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EX PARTE NOTICE

October 5, 2016

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

Re: *Business Data Services in an Internet Protocol Environment et al., WC Docket Nos. 16-143, 15-247, and 05-25 and RM-10593*

Dear Ms. Dortch:

For several months, Commission representatives have expressed an interest in broadening the set of proposed regulatory frameworks subject to consideration in the ongoing business data services (“BDS”) rulemaking. As CenturyLink and others have explained, the extremely aggressive regime advanced by Verizon and INCOMPAS suffers from many well-documented problems and cannot plausibly serve as a rational basis for resolving this proceeding.¹ In order to provide the Commission with a meaningful and legally sustainable path forward at this critical juncture, CenturyLink has developed the following proposal, which sets out a BDS framework to replace the current pervasive regulation of special access services offered by ILECs.

CenturyLink’s proposal reflects the company’s fundamental agreement with the basic premise articulated by the FNPRM – namely, that the Commission should measure competition in the BDS marketplace and then deregulate where it is present or apply limited price controls where it is not. Unlike other pending proposals, it would preserve cable, CLEC, and ILEC network providers’ ability and incentive to pursue the infrastructure investment needed for the deployment and growth of enterprise broadband and 5G wireless offerings. To be clear, this proposal does not reflect CenturyLink’s view as to the best or most appropriate regime for governing BDS offerings in the current marketplace, nor would CenturyLink necessarily support the adoption of any particular provision divorced from the proposal’s other tenets (or coupled with additional regulation affecting matters the proposal does not directly address). Indeed, CenturyLink believes that adoption of parts of this proposal in isolation from others, or in connection with other provisions not in accord with the proposal, would likely be unlawful.

¹ See, e.g., Letter from Russell P. Hanser, Counsel to CenturyLink, Frontier Communications, FairPoint Communications, and Consolidated Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 29, 2016) (“August 29 Letter”).

Taken as a whole, however, this good-faith proposal would resolve long-outstanding issues and offer the Commission a path forward in this proceeding.

In light of other pending proposals, we emphasize at the outset that there is no lawful or evidentiary basis on which the Commission could simply declare all services at or below 50 Mbps non-competitive – an approach that would result in price cap regulation of ILECs alone, and would regulate in many markets that are indisputably competitive.

- The Commission’s own regression analyses – though plagued by data collection and economic modeling flaws that *understate* competition – demonstrate that no provider exerts market power in the provision of sub-45 Mbps bandwidth services.²
- Though Verizon has sponsored a plan that would deem all sub-50 Mbps services non-competitive, it also, in the context of its pending acquisition of XO Communications, recently argued that that market is frequently competitive. As Verizon has explained there, “TDM-based DS1 and DS3 services . . . compete with EoC,” and that EoC, in turn, competes “to a significant extent” with other “media,” including fiber, “the HFC networks that cable operators have deployed,” and fixed wireless.³
- AT&T has submitted evidence that “ninety percent of [its] sub-50 Mbps bandwidth is within a half mile of competitive fiber,” meaning that “CLECs not only have the facilities to compete for all BDS demand, but have been quite successful in winning business” in such markets.⁴

² See Mark Israel, Daniel Rubinfeld, and Glenn Woroch, *Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test, Second White Paper*, at 26 (June 28, 2016) (“*Second IRW White Paper*”), attached to letter from Glen Woroch, Senior Consultant, Compass Lexecon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 *et al.* (filed June 28, 2016); Declaration of John W. Mayo, ¶¶ 71-76 (June 28, 2016), attached as Exhibit B to the Comments of Comcast Corp., WC Docket Nos. 16-143 *et al.* (filed June 28, 2016).

³ *Verizon-XO Transaction: Whitepaper on the effect of Verizon’s XO acquisition on business data services* (Aug. 1, 2016), attached to Letter from Katherine R. Saunders, Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-70, at 8, 20 (filed Aug. 26, 2016); *see also id.* at 18-19 (stating that Verizon’s pricing for lower-speed BDS services is constrained by “competition from fiber providers, cable providers, and other CLECs offering copper-based services”).

⁴ Reply Comments of AT&T Inc., WC Docket Nos. 16-143 *et al.*, at 3 (filed Aug. 9, 2016) (“AT&T Reply Comments”).

- And CenturyLink, along with (among others) Frontier, has submitted evidence showing that nearly ubiquitous cable broadband facilities are robust and relevant substitutes for low-bandwidth ILEC BDS offerings.⁵
- Analysis by Israel, Rubinfeld, and Woroch demonstrates that 55 percent of CenturyLink’s aggregate bandwidth for sub-50 Mbps services (and 59 percent of AT&T’s) is in buildings that have two or more competitors in the building or within 1,000 feet.⁶
- Fully 88% of CenturyLink’s sub-50 Mbps bandwidth, and 90% of AT&T’s, is within a half mile of competitive fiber.⁷
- Dr. Rysman found that circuit-based (as opposed to packet-based) services accounted for 42% of competitive providers’ BDS revenues,⁸ and that competitive providers earned about 38 percent of circuit-based BDS revenues⁹ – a far cry from the “zero percent” some are asking the Commission to presume here.
- The Commission’s data set also shows that there are census blocks in almost every MSA in which a CLEC provides service, but no ILEC does.¹⁰ In fact, the FNPRM observes that CLECs are the only suppliers of BDS in about 13 percent of census blocks.¹¹

⁵ See, e.g., Joint Reply Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 39-41 (filed Aug. 9, 2016) (“Mid-Size ILEC Reply Comments”); see also Letter from Eric J. Branfman, Counsel, Wilshire Connection, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2 (filed Aug. 25, 2016) (“Wilcon does not see materially less competition in the areas it serves at lower bandwidths (i.e., below 50 Mbps)”); Joint Reply Comments of Lumos Networks Corp. *et al.*, WC Docket Nos. 16-143 *et al.*, at 12 (filed Aug. 9, 2016) (noting that “approximately 40 percent of the circuits provided by [competitive fiber provider] Lightower are at 50 Mbps or less”).

⁶ See Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld and Glenn Woroch, at 14-15 (Apr. 20, 2016), attached to Letter from Chris Shenk, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Apr. 20, 2016).

⁷ See *Second IRW White Paper* at 5.

⁸ Marc Rysman, *Empirics of Business Data Services*, White Paper, Apr. 2016 (rev. June 2016), at 7 (“Revised Rysman Report”).

⁹ *Id.*

¹⁰ Mark Israel, Daniel Rubinfeld, & Glen Woroch, *Competitive Analysis of the FCC’s Special Access Data Collection*, at 17 (Jan. 26, 2016), attached to Letter from Kyle Fiet, Sidley Austin LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Apr. 7, 2016).

¹¹ See, e.g., *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4801 ¶ 182 (2016) (“FNPRM”).

These facts conclusively refute any claim that services at or below 50 Mbps are uniformly exempt from competition, and eviscerate any suggestion that the Commission could lawfully find them to be non-competitive without applying any competitive market test.

The core tenets of CenturyLink's proposed BDS framework are set forth below.

First, BDS competition would be measured consistent with the following parameters:

- Services above 50 Mbps would be presumed to be competitive.¹²
- For services between 10 Mbps and 50 Mbps, a census tract will be subject to a competitive market test, and deemed competitive if three or more providers have facilities in or within 2,000 feet of that census tract.¹³
- Services under 10 Mbps (such as DS1 links) would be subject to a separate competitive market test from services with speeds above that threshold, and, for purposes of this test, offerings provisioned using Ethernet over hybrid-fiber-coax ("HFC") would be counted as competing offerings.¹⁴
- For all product markets, services provisioned using unbundled network elements ("UNEs") would be counted as competing offerings.¹⁵

¹² The Commission's hired economist, Dr. Rysman, failed to find evidence of market power in the provision of services at capacity levels over 50 Mbps. *See, e.g., FNPRM* at 4830 ¶ 238.

¹³ As CenturyLink and others have explained, there is good reason to believe that welfare-maximizing outcomes can arise from just *two* competitors in markets of the type at issue here. *See, e.g.,* Joint Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 57-61 (filed June 28, 2016) ("Mid-Size ILEC Comments"); Mid-Size ILEC Reply Comments at 51-55; Letter from Christopher Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No 16-143, at 7 (filed Aug. 22, 2016). There should be no doubt that three competitors are sufficient to ensure welfare-maximize outcomes without the application of expansive regulation. Moreover, the census tract is an appropriate geographic unit for analysis here, given the impracticality of a framework based on census blocks. *See* Mid-Size ILEC Comments at 51-52; August 29 Letter at 5-6.

¹⁴ CenturyLink has provided detailed evidence regarding the suitability of HFC-based cable offerings for provision of services at or below 10 Mbps and cable providers' success in competing for the provision of such offerings. *See, e.g.,* Letter from Melissa E. Newman, Vice President, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-247 *et al.* (filed Apr. 8, 2016).

¹⁵ As CenturyLink and others have explained, there is no appropriate basis on which to exclude UNEs from the competitive analysis. Indeed, it would seem contrary to the spirit and intent of the 1996 to find otherwise. CLECs themselves have argued that UNE-based services are important competitive alternatives to ILEC BDS, and Dr. Rysman recommends "analysis of UNE competition." Further, geographic and other limits on UNE availability are irrelevant here, because CenturyLink is not proposing that UNE-based competition be accounted for where the relevant network elements are unavailable as UNEs. *See generally* August 29 Letter at 11-12 and sources cited therein.

- Areas found to be non-competitive for any class of service would be reassessed every three to five years.

Second, competitive markets would be deregulated as follows:

- Competitive markets would be subject to permissive (not mandatory) detariffing, no additional price regulation, and only limited regulation of practices.¹⁶
- Any rules applied in competitive markets would apply equally to all BDS providers.¹⁷

Third, non-competitive areas would be regulated as follows:

- Price cap regulation would continue to apply. Only providers with market power would be subject to price regulation.
- BDS rates in non-competitive markets would be subject to at most a modest “reset” to account for productivity over the past decade, and such a reset would be phased in over a period of three years.¹⁸
- BDS rates in non-competitive markets would be subject to an X-factor of no more than 2.1% minus inflation, with a sunset in five years.¹⁹ Any adjustment to the productivity factor going forward should account for the fact that ILECs have faced rapidly declining customer counts and revenues, which increases

¹⁶ CenturyLink and others have explained that mandatory tariffing is only appropriate in non-competitive markets, and that *permissive* detariffing is more appropriate here than *mandatory* detariffing. See Mid-Size ILEC Comments at 61-65.

¹⁷ CenturyLink agrees with the Commission that any framework it adopts here should be technologically neutral. As such, there is no lawful basis on which to subject one provider in a competitive market to regulations from which others are exempt. See, e.g., Mid-Size ILEC Comments at 66-69.

¹⁸ Econometric analyses placed into the record overwhelmingly refute any suggestion that costs have fallen significantly since rates were indexed to inflation under the CALLS plan. See, e.g., Mark Schankerman and Pierre Régibeau, *Response to the FCC Further Notice: Regulation of DS1 and DS3 Services*, attached to Letter from Russell P. Hanser, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016) (“Schankerman/Régibeau Declaration”); Mid-Size ILEC Reply Comments at 13-16; August 29 Letter at 3-4. See also AT&T Reply Comments at 76-77 and sources cited therein. Thus, there is no basis for a significant rate reduction, and no reduction of any sort should be imposed via a disruptive flash cut.

¹⁹ Econometric analysis in the record demonstrates that there is no basis for imposing substantial or indefinite annual rates cuts. See, e.g., Schankerman/Régibeau Declaration ¶¶ 109-112; August 29 Letter at 4. A reduction of 2.1 percent minus inflation is more than adequate to ensure low prices, and a five-year sunset is critical to ensuring that rates not be pushed below costs.

average costs.²⁰ In addition, companies would be permitted to increase rates that are below economic cost.

- Downward pricing flexibility should be permitted in all areas.²¹
- Regulated prices would in no case be below forward-looking economic costs.²² A BDS provider should be permitted to use a forward-looking cost model and/or its actual costs to show that regulated BDS rates are too low in an area.²³

Fourth, Ethernet services would not be subject to rate regulation.²⁴

* * *

CenturyLink has devoted significant effort to developing a framework that, in contrast to others, is administratively simple and pro-competitive. While CenturyLink continues to believe that a less intrusive regime would be more consistent with the record evidence and would better promote the Commission's broadband deployment goals, it also believes that its proposal, if adopted in whole, offers a reasonable alternative to the more aggressive approaches that some parties have advocated. We urge the agency to move forward on this basis.

²⁰ See generally Mid-Size ILEC Comments at 70-76; Schankerman/Régibeau Declaration ¶¶ 76-86.

²¹ See Letter from Kathleen Q. Abernathy, Executive Vice President, Frontier Communications, *et al.*, to Marlene H. Dortch., Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2 n. 3 (filed Oct. 3, 2016).

²² It should go without saying that, if rates are capped at levels below forward-looking economic costs, providers will be left unable to invest or to continue to operate over time.

²³ See Mid-Size ILEC Reply Comments at 49-51; *see also id.* n. 21.

²⁴ Nearly all Ethernet service is deployed in areas that are competitive, because the cost to deploy such service is higher in non-competitive areas (which tend to be more rural) and those areas offer fewer potential customers. Moreover, all providers face the same challenges and opportunities with respect to the deployment and provision of Ethernet offerings – no provider has an unfair advantage over any other. Indeed, Vertical Systems Group has found that in the first half of 2016, Level 3 and Charter each provided a greater share of Ethernet connections than any of the Mid-Size ILECs – or, indeed, any ILEC other than AT&T. 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/>. Moreover, during this period, CLECs and cable companies provisioned more than 60% of new Ethernet ports. *Id.* For these reasons, Ethernet services should be treated as competitive entrants or new services and excluded from price cap regulation.

Pursuant to Section 1.1206(b) of the Commission's rules, this is being filed in the above-referenced dockets. Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeffrey D. Lantz". The signature is written in a cursive style with a horizontal line at the end.