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

**Re: Business Data Services, WC Docket No. 16-143
Special Access, WC Docket No. 05-25**

Dear Ms. Dortch:

NCTA – The Internet & Television Association (NCTA) hereby responds to the letter submitted by Sprint on September 28, 2016 in the special access/business data services (BDS) proceeding.¹ Sprint’s letter appears to be premised on the theory that arguments that are unconvincing on an individual basis somehow gain credence if they are compiled in a colorful chart. Unfortunately for Sprint, that theory, like so much of its advocacy in this proceeding, is nothing more than wishful thinking.

Sprint’s summary is offered as a response to a filing by AT&T, which Sprint describes as “the one nationwide wireless carrier to stand outside” of a supposed “consensus” supporting the regulatory regime proposed by Verizon and INCOMPAS.² Whatever the validity of Sprint’s assertion regarding the position of wireless carriers, it is abundantly clear that AT&T is not an outlier for opposing the Verizon/INCOMPAS plan. Similar concerns have been raised by a broad range of companies, including a substantial number of incumbent local exchange carriers, cable operators, and competitive fiber providers. The companies opposing the Verizon/INCOMPAS proposal are responsible for building a significant portion of the fiber optic facilities in this country, and the fact that all of these competing sectors of the industry are united in their overwhelming concern regarding the damage the Verizon/INCOMPAS proposal would do to future investment should be a gigantic red flag for the Commission.

Furthermore, while Sprint tries to downplay AT&T’s opposition as “an eleventh-hour effort” to “preserve its lucrative dominance over the BDS marketplace,”³ the fact that there is similar opposition from hundreds of competitive providers that are investing billions of dollars to

¹ Letter from Jennifer Bagg, Counsel for Sprint Corp., to Marlene Dortch, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (Sept. 28, 2016) (Sprint Letter).

² Sprint Letter at 2 (citing Letter from Christopher T. Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC WC Docket No. 16-143 (Sept. 19, 2016)).

³ Sprint Letter at 2.

put an end to any “lucrative dominance” AT&T may still possess proves that Sprint is grasping at straws.⁴ Indeed, it should be clear to everyone that it is Sprint that is making a desperate last-minute attempt to turn the Commission’s attention away from the obvious and substantial flaws in the Verizon/INCOMPAS proposal.

The Commission should recognize Sprint’s letter for what it is – a cherry-picked summary of quotes from a small number of companies who will say anything to convince the Commission to adopt expansive new rules that would transfer billions of dollars from companies that invest in their networks to those that choose not to. While Sprint certainly is free to put the best face it can on the underwhelming record in support of regulation, the Commission has a legal obligation to review the entire record and to address all arguments that have been meaningfully presented,⁵ including the following:

- The Verizon/INCOMPAS proposal is wholly unjustified in the face of overwhelming evidence demonstrating that the BDS market, particularly Ethernet BDS, bears all of the hallmarks of an effectively competitive market, including substantial investment, rapidly declining Ethernet prices, expanding output, and continued improvements in quality and efficiency.⁶
- The regression analyses relied upon to demonstrate purported widespread market power have been thoroughly discredited as a basis for regulation.⁷ In particular, the competitive local exchange carrier (LEC) regression analyses purporting to demonstrate Ethernet market power are unconvincing as an economic matter and impossible to reconcile with evidence that Ethernet prices are declining and competitive providers of all types are adding Ethernet connections faster than are incumbent LECs.⁸

⁴ See, e.g., Letter from Access Cable Television *et al.*, to Chairman Wheeler and Commissioners Clyburn, O’Reilly, Pai, and Rosenworcel, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 (Aug. 29, 2016) (Small Provider Letter) (letter from nearly 100 facilities-based cable and competitive fiber providers stating that broad regulation “would risk undermining deployment of fiber networks”).

⁵ See, e.g., *Covad Comm. Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006); *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (“Unless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.”).

⁶ See, e.g., Comments of the National Cable & Telecommunications Association, WC Dockets 16-143, 05-25, at 2-11 (June 28, 2016); Reply Comments of the National Cable & Telecommunications Association, WC Dockets 16-143, 05-25 at 3-10 (Aug. 9, 2016) (NCTA Reply Comments); Reply Declaration of John Mayo at ¶¶ 6-30 attached to Reply Comments of Comcast Corporation, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (Aug. 9, 2016) (summarizing record evidence of growth, investment and price declines).

⁷ See, e.g., Letter from Christopher Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, at 3-6 (Aug. 22, 2016) (recapping numerous flaws with regression analyses); Katz/Keating Declaration at ¶¶ 29-62 (explaining in detail why the regression analyses “do not support the proposals for pervasive ex ante price regulation.”).

⁸ Competitive LECs now establish more new Ethernet connections (60%) than do incumbent LECs (40%). See Vertical Systems Group, Mid-Year 2016 U.S. Carrier Ethernet LEADERBOARD (Aug. 18, 2016), available at <http://www.verticalsystems.com/vsglb/mid-year-2016-u-s-carrier-ethernet-leaderboard/>.

- Regulatory proponents like Sprint ignore the substantial costs of regulation both in terms of reduced investment in vital infrastructure and the administrative costs of compliance.⁹ A wide range of companies that build facilities have demonstrated that the regime proposed by Verizon and INCOMPAS would substantially reduce deployment of new facilities.¹⁰
- The proposed competitive market test is a sham that results in extraordinarily broad regulation without regard to the options available to business customers.¹¹ Evidence regarding the supposed paucity of competitors within census blocks, which is purported to show substantial market dominance, is highly exaggerated.¹² Requiring the actual presence of four competitors in a census block ignores the reality of how the BDS marketplace functions and produces absurd results because the vast majority of census blocks have fewer than four customers.¹³
- Neither the goal of “technological neutrality” nor the proposed temporary exemption for “new entrants” are sufficient to justify abandoning four decades of successful policy that focuses rate regulation solely on monopoly providers that possess market power.¹⁴ Proposed reductions in prices for virtually all BDS even in the absence of

⁹ See, e.g., Reply Declaration of Michael L. Katz and Bryan G.M. Keating at ¶¶ 12-28, attached to NCTA Reply Comments (Katz/Keating Declaration); see also, Letter from Russell P. Hanser, Counsel for CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (Sept. 28, 2016) (detailing implementation costs and burdens).

¹⁰ See, e.g., Small Provider Letter; see also Anna-Maria Kovacs, *Business Data Services: The Potential Harm to Competitive Facilities Deployment* (Oct. 2016) (Kovacs Paper) at 4-5 (“Unfortunately, however, the path the FCC is pursuing in this proceeding is likely to do serious damage to the financials of competitive providers as well as incumbents who provide BDS infrastructure, and the heaviest damage is likely to be to those who are chiefly facilities-based. Reduced cash flows and valuations will reduce access to capital, which will reduce the facilities-based providers’ ability to invest in their infrastructure.”), at http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Kovacs%20BDS%202016-10-04_0.pdf.

¹¹ “A further problem is that many buildings may contain only one customer, and thus we will observe only one provider *regardless of how competitive the markets to serve that customer is.*” Rysman White Paper at p. 16 (emphasis added).

¹² The ostensibly large number of incumbent LEC-only or two-provider locations is exaggerated because it ignores unbundled network element (UNE)-based competition. UNEs were established specifically to enable competitive entry and therefore should be included in an analysis of BDS competition. When competitive LEC UNE-provided BDS connections are included, the percentage of incumbent LEC-only buildings drops from 77% to 57%, and the number of buildings with two providers nearly doubles, from 22% to nearly 40%. Rysman White Paper at p. 15, Table 7. And these numbers do not even consider the competitive effect attributable to nearby networks that are not connected to the building.

¹³ See, e.g., NCTA Reply Comments at 39-40; Katz/Keating Decl. at ¶¶ 72-76, 87.

¹⁴ See, e.g., Letter from Joseph Farrell, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 at 2 (Sept. 14, 2016) (“[W]e urge the Commission to adhere to widely accepted principles of regulatory economics that enjoy broad support in the record and in the economic literature by adopting a competitive market test targeted squarely at combating supracompetitive rents in entrenched monopoly markets, rather than regulating markets with multiple facilities-based competitors present.”).

market power would have devastating effects, even if such regulation were limited to incumbent LECs.¹⁵

- Adopting the proposed benchmarking regime for Ethernet rates would be the height of arbitrary and capricious rulemaking. No proponent of that regime has explained why the rate for high-capacity Ethernet services should depend on inaccurate assumptions regarding the technical configuration of DS1 services, or how the results produced by the benchmark have any relationship to the cost of providing those services or the rates that would be expected to exist in a competitive marketplace.¹⁶
- The market distorting effects of the roughly 20 percent price cuts proposed by Verizon and INCOMPAS would be further exacerbated by calls for additional, discriminatory 15 to 20 percent cuts in wholesale prices for carrier customers. Not only are these rate reductions completely unjustified, but applying any of these reductions to current rates in 2017 based solely on an analysis of competition and prices that existed in 2013 would exacerbate the arbitrary and capricious nature of these proposals.
- Arguments regarding the importance of reducing BDS rates to the future of 5G wireless deployment are pure makeweight. There is substantial evidence in the record demonstrating that reductions in Ethernet prices will only make it more difficult for providers to justify new fiber construction for backhaul, undermining 5G deployment and harming wireless carriers.¹⁷
- Rural areas will particularly suffer under the Verizon/INCOMPAS proposal. Cable companies, among others, are making significant investments to provide competitive BDS alternatives in rural areas, despite the typically higher costs.¹⁸ Planned price

¹⁵ See, e.g., Letter from Michael Pryor, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247 & 05-25 (Sept. 26, 2016) (explaining that indirect rate regulation would “significantly impact BDS investment decisions.”); Letter from Christopher Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary FCC, WC Docket Nos. 16-143, 05-25, 15-247 & RM-10592, at 11 (Sept. 16, 2016) (AT&T Response to Verizon/INCOMPAS Proposal) (noting that competitive providers would have to compete against AT&T’s drastically reduced Ethernet rates, forcing competitors “to dramatically cut rates”).

¹⁶ See, e.g., Letter from Melissa Newman, Centurylink, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (Sept. 30, 2016) (identifying significant flaws in the benchmark proposal and substantially negative consequences from the resulting rates).

¹⁷ See, e.g., AT&T Response to Verizon/INCOMPAS Proposal at 3; see also Kovacs Paper at 5 (“Cutting the price of Ethernet several years before 5G is even deployed is likely to have at least two detrimental effects. By distorting the relative pricing of Ethernet and dark fiber, it may slow the transition to dark fiber. By depriving facilities-based providers of capital, the artificial reduction of any of these rates is likely to reduce investment in fiber infrastructure in general and competitive providers in particular.”).

¹⁸ See, e.g., NCTA Reply Comments at 4; Comments of Mediacom Communications Corp., WC Docket No. 16-143, WC Docket No. 05-25, RM-10593 at 2 (June 28, 2016); Comments of the American Cable Association, WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593 at 8 (June 28, 2016).

reductions not only will chill this investment, but investment by the incumbent LECs that remain in these areas as well.¹⁹

The list above is by no means intended to be exhaustive. There is virtually no issue identified in the Sprint summary that has not been thoroughly rebutted in the record. In the face of this record, the most defensible approach for the Commission is to adopt NCTA's proposed framework for regulation.²⁰ By tailoring regulation to those areas where market power may still exist, our proposal does not penalize companies for past investments or discourage them from investing in new facilities. Furthermore, in contrast with the Verizon/INCOMPAS proposal, NCTA's approach is supported by substantial evidence in the record, is consistent with decades of successful Commission policy, and comports with well-established economic principles.

For all the reasons explained above and in prior NCTA filings, the Commission should reject the Verizon/INCOMPAS proposal and adopt the NCTA framework for BDS regulation.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

¹⁹ See, e.g., James Prieger, *Investment in Business Broadband in Rural Areas: The Impacts of Price Regulation and the FCC's Blind Spots* (Aug. 9, 2016) at 2 ("As suggested by voluminous empirical evidence from closely related regulatory settings, substantially lowering the price caps will deter investment by ILECs and competitive providers."), at http://www.investinbroadband.org/wp-content/uploads/2016/08/investment-in-business-broadband-in-rural-areas_prieger_080916.pdf.

²⁰ Letter from Steven F. Morris and Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25 (Sept. 14, 2016).