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October 3, 2016

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: ***Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *XO Holdings and Verizon Communications*, WC Docket No. 16-70**

REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Pursuant to the Protective Orders in the above-captioned proceedings,[1] Comcast Corporation ("Comcast") submits the redacted public version of the attached letter via electronic delivery. Comcast will separately submit a Highly Confidential version of this filing via hand delivery. The {{ and }} symbols denote Highly Confidential Information.

1 *In the Matter of Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, WC Docket No. 15-247, DA 15-1387 (rel. Dec. 4, 2015); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Modified Protective Order, WC Docket No. 05-25, DA 10-2075 (rel. Oct. 28, 2010); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, WC Docket No. 05-25, DA 10-2419 (rel. Dec. 27, 2010); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Order and Data Collection Protective Order, WC Docket No. 05-25, DA 14-1424 (rel. Oct. 1, 2014); *XO Holdings and Verizon Communications Inc.*, Protective Order, WC Docket No. 16-70, DA 16-567 (rel. May 19, 2016).

Please contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

/s/ Matthew A. Brill

Matthew A. Brill
of LATHAM & WATKINS LLP
Counsel for Comcast Corporation

Attachments

COMCAST

Comcast Corporation
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Washington, DC 20001

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Washington, DC 20554

Re: ***Special Access Rates for Price Cap Local Exchange Carriers,*** **WC Docket No. 05-25;** ***Business Data Services in an Internet Protocol Environment,*** **WC Docket No. 16-143;** ***Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans,*** **WC Docket No. 15-247;** ***XO Holdings and Verizon Communications,*** **WC Docket No. 16-70**

Dear Ms. Dortch:

The record in the proceeding on business data services ("BDS") leaves no doubt that the BDS marketplace is more competitive today than ever before, and lends no support to Verizon's persistent and unprincipled calls for expanding rate regulation, with respect to both incumbent LECs and new entrants like Comcast.[1] Parties have submitted copious evidence of ongoing investment, expanding output, and declining prices in the BDS marketplace.[2] As noted by a group of seven leading economists, including two former Chief Economists for the Commission, "large numbers of service providers have invested billions of dollars to increase the output and quality of BDS throughout the country, and have expanded into new markets to meet growing demand," while "Ethernet prices have been declining sharply, as have been prices for BDS more broadly."[3] Verizon itself has extolled the "extensive competition for [BDS] provided over fiber,

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1 *See, e.g.*, Letter of Curtis Groves, Verizon, to Marlene H. Dortch, FCC, WC Docket Nos. 05-25 and 16-143 and RM-10593 (filed Sep. 27, 2016) ("Verizon Sep. 27 Letter").

2 *See* Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 17-20 (filed Jun. 28, 2016) ("Comcast Comments") (describing the ways in which "the BDS marketplace, long dominated by incumbent LECs, is more competitive than ever before"); Reply Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 7-13 (filed Aug. 9, 2016) ("Comcast Reply Comments") (summarizing the "ample evidence" in the record of the rapid growth of competition in the BDS marketplace).

3 Letter of Dr. Joseph V. Farrell *et al.*, to Marlene H. Dortch, FCC, WC Docket Nos. 05-25, 15-247, and 16-143, at 1 (filed Sep. 14, 2016); *see also* Letter of Dr. Marius Schwartz

cable, and copper by a wide range of providers" in submissions supporting its proposed acquisition of XO Communications,[4] while conveniently ignoring that evidence in this parallel rulemaking. On this record, the only rational course of action for the Commission is to focus on eliminating entry barriers in the BDS marketplace and to exercise restraint in regulating rates—limiting such regulation to dominant providers where monopoly conditions are present.[5] By contrast, embracing Verizon's self-contradictory and arbitrary proposals to extend rate regulation to new entrants without regard to whether they possess market power would undercut core policy goals, defy decades of precedent, and trample on bedrock administrative law principles.

Whatever sliver of credibility remained in Verizon's advocacy on BDS withered away in its latest filing in this proceeding. In a letter dated September 27, Verizon appears to acknowledge the irrationality of imposing rate regulation on "new entrants" like Comcast "that began providing Ethernet services after 2006."[6] But Verizon's lip service to common sense and basic economics oddly does not lead it to renounce earlier calls to rate-regulate new entrants. Rather, Verizon proposes only a brief delay before rate regulation would apply to new entrants —of "approximately three years," to coincide with a "reassess[ment]" of "market competition" by the Commission.[7] Remarkably, Verizon's proposed application of rate regulation to new entrants would not hinge on the outcome of this proposed market reassessment; rather, that process appears to be mere window dressing, as Verizon makes clear that, "after that [three-year] time period has passed . . . the benchmarks [would] apply to them."[8]

What Verizon overlooks is that rate regulation of new entrants cannot simply be "deemed" the new default state of affairs, from which providers may seek relief. Instead, given that no new entrant is subject to rate regulation today, there must be record evidence justifying the imposition of such regulation, and here the justification must be particularly compelling in light of the Commission's longstanding, reliance-inducing practice of *refraining* from rate-regulating non-dominant providers.[9] In addition, given that Verizon's proposed benchmark

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to Marlene H. Dortch, FCC, WC Docket Nos. 05-25, 15-247, and 16-143, at 2 (filed Sep. 15, 2016) (explaining that the joint economists' letter "is consistent with" the market analysis submitted by Dr. Marius Schwartz and Dr. Federico Mini on June 28, 2016).

4 "Verizon-XO Transaction: Whitepaper on the Effect of Verizon's XO Acquisition on Business Data Services," at 36, attached to Letter of Katharine R. Saunders, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket No. 16-70 (filed Aug. 26, 2016).

5 *See* Letter of Steven F. Morris, NCTA, to Marlene H. Dortch, FCC, WC Docket Nos. 05-25 and 16-143, at 1 (filed Sep. 14, 2016).

6 Verizon Sep. 27 Letter at 6.

7 *Id.*

8 *Id.; see also id.* (reiterating that mandatory rate "benchmarks eventually should apply to *all* providers offering service in non-competitive areas") (emphasis added).

9 *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (where an agency reverses course, it must offer a "more substantial justification" when the "new policy rests upon factual findings that contradict those which underlay its prior policy" and when the prior policy "has engendered serious reliance interests that must be taken into

approach would seek to regulate competitive providers' Ethernet services based on ILECs' legacy TDM offerings, the Commission would need to justify the appropriateness of the resulting scheme despite material differences between these product categories in terms of service attributes, costs, and other variables, and would need to ensure that the net result of such an approach is non-confiscatory.[10] Indeed, it is difficult to imagine a more arbitrary and capricious process than subjecting new entrants to rate regulation—without a scintilla of support for that approach in the existing record, and in derogation of 40 years of consistent precedent to the contrary—*irrespective* of the results of the seemingly concurrent analysis of market conditions. Why conduct a "market assessment" *at all* if imposing benchmark regulation on all providers is the preordained result?

This proposal perfectly encapsulates Verizon's cynical approach to this proceeding. Verizon apparently believes that simply delaying the application of rate regulation to new entrants will make its position more palatable. But Verizon seems content to ignore the inherent irrationality and lawlessness of its proposal. Leaving aside that Verizon did not even bother to suggest a principled basis for designating "approximately three years" as an appropriate amount of time to wait before imposing rate regulation on new entrants, it blinks reality to posit that in three years—when every indication in the record is that there will be *greater* competition in the BDS marketplace—it somehow will be *more* appropriate to regulate all new entrants in all product and geographic markets. Whatever is driving Verizon's newfound interest in regulating new entrants' rates, its proposals have no grounding in fact, policy, or law.

If Verizon were serious about crafting a framework that appropriately recognizes the harms of rate-regulating new entrants without market power—as the Commission has repeatedly acknowledged[11]—its so-called "exemption" for new entrants (i.e., the longstanding policy of

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account"); *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (same); *cf. INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view.").

10 *See* Letter of Eric J. Branfman, Counsel for Lightower Fiber Networks, *et al.*, WC Docket Nos. 05-25, 15-247, and 16-143, Attachment at 3-5 (filed Sep. 23, 2016) (explaining that benchmarking rates for competitive Ethernet services to rates for ILECs' TDM offerings would not be workable); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties."); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (holding that rates established through agency ratemaking decisions may not be confiscatory and must be "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital," as well as "commensurate with returns on investments in other enterprises having corresponding risks").

11 *See, e.g.*, *Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 ¶ 10 (2016) (reiterating that "relaxed

refraining from regulating non-dominant providers' rates) would operate quite differently. Most significantly, the "exemption" would not lapse automatically after some arbitrary period of time. Instead, the Commission would update its Form 477 data collection to enable fresh assessments of actual market conditions and then determine, on a market-by-market and provider-by-provider basis, whether a provider that once was a new entrant has obtained sufficient market power to warrant the imposition of rate regulation. Again, any such finding would almost certainly be the exception rather than the rule, given the strong growth of competition in the BDS marketplace. Moreover, it would be far more appropriate for such a market reassessment to occur after a period of approximately seven years, rather than three years. In Comcast's experience, {{

}} A reassessment after seven years would avoid stranding current investments made in reliance on a system that has never subjected non-ILEC BDS providers to rate regulation, and would enable competitive BDS providers today to adjust their contracting practices and plan accordingly for the prospect of future rate regulation.

Unfortunately, Verizon seems far more interested in skewing the playing field in its favor than in helping create a rational and workable framework for BDS regulation. The Commission, however, has a legal duty and policy imperative to ensure that any new rules are data-driven, conducive to continued investment, and, in turn, procompetitive. Verizon's proposed regulation of new entrants' rates after three years cannot be squared with those core obligations.

Respectfully submitted,

<u>/s/ Kathryn A. Zachem</u>

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regulatory treatment of carriers [without market power] . . . would reduce barriers to entry and thereby fulfill consumer demand *more efficiently than applying the same regulatory requirements to all carriers*" (emphasis added, internal quotation marks and citations omitted)).