[297]

---

[292] 47 U.S.C. § 203; 47 C.F.R. §§ 61.1 – 61.193.

[293] Cbeyond et al. Oct. 28, 2014 *Ex Parte* Letter at 6.

[294] *Id*. at 6-7.

[295] *Id*. at 7. *See also* BT Americas Dec. 3, 2014 *Ex Parte* Letter at 1.

[296] Level 3 Mar. 7, 2011 *Ex Parte* Letter at 2.

[297] These data and information requests vary in subject matter and scope from those included in section II.B.13 of the mandatory data request. *See Reconsideration Order*, 29 FCC Rcd at 10921 (Appx. A (Data Collection) at 14).

IV. CONCLUSION

106. In light of the comments and evidence in the record with regard to potentially unjust and unreasonable practices of incumbent LEC special access tariff pricing plan terms and conditions identified here, and with regard to whether certain commercial agreements that incorporate tariffed special access services should be subject to tariff filing requirements, we conclude that substantial questions of lawfulness exist that require further investigation. We therefore institute this investigation and designate the issues for investigation as identified above. We investigate the designated tariff pricing plan provisions both as they operate individually and as they work in conjunction with other such provisions.

V. PROCEDURAL MATTERS

A. Filing Schedules

107. This investigation is designated WC Docket No. 15-247. AT&T, CenturyLink, Frontier, and Verizon (collectively, the incumbent LECs) are designated as parties to this investigation of the above-referenced special access tariff pricing plans.

108. The incumbent LECs shall file their respective direct cases no later than **December 18, 2015.** The direct case must present the incumbent LECs' positions with respect to the issues described in this Order. Incumbent LECs are directed to follow the instructions in the data request template prepared by Bureau staff for responding to ensure all data and narrative questions are answered and responses are properly identified. The data request template can be accessed at the Commission's website at https://www.fcc.gov/encyclopedia/tariff-investigation-special-access-tariff-discount-plans. Specifically, incumbent LECs must use the data request template format to respond to questions in paras. 28, 29, 63, 64, 65, 69, 70, 71, 77, 81, 84, 90, and 100, except for the narrative questions. Additionally, incumbent LECs are required to respond to the supplementary narrative questions from paras. 67, 68, 78, 80, 83, 101, and 105 with their submission. Responses to all narrative questions are to be submitted in a single, separate Word document in the sequence in which they appear in this Order.

109. Oppositions or comments responding to the incumbent LECs' direct cases may be filed no later than **January 21, 2016**, and may be captioned "Oppositions to Direct Case" or "Comments on Direct Case." Each of the incumbent LECs may also file a "Rebuttal" to oppositions or comments no later than **February 22, 2016**. Any filings that contain confidential or proprietary information should follow the instructions set forth in the relevant protective order.

- Electronic Filers: Direct cases and other pleadings may be filed electronically using the Internet by accessing the ECFS: http://apps.fcc.gov/ecfs.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

110. The direct cases, oppositions, and replies and any other filed documents in this investigation may be obtained from Best Copy and Printing, Inc., in person at 445 12th Street, S.W., Room CY-B402, Washington, DC 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via e-mail at FCC@BCPIWEB.COM. The pleadings will also be available for public inspection and copying during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554, and through the Commission's Electronic Filing System (ECFS) accessible on the Commission's Web site, http://apps.fcc.gov/ecfs.

111. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice) or 202-418-0432 (TTY). Contact the FCC to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov; phone: 202-418-0530 or TTY: 202-418-0432.

B. Ex Parte Requirements

112. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[298] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Paperwork Reduction Act

113. This is an investigation of certain designated issues raised by a limited number of special acces tariff pricing plans offered by four incumbent LECs. The data and information requests made here represent "an administrative action or investigation involving an agency against specific individuals or entities" and therefore do not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.[299] In addition, since this investigation is limited to four large incumbent LECs, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 47 U.S.C. § 3506(c)(4).

---

[298] 47 C.F.R. § 1.1200 et seq.

[299] 44 U.S.C. § 3518(c)(1)(B)(ii); *see also* 5 C.F.R. § 1320.4(a)(2).

VI. ORDERING CLAUSES

114. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201(b), 202(a), 203, 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 202(a), 203, 204(a), 205, 403, and sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, an investigation of the special access tariff pricing plans referenced in this Order IS INSTITUTED and the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

115. IT IS FURTHER ORDERED that AT&T, CenturyLink, Frontier, and Verizon SHALL BE parties to this proceeding.

116. IT IS FURTHER ORDERED that AT&T, CenturyLink, Frontier, and Verizon SHALL INCLUDE, in their respective direct cases, a response to each request for information in the relevant paragraphs of this Order as enumerated above and in the tables of the data request template accessible at https://www.fcc.gov/encyclopedia/tariff-investigation-special-access-tariff-discount-plans.

FEDERAL COMMUNICATIONS COMMISSION

Matthew S. DelNero
Chief
Wireline Competition Bureau

APPENDIX

Incumbent LEC Tariff Pricing Plans Subject to Investigation

Tariff	Pricing Plan	Section[1]
AT&T		
Ameritech Operating Companies Tariff F.C.C. No. 2	Discount Commitment Plan (DCP)	7.4.13
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	Area Commitment Plan (ACP)	2.4.8 (B)
Pacific Bell Telephone Company Tariff F.C.C. No. 1	DS1 Term Payment Plan (DS1 TPP)	7.4.18
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	DS1 Term Payment Plan (DS1 TPP)	7.2.22
CenturyLink		
CenturyLink Operating Companies Tariff F.C.C. No. 11	Regional Commitment Program (RCP)	7.1.3.B
CenturyLink Operating Companies Tariff F.C.C. No. 9	Special Access Term Discount Plan	7.4.11
Frontier		
Frontier Telephone Companies Tariff F.C.C. No. 5	DS 1 Term Volume Plans (DS1 TVP)	5.6.14
Frontier Telephone Companies Tariff F.C.C. No. 5	DS 3 Term Volume Plan (DS3 TVP)	5.6.19
Frontier Telephone Companies Tariff F.C.C. No. 6	DS1 Term Payment Plan (DS1 TPP)	7.2.1(G)
Frontier Telephone Companies Tariff F.C.C. No. 11	Optional Payment Plans (OPP)	2.11.1.1
Verizon		
Verizon Telephone Companies Tariff F.C.C. No. 1	Commitment Discount Plans (CDP)	25.1
Verizon Telephone Companies Tariff F.C.C. No. 11	Commitment Discount Plans (CDP)	25.1
Verizon Telephone Companies Tariff F.C.C. No. 14	DS1 Term Volume Plans (DS1 TVP)	5.6.14
Verizon Telephone Companies Tariff F.C.C. No. 14	DS3 Term Volume Plan (DS3 TVP)	5.6.19
Verizon Telephone Companies Tariff F.C.C. No. 1	National Discount Plan (NDP)[2]	25.3

[1] The citations in this list are not intended to be inclusive of every provision in the relevant tariffs that may be related to the pricing plans under investigation.

[2] Verizon has one National Discount Plan that is contained in four separate tariffs. The above chart identifies where the NDP is located in each of the tariffs being investigated.

Verizon Telephone Companies Tariff F.C.C. No. 11	National Discount Plan (NDP)	25.2
Verizon Telephone Companies Tariff F.C.C. No. 14	National Discount Plan (NDP)	23.1
Verizon Telephone Companies Tariff F.C.C. No. 16	National Discount Plan (NDP)	22.1