

April 12, 2017

**Via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., S.W.  
Washington, D.C. 20554

**Re: *Ex Parte* Letter, Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593**

Dear Ms. Dortch:

The Computer & Communications Industry Association (CCIA)<sup>1</sup> respectfully submits this *ex parte* letter in the above-referenced proceedings. For over a decade, the market for Business Data Services (BDS) has been plagued by high prices and a lack of competition largely due to incumbent control of this critical broadband input. Although the Commission now seeks BDS reform, CCIA has concerns that the Commission's Draft BDS *Report and Order*<sup>2</sup> would not effectively promote competition, that instead it would lead to price increases that would ultimately be born by consumers, and that the Commission is overlooking key findings from its extensive data collection, which led to the *FNPRM*.<sup>3</sup>

Throughout 2016, the Commission had been developing and was set to vote on a consensus approach favored by large parts of the industry.<sup>4</sup> The *FNPRM*'s framework built upon

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<sup>1</sup> CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.

<sup>2</sup> *Report and Order*, Fed. Comm'n Comm'n (Mar. 30, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0330/DOC-344162A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0330/DOC-344162A1.pdf) (Draft BDS *Report and Order*).

<sup>3</sup> *In the matter of Business Data Services in an Internet Protocol Environment*, WC Dkt. No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Dkt. No. 15-27; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking (rel. May 2, 2016) (*FNPRM*).

<sup>4</sup> See *FNPRM* at ¶ 159 (explaining the consensus framework developed by INCOMPAS and Verizon); see generally Draft BDS *Report and Order* at ¶ 93 ("Generally, competitive LECs needing to purchase business data services as inputs at wholesale, mobile wireless providers not affiliated with an incumbent LEC, Windstream and

the largest data collection ever conducted by the Commission. In the *FNPRM*, the Commission noted that an estimated seventy-three percent of BDS locations are served by just one incumbent, and “almost all purchaser locations, 97 percent, are served by only one or two suppliers.”<sup>5</sup> The record also showed that real competition for BDS is present in “only a tiny number of locations [and] . . . only where reasonably efficient competitive carriers can be expected to deploy connections to a customer location.”<sup>6</sup> Despite these key facts and an original conclusion that “[c]ompetition in this marketplace is uneven,”<sup>7</sup> the Commission now appears to arrive at a divergent conclusion that “the competition envisioned in the Telecommunications Act of 1996 (1996 Act) has been realized”.<sup>8</sup>

CCIA has concerns regarding the generalities and lack of record support for the Draft BDS *Report and Order*’s conclusions on defining competition. For example, the Draft BDS *Report and Order* claims “a nearby potential business data services supplier, in the form of a wired communication network provider, generally tempers prices (for incumbent DS1s and DS3s) in the short term and results in reasonably competitive outcomes over three to five years”.<sup>9</sup> However, evidence in the record shows that contrary to ILEC claims, “[w]hile it is true that competitive providers, including CLECs, have invested heavily in fiber, the data does not support the ILEC’s presumption that fiber in the ground in a location indicates a CLEC’s ability – or indeed even its intent – to compete with last mile special access facilities.”<sup>10</sup> CCIA is concerned that the Commission now presumes that the mere presence of fiber or any other type of connection “nearby” incumbent facilities would be sufficient for pricing discipline when in reality that non-incumbent provider may have no desire or ability to offer BDS.<sup>11</sup> Despite the fact that there may be fiber “nearby,” a consumer cannot “practically turn for alternative sources”<sup>12</sup> to the incumbent’s BDS if that fiber owner is not offering BDS. The Commission now believes that a “single BDS competitor” “nearby” incumbent facilities would be “substantial” and effectively “discipline rates, terms, and conditions to just and reasonable

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Verizon (both net buyers), and end-user representatives, such as the Ad Hoc, interpret the *2015 Collection* as largely showing a non-competitive market, requiring regulatory intervention at all but the highest service bandwidth levels, i.e., in excess of 1 Gbps”).

<sup>5</sup> *FNPRM* at ¶ 181.

<sup>6</sup> Comments of Birch Communications, Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Dkt. Nos. 16-143, 15-247, and 05-25, RM-10593, at 4 (filed June 28, 2016).

<sup>7</sup> *FNPRM* at ¶ 3.

<sup>8</sup> Draft BDS *Report and Order* at ¶ 5.

<sup>9</sup> *Id.* at ¶ 13 (emphasis added).

<sup>10</sup> *FNPRM* at ¶ 179.

<sup>11</sup> Compare Draft BDS *Report and Order* at ¶ 13 (“For example, a cable company that has fiber nodes nearby, and hence the ability to provide both Ethernet-over-fiber and, even more readily Ethernet-over-Hybrid Fiber Coax (EoHFC), if a profitable opportunity arises, is particularly relevant to pricing decisions of a business data services provider wishing to retain a customer.”), with *FNPRM* at ¶ 179 (“[t]he data filed in this proceeding definitively supports the conclusion that the presence of fiber cannot be equated with the availability of facilities-based, price-constraining competitive services [and] clearly shows that the vast majority of Competitor fiber is not used for last-mile connections.”).

<sup>12</sup> Draft BDS *Report and Order* at ¶ 38.

levels.”<sup>13</sup> The Commission now holds that “nearby” means a half-mile, and that “all business locations with demand for last-mile access in a county that are within a half mile of a competitive provider’s facilities are deemed competitive.”<sup>14</sup> CCIA is concerned that the Commission’s new half-mile test seems to rely on assertions based on potentiality<sup>15</sup> while not realizing the realities of the marketplace where a competitor faces high costs to extend that fiber to the building. Furthermore, the Commission’s belief that “where an incumbent sets supracompetitive prices it is vulnerable to competitors vying for customers” neglects the fact that many customers are locked into certain contracts imposed by the incumbents. Many of these contracts contain terms so egregious that the Commission found it necessary to outlaw them in the *FNPRM*.<sup>16</sup>

The Commission should enact a three-year delay in the implementation of BDS rate increases. CCIA fears that rapid deregulation would beget rapid price increases from incumbent BDS providers to their customers. This would be very detrimental to competitive providers that rely on the certainty of input pricing as they seek to build out their own networks. We echo Sprint’s and Windstream’s concerns that businesses will need more time “to adapt to a radically altered BDS framework.”<sup>17</sup> We agree with Verizon that there should be a “transition period,” which would help businesses work with their customers should incumbents decide to raise rates suddenly.<sup>18</sup> Moreover, rapid deregulation and rapid BDS price increases would adversely affect other BDS purchasers like schools, hospitals, and small businesses. These institutions and businesses would ultimately have to pass on the incumbents’ unnecessary prices increases to their customers. So BDS purchasers, like businesses, schools, and hospitals, do not have to suddenly change their own prices and fees overnight, the Commission should prevent incumbent BDS providers from raising BDS prices for three years.

CCIA fears that if enacted, this Draft BDS *Report and Order* would ultimately favor incumbents at the expense of competitive network providers and consumers.<sup>19</sup> CCIA urges the Commission to revise its current construction of the Competitive Market Test to adequately consider the real offerings of providers, and we urge the Commission to adopt a three-year

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<sup>13</sup> *Id.* at ¶ 114.

<sup>14</sup> *Id.* at ¶ 126.

<sup>15</sup> See Comments of AT&T Inc., WC Dkt. Nos. 16-143, and 05-25, RM-10593, at 2 (filed June 28, 2016) (“The Commission’s data collection reveals that, as of 2013, virtually all buildings with special access demand were either connected to, or within one half mile of, competitive fiber, even without taking into account cable HFC facilities.”); *id.* at 12.

<sup>16</sup> See *FNPRM* at Sec. IV (concluding that “all-or-nothing” provisions, certain shortfall penalties, and early termination penalties are unjust and unreasonable).

<sup>17</sup> Notice of Ex Parte Presentation from John Nakahata, Harris, Wiltshire & Grannis LLP, WC Dkt. No. 16-143 (filed April 3, 2017).

<sup>18</sup> See Notice of Ex Parte Presentation from Maggie McCready, Vice President Federal Regulatory and Legal Affairs, Verizon, WC Dkt. Nos. 16-143, and 05-25, RM-10593 (filed Apr. 6, 2017) (“We also emphasized the need for a suitable transition period to allow companies to adjust to the proposed detariffing actions and for preserving existing contracts.”).

<sup>19</sup> Despite significant deregulatory efforts since 1999, concentration has increased and lack of competition remains in the BDS market. See generally Draft BDS *Report and Order* at ¶ 7 (detailing the Commission’s various efforts at deregulating beginning in 1999, to the ill-fated CALLS plan, to granting ILEC).

moratorium on BDS price increases so competitive network providers can adequately plan their deployments and services should incumbents take the opportunity to raise rates.

Sincerely,

/s/ John A. Howes, Jr.

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