



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

cshenk@sidley.com
(202) 736 8689

BEIJING	HONG KONG	SAN FRANCISCO
BOSTON	HOUSTON	SHANGHAI
BRUSSELS	LONDON	SINGAPORE
CENTURY CITY	LOS ANGELES	SYDNEY
CHICAGO	MUNICH	TOKYO
DALLAS	NEW YORK	WASHINGTON, D.C.
GENEVA	PALO ALTO	

FOUNDED 1866

October 6, 2016

By ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
455 12th Street, SW
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment; Special Access Rates for Price Cap Local Exchange Carriers; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593

Dear Ms. Dortch:

At the outset of this proceeding, the Commission promised a fact-based rulemaking. To that end, the Commission issued, first, a voluntary data collection, and then, when most CLECs stonewalled the request, a mandatory one. Any decision in this proceeding must be based on this extensive factual record and the application of sound economic principles to it. Unfortunately, certain so-called “compromises” that have been proposed in this docket pay no heed whatsoever to the record evidence. Instead, these “compromises” are nothing more than exercises in self-dealing.

AT&T has previously detailed how the Verizon/INCOMPAS proposal would not only enable Verizon to retain TDM rates that are much higher than those of other ILECs, but also to *increase* its Ethernet rates even as other providers’ lower rates were slashed to unsustainable levels.¹ We further pointed out neither Verizon nor INCOMPAS even pretended to ground their self-serving proposals in the record.² Now Frontier and Windstream evidently have decided that

¹ See, e.g., Letter from Christopher T. Sherk (AT&T Counsel) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10592 (Sep. 16, 2016).

² See *id.*

Marlene H. Dortch
October 6, 2016
Page 2

if Verizon can play this game, so can they. And so, along with Sprint, they have submitted their own “compromise” proposal under which they exempt themselves from the timelines and price cap reductions proposed by Verizon/INCOMPAS, while throwing other facilities-based BDS providers “under the bus.”³ Like the earlier “compromise” proponents, these new ones offer no evidentiary justification for the rate cuts they would impose on others or the blanket exemptions they propose for themselves. Instead, they proceed as if all they have to do is slap the label “compromise” on their proposal to give it credibility. Quite obviously, no reviewing court would find reasoned decision-making in any Commission endorsement of this kind of self-dealing. Thus these proposals must be rejected.

The Frontier, Sprint, Windstream (“FSW”) proposal begins by assuming that the Commission will adopt some version of Verizon’s and INCOMPAS’s arbitrary and entirely unsupported framework for TDM price reductions, which includes both a one-time reduction to price caps that would be implemented over two years and a large annual X-Factor.⁴ FSW propose two exceptions to that rule. First, if a price cap LEC is not the largest ILEC in the state but serves more than 25 percent of all ILEC broadband connections in a top 100 MSA in that state, then (1) the new rules would not apply at all in Year 1, (2) the annual X-Factor would apply beginning in Year 2, and (3) a “smaller” one-time adjustment would be implemented in one-third increments over a three-year period (Years 2, 3, and 4).⁵ Second, if the price cap LEC does not serve at least 25 percent of the ILEC broadband connections in a top 100 MSA in a state, then the increased annual X-Factor would not apply until Year 2 and there would *never* be a one-time adjustment.⁶

If this formula sounds gerrymandered, that is because it is. There is no explanation for the specific features of the tests, much less any attempt to ground them in record evidence. Instead, the proposal is rigged by design to protect both Frontier and Windstream from the impact of the Verizon/INCOMPAS framework, while making sure that larger providers have no such protection. The FSW proposal is especially hypocritical insofar as Windstream proposes a

³ Letter from Kathleen Q. Abernathy (Frontier), Charles W. McKee (Sprint), and Eric N. Einhorn (Windstream) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1 (Oct. 3, 2016) (“*FSW 10/3 Ex Parte*”).

⁴ *Id.* at 2. FSW do not collectively endorse the specific numerical X-Factor adjustments or annual X-Factor Verizon and INCOMPAS have proposed. *See, e.g., id.* at 3 (“[T]he parties have not agreed on what one-time reduction the Commission should apply in the default transition . . .”).

⁵ *Id.* at 2-3.

⁶ *Id.* at 3-4.

Marlene H. Dortch
October 6, 2016
Page 3

carve-out for its own ILEC. Windstream has been one of the most ardent supporters of dramatic reductions to price caps.⁷ Moreover, Windstream has aggressively downplayed the serious concerns by other parties that such proposals would dramatically reduce the ability and incentive for BDS providers to continue making the enormous investments needed to support skyrocketing demand and next generation services, such as mobile 5G.⁸ But now Windstream asks that it be protected against the application of these new rules to its ILEC affiliate on the grounds that such rules would undermine its ability and incentives to invest in BDS.⁹ The irony of that request should be lost on no one.

According to FSW, these convoluted demarcations are necessary because they have “agreed” that the Verizon/INCOMPAS proposal would cause “abrupt regulatory changes” that would have a “uniquely large impact” on “the business operations of smaller ILECs.”¹⁰ But their fundamental premise – that larger ILECs have a greater ability to withstand BDS price reductions because they are less dependent on BDS revenue and they benefit from economies of scale that allow them to spread costs over a larger subscriber base – is both wrong and completely beside the point. The proposed reductions are per-unit reductions. Thus, the more subscribers, the greater the reductions. Economies of scale have nothing to do with it. In fact, the larger the BDS provider, the bigger the hit it would experience.

That leaves FSW with nothing but the argument that, because of their size, they are uniquely unable to sustain the price reductions they propose be imposed on others. But they

⁷ Reply Comments of Windstream Services, LLC on The Further Notice of Proposed Rulemaking, *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, RM-10592, at 10-13 (Aug. 9, 2016).

⁸ See, e.g., Letter from Malena F. Barzilai (Windstream) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, RM-10592 (Sep. 22, 2016) (criticizing CenturyLink for raising the very same concerns about reducing DS1 and DS3 rates that Windstream now relies upon to seek extensions and exemptions from BDS rate reductions).

⁹ *FSW 10/3 Ex Parte* at 2.

¹⁰ *Id.* at 2. Although FSW pitch their proposal as mainly adjusting the “transition” to lower price caps, it is actually much more. ILECs that qualify for either of the two carve-outs (including Windstream and Frontier) would entirely avoid the application of a higher X-Factor in the first year. In addition, ILECs that qualify for the first carve-out would also be allowed to postpone the one-time price cap adjustment until the second year and then phase it in more slowly over three years. And ILECs that qualify for the second carve-out would never implement the one-time adjustment. Together, these changes would put the favored ILECs’ price caps on a much higher trajectory over time than other price cap LECs. Given that reductions in price caps compound year-over-year (like compounding interest), FSW’s proposal would actually permit such LECs to *avoid*, rather than merely delay, much of the impact of the Verizon/INCOMPAS reductions compared to price cap LECs that do not qualify for the exemptions.

Marlene H. Dortch
October 6, 2016
Page 4

present no evidence to support that assertion. Nor could they. The problem with the Verizon/INCOMPAS framework is not limited to Frontier and Windstream; it is an industry-wide problem.¹¹ As other ILECs have explained, “[t]he economic incentives to pursue new infrastructure deployment are already challenging given the competitive nature of the [marketplace]” and “[s]lashing rates in the manner envisioned by the [Verizon/INCOMPAS] Proposal would make that business case all the more difficult.”¹² It is not a company’s size that determines how it invests its limited capital; it is the ability to make a return on investment. Artificially suppressing BDS rates based on some pre-conceived agenda or fake compromise will reduce investment by all providers, large and small. And it is not just those directly subject to the rate reductions that will be affected; it is any provider who competes against them, including CLECs, and cable companies. That is why cable companies have explained that the proposed rate regulations “would make it uneconomic in many areas . . . to continue to deploy fiber, particularly for small and medium-sized businesses”¹³ and facilities-based CLECs express concern that the “proposed regulations . . . would impede [their] ability to invest in [their] fiber network[s] and continue bringing competitive fiber deployment.”¹⁴ And it explains why the

¹¹ See, e.g., Joint Letter from Drs. Joseph V. Farrell, Michael L. Katz, Daniel L. Rubinfeld, John W. Mayo, Mark A. Israel, Glenn A. Woroch, and Bryan G.M. Keating to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, RM-10592 (Sep. 14, 2016).

¹² Letter from Melissa E. Newman (CenturyLink) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 7 (Sep. 30, 2016).

¹³ Letter from Samuel L. Feder (Charter) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 3 (Oct. 3, 2016); see also, e.g., Letter from Thomas Cohen (American Cable Association) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 05-25, RM-10593, at 1 (Sept. 22, 2016) (explaining that the Verizon/INCOMPAS proposal “fail[s] to recognize that a Commission order indicating that the Commission will revisit whether to rate regulate non-incumbents will have an immediate impact on investment, since the payback period on investments is often longer, especially in rural areas, and the overhang from potential regulation will be taken into account immediately by bankers who will pass the increased risk onto non-incumbent providers, thus slowing investment and further competition.” (footnote omitted)).

¹⁴ Letter from Eric J. Branfman and Joshua M. Bobeck (Lumos Counsel) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T*

Marlene H. Dortch
October 6, 2016
Page 5

Communications Workers of America has emphasized that the proposed “[d]rastic rate cuts in [BDS] would lead to reduced investment in broadband networks . . . and downward pressure on jobs and living standards.”¹⁵

Moreover, the timelines in the proposal are completely divorced from reality. As CenturyLink has previously explained, implementation of the Verizon/INCOMPAS framework or any similar framework based on geographic areas smaller than MSAs would require numerous changes to legacy ordering, billing, and sales systems.¹⁶ This is not a challenge that is limited to CenturyLink. AT&T has previously noted these challenges, and today it is filing a declaration that documents the steps that would have to be taken to implement a new BDS framework.¹⁷

Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1 (Sept. 26, 2016); *see also, e.g.*, Letter from Eric J. Branfman and Joshua M. Bobeck (Lightower Counsel) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1 (Sept. 23, 2016) (explaining that rate regulation of even only ILEC prices “would harm [competitive fiber providers] and their efforts to build new fiber networks, including build outs for mobile wireless networks, enterprise customers and community institutions such as schools and healthcare networks”); Letter from Joshua M. Bobeck and Jeffrey R. Strenkowski (Uniti Fiber Counsel) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1 (Sept. 22, 2016) (“[T]he proposals in the record that could subject Uniti Fiber and other competitive fiber providers’ (‘CFP’) prices to regulation through the application of benchmarks based on ILEC prices . . . would harm Uniti Fiber and other CFPs and their efforts to deploy new fiber networks for mobile wireless backhaul.”).

¹⁵ Letter from Christopher M. Shelton (Communications Workers of America) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 1 (Sept. 14, 2016).

¹⁶ Letter from Russell P. Hanser (CenturyLink) to Marlene H. Dortch, *Business Data Services in an Internet Protocol Environment*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Slide Deck, at 4 (Sep. 28, 2016); Joint Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp., *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 51-52 (Jun. 28, 2016).

¹⁷ *See* Declaration of Martin Kelly (AT&T), attached to Letter from Christopher T. Shenk (AT&T Counsel) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment; Investigation of Certain*

Marlene H. Dortch
October 6, 2016
Page 6

Although precise estimates are impossible until the Commission has adopted final rules, price cap carriers would likely need at least eighteen months to implement such changes.¹⁸ The FSW proposal takes no account of these requirements, but simply assumes that larger ILECs would be able to implement the Verizon/INCOMPAS framework right out of the gate. Because that assumption is wrong, the proposal's timetables are untenable.

There is no merit to the claims that the Commission has adopted such patently arbitrary favoritism in the past. Contrary to FSW's assertions, the *CALLS Order* and the *VRS Order* relied on extensive record evidence demonstrating that different types of providers incurred different costs for the services at issue, and thus justified the application of differing rates based on those cost differences.¹⁹ There is no evidence in the record here that could support any such disparate treatment. Likewise, the *USF/ICC Transformation Order* adopted different time periods for providers subject to different *regulatory regimes* (i.e., price cap versus rate of return) to transition to lower rates on the grounds that rate-of-return carrier rates were currently higher and would take longer to complete the transition.²⁰ Again, there is no analogue here. Windstream and Frontier, for example, are subject to the same regulatory regime as all other price cap LECs. In fact, under their proposal, they would be given *more* time to implement *smaller* price reductions, which is a departure from the *USF/ICC Transformation Order*.

In short, the proposals to adopt an annual X-Factor in excess of 2.0 percent and to impose a substantial, additional one-time reduction to price caps for legacy DS1 and DS3 services would have severe impacts on all LECs and create powerful disincentives for broadband investment and the IP transition. The solution is not to create carve-outs from those effects for smaller ILECs that call their carve-outs "compromises." The solution is for the Commission to double down on its commitment to fact-based decision-making.

Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (Oct. 6, 2016).

¹⁸ *Id.* at ¶¶ 15-16.

¹⁹ Sixth Report and Order, *Access Charge Reform*, 15 FCC Rcd. 12962, ¶ 176 and n.387 (2000) ("*CALLS Order*") (citing to record evidence of cost studies supporting the different rates targets); Report and Order and Declaratory Ruling, *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 22 FCC Rcd. 20140, ¶ 54 (2007) ("*VRS Order*") (adopting rates "based on the providers' projected costs and minutes of use, and other data submitted to the Fund administrator by the providers").

²⁰ Report And Order And Further Notice Of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, ¶ 801 (2011) ("*USF/ICC Transformation Order*") (finding that Price Cap LECs and CLECs that benchmark to Price Cap LEC rates could transition faster than carriers subject to rate of return regulation).



Marlene H. Dortch
October 6, 2016
Page 7

Sincerely,

/s/ Christopher T. Shenk

Christopher T. Shenk
Counsel to AT&T Inc.