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October 5, 2016

VIA ECFS

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

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Re: *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; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25*

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 {{ }} 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).

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

Respectfully submitted,

/s/ Matthew A. Brill

Matthew A. Brill
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Counsel for Comcast Corporation

Attachments

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Marlene H. Dortch
 Secretary
 Federal Communications Commission
 445 12th 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*

Dear Ms. Dortch:

In their zeal to expand regulation of business data services (“BDS”) to all corners of this increasingly competitive and dynamic marketplace, Verizon, INCOMPAS, and allied parties repeatedly urge the Commission to rule that all BDS offerings—no matter their particular attributes or variations—are common carrier services subject to Title II of the Communications Act of 1934, as amended (the “Act”).¹ But as Comcast and others have explained in their comments and ex parte submissions, and as discussed further below, the record developed in this proceeding demonstrates that various providers (including Verizon itself) offer certain BDS products on a private carrier basis—that is, by making “individualized decisions, in particular cases, whether and on what terms to deal,” without the sort of indifferent “holding out” to the

¹ See, e.g., Comments of Verizon, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 17-20 (filed Jun. 28, 2016) (“Verizon Comments”); Letter of Curtis Groves, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 1-2 (filed Aug. 5, 2016); Reply Comments of Verizon, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 25-37 (filed Aug. 9, 2016) (“Verizon Reply Comments”); Letter of Maggie McCreedy, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 1-2 (filed Aug. 19, 2016); Letter of Curtis Groves, Verizon, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 16-143 and 05-25 and RM-10593, at 3-5 (filed Sep. 27, 2016) (“Verizon Sep. 27 Letter”); Reply Comments of INCOMPAS, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 20-29 (filed Aug. 9, 2016) (“INCOMPAS Reply Comments”).

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public that defines common carrier offerings.² This evidence, and the absence of any probative evidence to the contrary, precludes the Commission from concluding on this record that *all* BDS offerings are offered on a common carrier basis. The Commission also cannot compel cable providers and other new entrants to offer BDS on a common carrier basis in this proceeding; the FNPRM provided no notice that the Commission might pursue such an approach, and in any event, the record is devoid of any evidence that cable BDS providers have sufficient market power to justify such a compulsion. In short, there is simply no lawful path by which the Commission can adopt a blanket classification of BDS as common carriage in this proceeding.

The record is replete with evidence that many providers offer a wide range of BDS products on a private carrier basis. Comcast has submitted a sworn declaration from David Allen, Vice President for Carrier Services at Comcast Business, attesting that the company’s “cellular backhaul service and E-Access service are both structured and offered by the company as private carriage services.”³ Mr. Allen’s declaration explains that “Comcast does not hold itself out indifferently to the public or any class of customers to provide cellular backhaul or E-Access services,” but rather “makes individualized determinations as to the circumstances in which and the customers to whom it will offer wholesale service,” and provides service pursuant to contracts containing “highly individualized terms and prices.”⁴ Comcast structured its cellular backhaul service and E-Access service in this manner “in reliance on the operational flexibility the private carriage model entails”⁵—based on established Commission precedent recognizing that private carriage “permit[s] closer planning between the operator and its customers”⁶ and enables “parties to a contract to modify their arrangement over time as their respective needs and requirements change without the inherent delay associated with” common carrier obligations.⁷

Several other parties have explained that they, too, offer BDS on a private carrier basis. Charter submitted a sworn declaration from Phil Meeks, an Executive Vice President at the company and President of Spectrum Enterprise, stating that Charter “enters into individualized negotiations with potential BDS customers” in connection with “detailed requests for proposals,”

² *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC I*”), *cert. denied*, 425 U.S. 992 (1976).

³ Declaration of David Allen ¶ 13 (“Allen Decl.”), attached as Exhibit E to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016) (“Comcast Comments”).

⁴ *Id.*

⁵ Reply Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 33-34 (filed Aug. 9, 2016) (“Comcast Reply Comments”).

⁶ *Id.* at 34 & n.123 (citing *Domestic Fixed-Satellite Transponder Sales*, Memorandum Opinion, Order, and Authorization, 90 F.C.C.2d 1238 ¶¶ 31-34 (1982) (“*Transponder Sales Order*”).

⁷ *Id.* (quoting *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 88 (2005)).

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and that “[f]or enterprise-level customers in particular, service relationships are individually tailored, and it is not infrequent that negotiations over these terms fall apart because they are unacceptable to one party or the other.”⁸ In addition, both the National Cable & Telecommunications Association and the American Cable Association have indicated that their members rely extensively on private carriage arrangements in offering competitive BDS products in the marketplace.⁹

The record also demonstrates that various *non*-cable BDS providers have adopted a private carriage model as well. Most notably, Verizon—which today is the most vocal proponent of classifying all BDS as common carriage—told the Commission in 2013 that “[i]n the time since it obtained forbearance” from Title II requirements for non-TDM services in 2006, “Verizon has entered into approximately 3,300 *private carriage contracts* with unaffiliated carriers for non-TDM based services, valued at more than \$3.7 billion over their lifetime.”¹⁰ Verizon tries in vain to distinguish its private carrier BDS offerings as “unique” products that exist only “because Verizon has received forbearance from all Title II regulation for its packet-based Business Data Services.”¹¹ But these offerings plainly are *not* “unique” in a marketplace where cable providers and others routinely offer private carrier services. And the notion that Verizon can offer service on a private carrier basis because it has obtained forbearance from Title II regulation *undercuts* rather than supports its arguments; cable BDS providers that entered the marketplace as private carriers have *never* been subject to Title II regulation and so, by Verizon’s own logic, have always been free to offer service on a private carrier basis.

Another commenter, BT Americas, explained that its BDS offerings “plainly meet the criteria of private carriage,” as it is “very selective as to the RFP opportunities it chooses to pursue” and “engage[s] in substantial and extensive negotiations to tailor the contract to the

⁸ Declaration of Phil Meeks ¶ 7, attached as Exhibit A to Comments of Charter Communications, Inc., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016).

⁹ See Comments of the National Cable & Telecommunications Association, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 12 (filed Jun. 28, 2016) (“Competitive BDS typically is provided as a private carrier service, particularly with respect to higher-bandwidth services. Cable operators, in particular, do not provide posted, publicly-available pricing for Ethernet and dedicated access services; rather, most operators provide a contact form on their websites to facilitate individualized discussions with sales staff.”); Reply Comments of the American Cable Association, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 12 (filed Aug. 9, 2016) (“It is ACA’s understanding that many of its members also have provided and continue to provide BDS-like services on a private carriage basis, meeting each prong of the private carriage definition.”).

¹⁰ FNPRM ¶ 257 n.671 (quoting Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM-10593, at 6-7 (filed Apr. 16, 2013) (emphasis added)).

¹¹ Verizon Reply Comments at 31 n.88.

needs of the customer.”¹² BT Americas emphasized that its ability to offer BDS depends on the availability of this private carriage model, and that “a legal obligation to provide Business Data Services to any entity requesting the service would require BT Americas to change its business model and provide a service that it does not make economic sense for BT Americas to offer on a standalone basis.”¹³ In addition, multiple providers of high-capacity data services to non-profit organizations and universities, including Internet2, EDUCAUSE, and The Quilt, filed reply comments explaining that their services, which “are designed and operated only for a limited number of users and engineered and managed to those users’ specific needs,” likewise are provided on a private carrier basis.¹⁴

In the face of this unequivocal evidence that many BDS products in the marketplace are offered on a private carrier basis, Verizon and its allies nevertheless continue to urge the Commission to make an across-the-board finding that *all* BDS offerings are common carrier services.¹⁵ These calls for a blanket classification—based largely on cherry-picked statements by a few providers about a subset of their offerings—not only ignore the record submissions summarized above, but also overlook the D.C. Circuit’s instruction that the Commission must determine whether a provider is acting as a common carrier on an *offering-by-offering* basis, and may not simply deem a diverse array of offerings to be common carriage based on “evidence” about just a few. In *Southwestern Bell*, the D.C. Circuit struck down the Commission’s blanket determination that all dark fiber offerings provided pursuant to contracts filed at the agency were “common carrier” offerings, and did so precisely because the Commission made that determination “[w]ithout examining the actual contours of the dark fiber offerings represented by the [contracts].”¹⁶ The court explained that “[w]hether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance,” and that “[t]he mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [the offerings at issue] on a common carrier basis.”¹⁷ So, too, here. In order for the Commission to conclude that *all* BDS offerings are common carrier services, it would need to find, based on record evidence, that every individual BDS product—ranging from cell backhaul and other carrier-class services to retail enterprise offerings—is offered on a common carrier basis. The record does not remotely support the sort of particularized findings that would be necessary for such a ruling.

¹² Reply Comments of BT Americas, Inc., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 12-13 (filed Aug. 9, 2016).

¹³ *Id.* at 11.

¹⁴ Reply Comments of Internet2 and EDUCAUSE, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 10 (filed Aug. 9, 2016); *see also* Reply Comments of the Quilt, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 8 (filed Aug. 9, 2016).

¹⁵ *See supra* note 1; *see also, e.g.*, Reply Comments of Public Knowledge *et al.*, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 6-14 (filed Aug. 9, 2016).

¹⁶ *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994).

¹⁷ *Id.* at 1481.

A closer examination of the arguments advanced by Verizon, INCOMPAS, and their allies illustrates these fatal flaws. For instance, Verizon and INCOMPAS cite statements in the record regarding the “rack rates” for certain BDS offerings as supposed “proof” of an indifferent “holding out” by cable providers.¹⁸ But these assertions are entirely misleading. Verizon and INCOMPAS ignore that the references to “rack rates” appear only in connection with certain *retail* BDS offerings¹⁹—and not in connection with the *wholesale* cellular backhaul and E-Access services that Comcast offers on a private carrier basis, for which the pricing is “highly individualized.”²⁰ And in any event, the mere existence of “rack rates” for a service does not transform that service into a common carrier offering. Even Comcast’s retail services involve substantial price negotiations off the “rack rate,”²¹ and as the Commission has explained, it is entirely consistent with private carriage for a provider to offer standardized pricing and then “to engage in negotiations with each of its customers on the price and other terms which would vary depending on the customers’ . . . needs.”²²

INCOMPAS also points to general statements in the record that cable BDS providers serve “more than 100,000 fiber locations” and asserts that these statements somehow show that cable providers offer BDS “indiscriminate[ly]” and “to the public.”²³ But again, these statements relate only to retail BDS offerings and have nothing to do with Comcast’s private carrier cellular backhaul and E-Access services. In any event, the aggregate number of *locations* served by all cable providers says nothing about how many *customers* are served by any particular provider (despite INCOMPAS’s disingenuous attempt to conflate the two²⁴), let alone whether any particular provider offers service to its customers on a common carrier basis. In fact, sworn testimony in the record regarding Comcast’s private carrier cellular backhaul and E-Access

¹⁸ Verizon Reply Comments at 27; INCOMPAS Reply Comments at 23.

¹⁹ See Comcast Comments at 16, 65 (using the term “rack rates” to describe pricing only for “retail services”).

²⁰ Allen Decl. ¶ 13.

²¹ See Declaration of John Guillaume ¶ 14, attached as Exhibit C to Comcast Comments (“Although Comcast has standard ‘rack’ rates for all of its retail services, contracts generally are individually negotiated, with rates and other terms dependent on term, volume, and total commitment.”).

²² *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585 ¶ 8 (1998) (“*Vitelco Order*”), *aff’d sub nom., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999).

²³ INCOMPAS Reply Comments at 21-23.

²⁴ See INCOMPAS Reply Comments at 26 (incorrectly characterizing the record as showing that cable providers “sell business data services to hundreds of thousands of business *customers* of all types” (emphasis added)).

services shows that the number of customers purchasing these services is very small²⁵—which underscores Comcast’s selective decision-making as to “whether and on what terms to deal” as a private carrier.²⁶

Verizon’s arguments fall flat even in the few instances when they purport to address specific cable BDS offerings with particularity. In discussing cable providers’ cellular backhaul offerings, Verizon relies on materials describing these offerings on cable providers’ websites, arguing that these materials represent “advertising” that reflects an indifferent holding out of backhaul service to wireless carriers.²⁷ But a provider’s posting of general information about a service on its website does not constitute an “advertisement,” and certainly does not indicate that the provider is making an open-ended offer to serve all comers. Private carriers certainly are not required to keep their offerings secret. As for E-Access, Verizon’s argument that this service should be deemed common carriage centers largely on its allegation that a cable provider declined to sell Verizon the service in Verizon’s ILEC franchise areas.²⁸ That allegation, however, *reinforces* the fact that E-Access service is offered on a private carrier basis, subject to individualized determinations as to whether and with whom to deal. And despite its protestations about alleged refusals to deal, Verizon itself has acknowledged that a private carrier, by definition, does “not hold itself out to provide service indiscriminately where it has available facilities,” and that it has taken advantage of private carriage status for some of its services.²⁹ INCOMPAS’s retort that the “practice of selectively choosing which carrier customers to serve” is “proof of unreasonable discrimination”³⁰ under Section 202(a) of the Act puts the cart before the horse, as it incorrectly presupposes that Title II applies to offerings that have not been classified as common carrier services. INCOMPAS’s argument also proves too much; if it were true that all service providers were prohibited from making individualized determinations and could never turn away business, then private carriage itself would be

²⁵ See, e.g., Allen Decl. ¶¶ 4, 9 (explaining that Comcast provides cellular backhaul service to a handful of “large wireless carriers” and sells its E-Access service to only “{ { } }” carriers).

²⁶ *NARUC I*, 525 F.2d at 641.

²⁷ See, e.g., Verizon Reply Comments at 32 (asserting that cable providers “engage in common business practices of holding their services out indiscriminately” by “marketing” cellular backhaul service “through their websites”); Declaration of Sam Giannini, attached as Exhibit B to Verizon Reply Comments, ¶ 7 (filed Aug. 9, 2016) (stating that “[c]able companies offer and market” cellular backhaul service “broadly” via “their websites”).

²⁸ See, e.g., Verizon Comments at 17-20; Declaration of Daniel Higgins ¶ 2, attached as Exhibit A to Verizon Comments.

²⁹ Verizon Sep. 27 Letter at 5.

³⁰ INCOMPAS Reply Comments at 26 (internal citations, quotation marks, and alterations omitted).

unlawful, and the well-established ability of providers to operate as private carriers would be rendered meaningless.³¹

Verizon ultimately falls back on the contention that the Commission “has long held that packet-based Business Data Services are telecommunications services”³²—arguing that, regardless of what the record shows, Commission precedent precludes providers from offering BDS on a private carrier basis. But this argument rests on a gross mischaracterization of precedent. The *2005 Wireline Broadband Order*—the principal order Verizon cites for this proposition—simply observed that ILECs had “traditionally” offered “Ethernet service” and “other high-capacity special access services” as common carrier telecommunications services.³³ That observation undoubtedly was correct at the time it was made; no ILECs had obtained broad forbearance from dominant carrier regulation as of 2005, so all ILECs—as dominant carriers—still were *required* to offer special access services (including packet-based transmission services) on a common carrier basis. But the context makes clear that the Commission plainly was not making any findings with respect to cable BDS offerings, which generally had not yet even arrived in the marketplace,³⁴ nor was the Commission ruling that *all* future packet-based BDS offerings from *any* provider necessarily would constitute common carriage.³⁵ Similarly unpersuasive is Verizon’s citation to a discussion of Ethernet services in the *2015 Open Internet Order*.³⁶ There, too, the Commission did not rule that all “Ethernet” offerings are common carrier services, as Verizon asserts, but instead stated that offerings “*by incumbent ILECs* in the

³¹ See *Transponder Sales Order* ¶¶ 16, 20-21 (rejecting arguments that private carriage offerings involving the “careful selection of customers” reflect an improper effort to “evade . . . common carrier obligations,” and reaffirming that “[t]he Commission has long recognized that particular market needs for . . . services may be met by means other than traditional common carrier offerings”).

³² Verizon Reply Comments at 25-26; see also Verizon Sep. 27 Letter at 5 (asserting that “[t]he Commission has long held Ethernet service—the type of Business Data Service cable providers offer—is a telecommunications service”).

³³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 9 (2005) (“*2005 Wireline Broadband Order*”).

³⁴ See, e.g., Comcast Comments at 8 (noting that “Comcast’s first substantial foray into the marketplace for dedicated business data services” was “in 2009”).

³⁵ Verizon also cites the *2007 AT&T Forbearance Order*, but the relevant passage in that order merely summarizes the ILEC-specific findings of the *2005 Wireline Broadband Order* and provides no support for the proposition that cable BDS offerings are common carrier services. See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 ¶ 9 (2007) (“*2007 AT&T Forbearance Order*”).

³⁶ See Verizon Reply Comments at 26.

Ethernet market” are “regulated under Title II.”³⁷ That order says nothing about the regulatory status of cable BDS offerings, and certainly does not preclude cable providers (or other non-ILECs) from offering BDS on a private carrier basis.

Nor is there any legitimate ground on this record to compel private carriers to offer BDS on a common carrier basis. As noted above, the FNPRM did not provide notice of any potential proposal to compel providers to offer BDS as common carriers. The Administrative Procedure Act thus bars the Commission from pursuing such an approach in this proceeding absent a further NPRM that properly raises the prospect of such compulsion and the many complex issues it would entail.³⁸ And in any event, the Commission could not come close to demonstrating that any cable BDS provider has market power—let alone that all of them have market power in each discrete product and geographic market. In particular, there is no basis in the record to conclude that cable BDS providers have sufficient pricing power to “charge monopoly rents” for service—which, under established precedent, is a prerequisite to compelling common carriage.³⁹ To the contrary, the record demonstrates that “non-ILEC BDS providers . . . cannot be shown to possess market power under any recognized theory.”⁴⁰ Verizon and its allies adduce no evidence that would remotely justify a compulsion for new entrants to operate as common carriers. Indeed, Verizon’s own submissions in support of its proposed acquisition of XO Communications tout the “extensive competition for [BDS] provided over fiber, cable, and copper by a wide range of providers” in today’s marketplace,⁴¹ and thus undercut any suggestion that *any* BDS provider or

³⁷ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 ¶ 420 (2015) (“*2015 Open Internet Order*”) (emphasis added).

³⁸ See *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (explaining that an agency must “describe the range of alternatives being considered with reasonable specificity”).

³⁹ *Vitelco Order* ¶ 9.

⁴⁰ Declaration of Dr. John W. Mayo ¶ 77, attached as Exhibit B to Comcast Comments (filed Jun. 28, 2016); see also Reply Declaration of Dr. John W. Mayo ¶ 60, attached as Exhibit B to Comcast Reply Comments (filed Aug. 9, 2016) (noting that “[n]umerous parties, including those that support price cap regulations, are in agreement with my conclusion that new entrants such as Comcast do not possess market power,” and collecting citations); “Competitive Effect of Cable Network Infrastructure,” Federal Communications Commission Staff, Jun. 28, 2016, at 1, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0628/DOC-340040A8.pdf (finding that cable BDS competition generally does not even have “a statistically significant effect” on ILEC prices).

⁴¹ “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).

class of providers—let alone cable providers or other new entrants—broadly exercise market power in the provision of BDS.⁴²

* * *

In sum, the record contains overwhelming evidence that cable providers and others offer particular BDS products, including cellular backhaul service and E-Access service, on a private carrier basis. In urging the Commission to hold otherwise and find that these BDS products are offered on a common carrier basis, Verizon, INCOMPAS, and their allies rely largely on unsupported assertions and mischaracterizations of law—and when they do cite “evidence,” that evidence either does not support or affirmatively undercuts a common carriage classification for the offerings at issue. On this record, where there is substantial evidence supporting a private carriage classification for various BDS products and no relevant evidence refuting that classification, it would be unlawful for the Commission to conclude that all BDS offerings are common carrier services.⁴³

Respectfully submitted,

/s/ Matthew A. Brill

Matthew A. Brill
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 Counsel for Comcast

⁴² See Letter of Melissa Newman, CenturyLink, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Sep. 15, 2016) (detailing the various ways in which Verizon’s submissions in connection with its proposed acquisition of XO Communications “highlight[] the intense competition in the BDS marketplace,” in “stark contrast to the dour portrayal of competition that Verizon and INCOMPAS have advanced to justify their draconian regulatory proposals concerning business data services”).

⁴³ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that agency action is arbitrary and capricious if the agency “offered an explanation for its decision that runs counter to the evidence before the agency”); *Sorenson Communs., Inc. v. FCC*, 765 F.3d 37, 49-51 (D.C. Cir. 2014) (holding that the Commission acted arbitrarily and capriciously when it adopted a more demanding speed-of-answer requirement for video relay services “based in part upon the explicit premise that [the rule] would not increase labor costs”—a premise that was “contrary to the general [cost] relationship suggested [in petitioner’s comments] and without citing any evidence to dispel [petitioner’s] suggestion” that costs would rise).