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Federal Communications Commission
Office of the Secretary

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

Re: In the Matter of 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 for Price Cap Local Exchange Carriers, WC Docket No. 05-25; and AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593

Dear Ms. Dortch:

On September 29, 2016, Alex Hoehn-Saric of Charter Communications, Inc. and Maureen O'Connell and the undersigned on behalf of Charter met with the Commission staff copied on this letter concerning the above-referenced proceeding. During the meeting, Charter explained that the current deregulatory approach to Ethernet service has created the proper incentives for Charter to invest, deploy fiber, and expand its business data services ("BDS") business. Charter raised serious concern that regulating Ethernet rates threatens continued growth and investment in an immature market that is evolving and, absent regulation, will continue to expand fiber deployment.

Charter explained that, since the beginning of 2013, it has invested **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** annually in the expansion of its BDS capabilities for a total investment of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.[1] This investment has resulted in significant new fiber deployment to buildings and cell sites. Since January 2015, in the legacy Time Warner Cable territory alone, Charter has connected **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** with fiber, including **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** a month for each of the last 6 months. Charter has deployed **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** to connect cell sites for backhaul since January 2015. Charter is thus doing exactly what the Commission wants to occur in this market—giving

[1] Comments of Charter Communications, Inc., WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 5 (June 28, 2016) ("Charter Comments").

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businesses of all sizes new competitive options and lower pricing.[2] If the current framework remains in place, Charter expects to continue investing and deploying fiber.

Charter is not alone. Other facilities-based providers are similarly investing and expanding their networks. For instance, Level 3's annual BDS revenues have grown dramatically in the last few years, from just over $3 billion in 2013 to nearly $5 billion in 2015,[3] and Level 3 recently stated its intention to "deploy new loops to approximately 3,000 to 4,000 commercial buildings in the U.S. each year."[4] Other cable companies too, such as Comcast, Cox, and Mediacom, have made substantial investment in deploying fiber.[5] And with respect to smaller cable companies, ACA estimates that its members "are making at least tens of millions and upwards of $300 million of investments annually to deploy facilities to support the provision of BDS."[6]

This significant level of investment shows that the market is healthy and creating the appropriate incentives to deploy fiber, thereby furthering the Commission's longstanding goal of promoting facilities-based investment. Indeed, recognizing that meaningful competition comes when providers invest in their own infrastructure, the Commission has long-favored policies that would spur such investment.[7] For precisely these reasons, the Commission has eased ownership restrictions for cable operators, concluding that doing so would "likely speed entry of cable operators into the market for

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[2] Declaration of Phil Meeks ¶ 5 (attached as Exhibit A to Charter Comments) (showing that, since 2013, rates for 100 Mbps have fallen by 40 percent, rates for 10 Mbps have fallen by 23 percent and rates for 5 Mbps have fallen by nearly 30 percent).

[3] *In re Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4928 (2016) ("FNPRM"), Appendix B, Dr. M. Rysman, White Paper: Empirics of Business Data Service (Apr. 2016).

[4] *See, e.g.*, Reply Comments of Level 3, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 33 (Aug. 9, 2016). Level 3's CEO recently touted the scope of their network as a competitive advantage over cable. *See Level 3 says Comcast, Charter, other cable operators can't match its network scale, service breadth*, Sean Buckley, Fierce Telecom (Sept. 23, 2016), http://www.fiercetelecom.com/telecom/level-3-says-comcast-charter-and-other-cable-operators-can-t-match-its-network-scale.

[5] *See, e.g.*, Declaration of John Mayo on Behalf of Comcast Corporation ¶ 39 (June 28, 2016) (attached as Exhibit B to Comcast Comments) (noting that the percentage of buildings in Comcast's territory connected to fiber increased to 42 percent in 2014 compared to just 11 percent in 2004); Comments of Mediacom Communications Corp., WC Docket Nos. 16-143, 05-25, RM-10593 at 2 (June 28, 2016) (noting that Mediacom has invested over $4 billion and deployed nearly 600,000 strand miles of carrier grade fiber and provides backhaul to more than 1,000 wireless provider macro cell sites); Comments of Cox Communications, Inc., WC Docket Nos. 16-143, 05-25 at 7-8 (June 28, 2016) ("Cox Comments").

[6] Comments of the American Cable Association, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 8 (June 28, 2016). Such investment excludes any investment made by ACA members that are incumbent LECs.

[7] *See, e.g.*, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16,978, 16,984 ¶ 3 (2003) ("[W]e are very aware that excessive network unbundling elements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology."), *vacated in part by U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). The Commission's policy to support facilities-based investment long predates the 1996 Act. *See, e.g.*, *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 453-54 ¶ 23 (1981) (explaining that additional regulation may cause businesses to shift investment to other areas, "reduc[ing] both competition and innovation").

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telecommunications services provided to business customers and will foster increased facilities based-competition for these services."[8] This, of course, is precisely what has happened, and cable today is the "great entry success story" in the BDS marketplace partly as a result of the Commission's pro-investment policies.[9]

Charter is increasingly concerned, however, that regulating Ethernet pricing, as some have proposed, could deter further investment and thwart the very competition the Commission has long sought to promote.[10] The Verizon-INCOMPAS proposal, for example, would make it uneconomic in many areas for Charter to continue to deploy fiber, particularly for small and medium-sized businesses. Even though the Verizon-INCOMPAS proposal does not apply to new entrants such as Charter for three years, Charter and other new entrants would be effectively capped by the ILEC rates. That is because the ILEC is the market leader, and customers can easily take service from the ILEC if its pricing is cheaper.

To evaluate the impact of such rate reductions, Charter analyzed fiber Ethernet projects in the legacy Time Warner Cable area since January 2015.[11] Charter examined fiber projects to customers that purchased standalone Ethernet circuits and no other services and then evaluated the impact of the Verizon-INCOMPAS proposal in areas where AT&T is the competing ILEC.[12] If the Verizon-INCOMPAS proposal were implemented, AT&T reported that its Ethernet rate for 10 Mbps would be $287, the 50

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[8] *In re Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators, Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators,* Order, 27 FCC Rcd 11,532, 11,544 ¶ 27 (2012).

[9] FNPRM, 31 FCC Rcd at 4829-30 ¶ 236.

[10] The record includes similar concerns from other parties. *See e.g.,* Letter from Steven F. Morris, National Cable and Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25 at 2 (Sept. 14, 2016); 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 at 1 (Aug. 29, 2016) (stating on behalf of nearly 100 facilities-based cable and competitive fiber providers that broad regulation "would risk undermining deployment of fiber networks"); Letter from Eric Branfman on behalf of Lumos Networks Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593, GN Docket Nos. 13-5, 12-353, RM-11358 at 2 (Aug. 29, 2016) (noting that regulation of competitive fiber providers would reduce investment and "impede the very competition the Commission is seeking to encourage"); Letter from Eric J. Branfman, Counsel for Lightower Fiber Networks I, LLC and Lumos Networks Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 at 1 (Sept. 23, 2016) (explaining that "proposals in the record that could subject [Lightower's and Lumos'] prices to regulation through application of benchmarks based on the ILEC's costs and prices" would "harm [Lightower's and Lumos'] efforts to build new fiber networks, including build outs for mobile wireless networks, enterprise customers and community institutions such as schools and healthcare networks").

[11] Charter is in the process of integrating the legacy Time Warner Cable, Charter and Bright House Networks systems. This analysis uses the legacy Time Warner Cable data set because it is the most thorough and because the legacy Time Warner cable areas comprise the vast majority of Charter's BDS deployment.

[12] AT&T is the largest ILEC in the legacy Time Warner Cable areas. This analysis includes fiber Ethernet projects with an individualized financial review (retail and wholesale) since January 2015 and assumes that the monthly recurring charge is reduced to the AT&T rate but keeps all other costs and charges constant in order to isolate the impact of the proposed rate cuts.

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Mbps rate would be $370, and the 100 Mbps rate would be $410.[13] Using these rates Charter found that in areas where AT&T is the competing ILEC, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[14] Thus, under the Verizon-INCOMPAS proposal, those customers would not have had Charter as a fiber alternative to AT&T, resulting in diminished service offerings and competition, and the country would have lost significant private sector investment in infrastructure.

Given the Chairman's desire to reform BDS to promote 5G,[15] Charter also evaluated the impact of the Verizon-INCOMPAS proposal where AT&T is the competing ILEC on Charter's deployments of fiber to cell towers since January 2015.[16] For Ethernet services of 100 Mbps, assuming a **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Rather than promoting competitive options and fiber deployment to cell towers, then, the Verizon-INCOMPAS proposal would reduce competitive options for 5G backhaul in these areas.

Such consequences underscore the risk of harm of imposing a flawed Ethernet price-regulation regime, as well as the importance of proceeding cautiously. Even assuming there were any basis to price-regulate Ethernet—which Charter disputes—the current record is woefully inadequate to develop any kind of properly calibrated regulatory scheme.[17] The Ethernet market is enormously complex, with different sub markets for, among other things, wireless backhaul, small and medium businesses, and larger enterprises.[18] It is also rapidly evolving, dynamic, and bears no relation to legacy TDM DS1

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[13] *See* Letter from Christopher T. Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, Response to Verizon/INCOMPAS Proposal, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 at 9, Table 2 (Sept. 16, 2016) ("AT&T Ex Parte").

[14] These data represent **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

[15] *See generally Remarks of FCC Chairman Tom Wheeler CTIA Super Mobility Show 2016*, Sept. 7, 2016, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0907/DOC-341138A1.pdf.

[16] For purposes of this analysis, Charter followed the same methodology as described in *supra* note 12.

[17] As many commenters have noted, given the developing nature of the market and the substantial record reflecting growing competition, regulating based on 2013 data would be arbitrary and capricious.

[18] Ethernet service varies considerably in the type of service (e.g., Ethernet Private Line (EPL), Ethernet Virtual Private Line (EVPL), and Ethernet Local Area Networks) and, for each type of Ethernet services, in the specifications, which are individualized and often unique to each customer, including reliability, scalability, and quality of service. Moreover, the Verizon-INCOMPAS proposal fails to distinguish between Ethernet over fiber and Ethernet over coax, despite the significant record evidence that Ethernet over coax is not a comparable service due to the lack of service level and speed guarantees. *See, e.g.*, Cox Comments at i-ii ("Cox's Ethernet over HFC . . . is provided over the same shared facilities used to provide Cox's mass market voice, video and Internet services, sharply limiting offered speeds and precluding guarantees of performance. Properly understood, Cox's EoHFC does not fall within the

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circuits to which the Verizon-INCOMPAS proposal arbitrarily ties rates.[19] The Commission has not proposed a methodology to properly account for these differences, and the Verizon-INCOMPAS proposal wrongly assumes that Ethernet is a static,[20] monolithic service delivered identically by all providers.[21]

Falling prices, substantial investment, and new fiber deployment are all signs of a dynamic market. To adopt Ethernet price regulation on this record would at best fail to achieve the Commission's goals while adding unneeded costs and complexity. At worst, it could irreparably harm investment and reduce competitive options, particularly for small and medium-sized businesses. Accordingly, the Commission should refrain from regulating Ethernet services. At a minimum, the Commission should seek further comment before adopting any pricing regulations that directly or indirectly impact Ethernet pricing. The stakes are simply too high to proceed without at least ensuring that the Commission has the information it needs to avoid doing significant harm.

Please contact me if you have any questions regarding these matters.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder
Counsel for Charter Communications, Inc.

cc: Matthew DelNero
Paul de Sa
William Dever
Thomas Parisi
Eric Ralph

Commission's definition of BDS."); Comments of National Cable & Telecommunications Ass'n, WC Docket Nos. 16-143, 05-25 at 27-29 (June 28, 2016).

[19] *See, e.g.*, AT&T Ex Parte at 12-13; Letter from Russell P. Hanser, Counsel to CenturyLink, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-153, 15-247, 05-25, RM-10593 at 2-3 (Aug. 29, 2016) (highlighting arbitrary nature of the Verizon-INCOMPAS proposal). In addition to being arbitrary, the comparison is inappropriate because the legacy TDM networks are ubiquitous. While BDS providers collectively are steadily increasing the percentage of buildings connected with fiber, it is an incremental process. Absent harmful regulation, all signs suggest these significant growth trends will continue. Moreover, although the Commission has recognized that IP networks are more efficient and reliable, the Verizon-INCOMPAS proposal takes the backward approach of tying Ethernet prices to inefficient legacy network architectures and current DS1 pricing, which vary by ILEC study area and no longer are tied to actual costs. *See In re Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 18,025 ¶ 968 (2011) ("One of the goals of our reform is to promote investment in and deployment of IP networks."); *id.* at 17,930 ¶ 793 (noting that IP networks are more "efficient."); FCC Strategic Plan, 2015-2018 at 6 ("IP networks are more efficient, providing consumers with better products, lower prices, and massive benefits."), https://transition.fcc.gov/Reports/strategic-plan-2015-2018.pdf.

[20] *See generally* Letter from Kathleen Grillo, Senior Vice President, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05, 25, RM-10593 (Aug. 9, 2016).

[21] Unlike legacy DS1 pricing, nearly all of Charter's fiber Ethernet customers are individually negotiated and tailored to the customers. This is true even for Ethernet services of 10-120 Mbps; customers do not purchase a "rack" product.

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