

September 30, 2016

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

Re: *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;  
*AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange  
Carrier Rates for Interstate Special Access Services*, RM-10593

Dear Ms. Dortch:

On September 28, 2016, Eric Einhorn, Senior Vice President, Windstream Services, LLC (“Windstream”) and I, on behalf of Windstream, met separately with Amy Bender, Legal Adviser to Commissioner O’Rielly; Claude Aiken, Legal Adviser to Commissioner Clyburn; and Travis Litman, Legal Adviser to Commissioner Rosenworcel. On September 29, 2016, Mr. Einhorn and I met with Nicholas Degani, Legal Adviser to Commissioner Pai. In each of these meetings we addressed the Commission’s ongoing rulemaking on business data services.

In these meetings, we made the point that the data show that ILECs remain the sole last-mile facilities-based business data service provider to the vast majority of locations – 77 percent – and that in almost all of the remaining locations, businesses, governments or non-profit institutions had only two last-mile facilities-based providers.<sup>1</sup> Although cable has been deploying additional fiber-based building connections over the past two years, the record does not show that this makes a significant change in the overall market structure.<sup>2</sup> Furthermore, the

---

<sup>1</sup> Marc Rysman, *Empirics of Business Data Services* at 15, Table 7 (June 2016) (“Rysman White Paper”), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-340040A6.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 44, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 14, 2016) (“Baker Jan. 27, 2016 Declaration”).

<sup>2</sup> See Reply Comments of Windstream Services, LLC at 14-15, 20 & n. 55, WC Docket Nos. 05-25, 16-143, RM-10593 (filed Aug. 9, 2016) (“Windstream Reply Comments”) (quoting Comments of Charter Communications, Inc. at 6, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016) (“Charter Comments”); Comments of Comcast Corporation at 22, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016) (“Comcast Comments”); Comments of Cox Communications, Inc. at 10, WC Docket No. 16-143, 05-25 (filed June 28, 2016) (“Cox Comments”); Comments of Windstream Services, LLC at 19-20, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 21, 2016) (“Windstream Jan. 27, 2016 Comments”); Declaration of Dan Deem, Douglas Derstine,

record also reflects that Ethernet-over-cable is not a sufficient substitute for TDM or fiber-based business data services, and faces significant constraints.<sup>3</sup>

AT&T and other large ILECs argue nonetheless that potential entry from nearby fiber facilities sufficiently disciplines competition. For that to be true – a key premise of their proposed competitive market test – competitive entry and expansion from one building to the next would have to be relatively easy, i.e., not subject to significant barriers to entry and expansion. However, the record catalogs significant barriers to entry and expansion, even when a CLEC services a nearby building.<sup>4</sup> Moreover, the Commission itself has had substantial

---

Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶ 75 (“Windstream Declaration”), appended as Attachment A to Windstream Jan. 27, 2016 Comments; Comments of Birch, BT Americas, EarthLink, and Level 3 at 5, WC Docket No. 05-25, RM-10593 (filed Jan. 22, 2016) (“Joint CLECs Jan. 27, 2016 Comments”); Reply Comments of Birch, EarthLink, and Level 3 at 10-12, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (“Joint CLECs Feb. 19, 2016 Reply Comments”); Reply Comments of Level 3 at 5, 28, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Aug. 9, 2016) (“Level 3 Reply Comments”); Reply Comments of Sprint Corporation at 54-56, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (refiled Apr. 11, 2016) (“Sprint Feb. 19, 2016 Reply Comments”); Letter from Tamar E. Finn, Counsel for TDS Metrocom, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at Attach. (filed Apr. 4, 2016). *See also* Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶¶ 27-32, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016); Rysman White Paper at 16; FCC Staff, *Competitive Effect of Cable Network Infrastructure* at 1, appended as Attach. 3 to Letter from Deena M. Shetler, Associate Bureau Chief, Wireline Competition Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed July 8, 2016); Further Supplemental Declaration of William P. Zarakas ¶¶ 6, 9, 13, appended as Attachment A to Reply Comments of Sprint Corporation, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Aug. 9, 2016) (“Sprint Reply Comments”); Supplemental Declaration of William P. Zarakas ¶¶ 9-10, 12, attached to Letter from Jennifer Bagg, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-247, 05-25, RM-10593 (filed Mar. 24, 2016).

<sup>3</sup> *See* Windstream Jan. 27, 2016 Comments at 18-19; Windstream Declaration ¶¶ 76, 78-79; Sprint Reply Comments at 12-20, 26-31, 36-37; Windstream Reply Comments at 18-20; Joint CLECs Jan. 27, 2016 Comments at 17-18; Level 3 Reply Comments at 22-25; Declaration of Chris McReynolds on Behalf of Level 3 Communications, LLC ¶¶ 18-22, attached as Appendix A to Joint CLECs Jan. 27 Comments; Comcast Comments at 30-31; Charter Comments at 9, 19; Cox Comments at 9; Comments of the National Cable & Telecommunications Association at 28, WC Docket Nos. 16-143, 05-25 (filed June 28, 2016); Comments of the American Cable Association at 28, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016).

<sup>4</sup> *See* Reply Comments of INCOMPAS at 10-11, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016); Joint CLECs Jan. 27, 2016 Comments at 23, 32-35; Joint CLECs Feb. 19,

experience with building access issues and knows for itself that building access is not easy and presents a significant barrier to expanding service even when serving nearby buildings.

The fact that there are significant barriers to entry and expansion from building to building is also confirmed by the manner in which business data services are priced. Carriers place individual buildings on lists of more favorable or less favorable prices, on a building-by-building basis. These prices are not set on the basis of geographic areas or zones, as one would expect if entry from one nearby building to another were, in fact, relatively easy. The ILECs' own pricing behavior contradicts their econometric analysis.

The analysis provided by Prof. Jonathan Baker, on the other hand, is consistent with the manner in which ILECs price and with the overall observed market structure. As one would expect from such a market structure, Prof. Baker found that prices decrease as the number of in-building and nearby providers increase.<sup>5</sup> Specifically, Prof. Baker found that, for high bandwidth services, “the first nearby provider did not lower prices by a statistically significant amount . . . while the cumulative effect of rivalry from all providers was to reduce prices by 25% or 43%.”<sup>6</sup>

We also explained that the Verizon-INCOMPAS framework for the competitive market test and rates, particularly with respect to the Ethernet benchmarks, was framed in a way specifically to be administrable, with determinations based on existing data. With respect to the competitive market test, the determination of which census blocks have four or more providers serving buildings in that block or an adjacent census block can be run by a computer in the same manner as a census block or census tract based test. By using adjacent census blocks, this test also addresses concerns about situations in which a provider may be just across the census block boundary and could otherwise be missed through a test that focused solely on a census block. At the same time, it does not encompass as large an area as a census tract, and thus still limits the assumed area in which building additional connections is feasible.

With respect to the Ethernet benchmarks, we noted that these are also constructed from known data points in the market available to the FCC and all providers. The DS1 rates for the least dense zone come from the ILECs' tariffs. The price curve used to extend the anchor from

---

2016 Reply Comments at 14-15; Sprint Feb. 19, 2016 Reply Comments at 23-28; Reply Comments of Windstream Services, LLC at 13-17, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (refiled Apr. 21, 2016); Windstream Reply Comments at 21-22; Baker Jan. 27, 2016 Declaration ¶¶ 39-40; Reply Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶¶ 6-7, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (refiled Apr. 14, 2016).

<sup>5</sup> See Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶¶ 5-6, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Aug. 9, 2016) (“Baker Reply Declaration”). See also Declaration of David Sappington ¶ 21, attached to Comments of Sprint Corporation, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 11, 2016).

<sup>6</sup> Baker Reply Declaration ¶ 13 n.31.

the lowest Ethernet level above a DS1 to other speed tiers is also known and is based on the curve that the large ILECs themselves put in the marketplace through their published guidebooks.<sup>7</sup> If, as Windstream and other INCOMPAS members believe, the benchmark is for the highest level of current switched Ethernet service (“Real time” for Verizon or AT&T),<sup>8</sup> this also is more administrable because the FCC does not have to consider which mid-quality tier is appropriate for each carrier; the highest quality tier – which is most comparable to a fully dedicated DS1 or DS3 circuit – is readily identifiable.

Finally, we noted that in its recent criticism of the Verizon-INCOMPAS benchmarks, AT&T appears to be asserting that they are flawed because rates are not uniform.<sup>9</sup> But existing DS1 rates also are not uniform, which AT&T proposed to continue using. AT&T does not provide any basis on which to believe that price caps have been less successful at constraining Verizon’s DS1 rates than they were AT&T’s DS1 rates. No doubt, if Verizon-INCOMPAS had proposed a uniform set of nationwide benchmark rates, AT&T would have complained that they arbitrarily ignored cost differences between areas. AT&T cannot have it all ways.

Please contact me if you have any questions or require any additional information.

Sincerely,



John T. Nakahata  
*Counsel to Windstream Services, LLC*

cc: Claude Aiken  
Amy Bender  
Nicholas Degani  
Travis Litman

---

<sup>7</sup> The only noteworthy exception is Verizon, which does not have a published guidebook. Instead, Verizon has put its price curve information in the record. *See* Letter from Maggie McCready, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Aug. 5, 2016)

<sup>8</sup> *See* Letter from John T. Nakahata, Counsel to Windstream Services, LLC, WC Docket Nos. 16-143, 05-25, RM-10593, at 4-5 (filed Aug. 22, 2016).

<sup>9</sup> *See* Letter from Christopher T. Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 4-13 (filed Sept. 16, 2016).