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October 5, 2016

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25; RM-10593
Written Ex Parte Letter

Dear Ms. Dortch:

On behalf of Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, LLC ("Lightower"); Lumos Networks Corp. ("Lumos") and Unite Private Networks ("UPN") (collectively, the "Competitive Fiber Providers"), attached are Declarations of (1) Eric Sandman, Chief Financial Officer of Lightower; (2) Timothy Biltz, President & Chief Executive Officer of Lumos and (3) Jason Adkins, President of UPN. We submit these declarations to supplement prior submissions in this docket of each of the Competitive Fiber Providers ("CFPs"), urging that the Commission not apply the proposed benchmark regulation to CFPs. As discussed below, applying such regulation to CFPs (1) is not necessary to ensure that their prices are just and reasonable and (2) would in fact be counterproductive, undermining the Commission's primary goal of encouraging competition, because it would force CFPs to cut back on new network investment due to compliance cost, uncertainty, and increased cost of capital, and would thus reduce competitive alternatives and increase the prices paid by customers for business data services ("BDS"). Competitive Fiber Providers urge the Commission not to apply benchmarks to CFPs.

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I. Competitive Fiber Providers Have Increased Competition for Ethernet BDS in Locations Where They Operate

Lightower has had substantial success in bringing the benefits of competition to the markets for Ethernet BDS by deploying fiber networks within the areas it serves, which broadly consist of the eastern United States as far west as Chicago, and from Maine to North Carolina. Lightower owns approximately 30,000 route miles of fiber. Lightower spends essentially all its free cash flow (cash remaining after all cash expenses including capital expenditures and debt service) on building new fiber networks. In 2016, Lightower will spend more than $300,000,000 on building more than 2,000 miles of new networks and will bring service to more than 2,000 locations that it did not previously serve.[1]

Lumos similarly has had substantial success in bringing the benefits of competition to the markets for Ethernet BDS by deploying fiber networks within the areas it serves in Virginia, West Virginia, Pennsylvania, Maryland, Ohio and Kentucky, where Lumos has a total of 8,985 fiber route miles/436,000 fiber strand miles. Lumos has 3,215 total "on-net" locations and over 100,000 locations that are considered "near net" or located within one-half mile of its fiber network.[2]

UPN has also succeeded in bringing the benefits of competition to the markets for competitive Ethernet BDS by deploying fiber networks within the areas it serves. UPN provides high-bandwidth, fiber-based communications networks and related services to schools, governments, carriers, data centers, hospitals, and enterprise business customers in over 300 communities across 20 states. UPN currently serves over 6,200 metro fiber route miles and 3,750 on-net buildings. UPN's customer relationships typically include long-term agreements (10-20 years) for fiber-optic connectivity between multiple facility locations.[3]

II. It is Unnecessary to Apply Benchmarks to Competitive Fiber Providers

The Business Data Services FNPRM recognizes and articulates that at least since 2002, when AT&T filed its petition that led to these proceedings, the rationale for regulating special access rates has been that, due to the exercise of the ILEC's market power, the rates have been unjust and unreasonable in violation of Section 201(b).[4] In contrast, the record

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[1] Sandman Dec. ¶¶ 3-4.
[2] Biltz Dec. ¶ 3.
[3] Adkins Dec. ¶¶ 1-2.
[4] *See Business Data Services FNPRM,* 31 FCC Rcd. 4723 at 4733, 4836-39, 4861, ¶¶ 20, 257-58, 261-67, 353 ("BDS FNPRM"); *See Access Charge Reform Order*, 12 FCC Rcd.

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shows that Competitive Fiber Providers have no market power; rather, they are forced to match or beat the ILEC's price, unless they offer a compensating enhancement in quality.[5]

We are not aware of any evidence in the record that Lightower, Lumos, UPN, or any other CFP has had the power to demand an unjust or unreasonable price for BDS or possesses market power in any relevant market. Because they lack market power, their pricing could not run afoul of Section 201(b).[6]

As reflected by the attached declarations, the record shows that wherever the Competitive Fiber Providers operate, they face competition from the ILEC, and generally also face competition from the cable MSO and other CFPs.[7] As shown in the Sandman Declaration, "Lightower typically must set its prices at or below the price of the ILEC unless Lightower is offering enhanced quality of service when compared to the ILEC offering."[8] Therefore, if the Commission imposes benchmarks on the ILEC, ensuring that the ILEC's price is just and reasonable, CFPs will have no choice but to sell at a comparable price, which of necessity must be just and reasonable, since as shown below, any cost differences favor the ILEC.

Several of the price cap LECs have nevertheless argued that benchmarks be imposed upon CFPs. None of them has offered a persuasive rationale. CenturyLink *et al.* have argued that if the ILEC is subject to regulation, any other provider should be subject to the same regulation because "disparate treatment" must be "based on reasonable distinctions."[9] One obvious distinction is that CFPs lack market power, which is a critically important

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15982 at 16099, ¶ 273 (FCC's "price cap rules are designed to ensure that access charges remain within the "zone of reasonableness" defining rates that are "just and reasonable"); *see also Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 2883 ¶ 17 (1989) (FCC price cap rules adopted under framework that "rates be just and reasonable and not unreasonably discriminatory").

[5] Sandman Dec. ¶ 12.

[6] *See* Reply Comments of Crown Castle at 7 (citing Commission authority establishing that "a provider without market power lacks the ability to impose a rate that could conceivably run afoul of Section 201(b).") (filed Aug. 9, 2016).

[7] *See e.g.*, Sandman Dec. ¶ 12 ("Lightower typically must set its prices at or below the price of the ILEC unless Lightower is offering enhanced quality of service when compared to the ILEC offering"); Adkins Dec. ¶ 7 ("UPN competes with the ILEC and the cable company in every market it is in and where it plans to expand.").

[8] Sandman Dec. ¶ 12.

[9] CenturyLink *et al.* Comments, at 67 (filed June 27, 2016).

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distinction, given that the purpose of the regulation is to curb abuse of market power.[10] Moreover, ILECs have cost advantages[11] and the advantage of existing market share.[12] The FNPRM articulates the Commission's purpose of encouraging entry. Competitive Fiber Providers and others have shown that regulation of new entrants will discourage entry,[13] and this letter and the attached declarations make a further showing on this point.

Verizon takes a very slightly less unreasonable approach towards the regulation of CFPs. It suggests that (a) for approximately the next three years, benchmarks should apply only to new entrants that offered Ethernet before 2006 and (b) after approximately three years, the Commission should "reassess[] market competition" and *regardless of the results of the reassessment*, benchmarks should apply to all carriers in a non-competitive market, but (c) any provider should have the right to "petition for relief and show why benchmarks are unnecessary to ensure just and reasonable rates in a particular market."[14]

Verizon's proposal is largely deficient for the same reasons as that of CenturyLink *et al.* It would subject carriers that lack market power to burdensome and completely unnecessary regulation. Verizon's proposal for temporary exemption of carriers that did not offer Ethernet until 2006 or later is neither helpful nor rational as there is no valid rationale for distinguishing between CFPs that began to offer Ethernet in 2005 or earlier from those that began to offer Ethernet after 2005. Verizon has suggested that the year when a carrier first offered Ethernet BDS provides a reasonable basis for distinction because certain price cap LECs received forbearance from Ethernet regulation in 2006.[15] Verizon fails to consider that, unlike price cap LECs, CFPs were not subject to pricing regulation of Ethernet before 2006. Moreover, the fact that a CFP made a decision to invest in Ethernet in one location in 2005, when it was not subject to any pricing regulation, has no bearing on its decision whether to make an investment in Ethernet in another location in 2015, or in 2017. As discussed below, applying benchmarks in 2017 is still likely to deter the CFP from investing in Ethernet, much to the detriment of competition.

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[10] See BDS FNPRM, 31 FCC Rcd. at 4804-05, 4712, 4830, 4836 ¶¶ 187, 188, 203, 237, 256.
[11] See p. 8, *infra.*
[12] *E.g.*, Birch *et al.* Initial Comments at 59-60; American Cable Ass'n Initial Comments at 23.
[13] *E.g.*, Lightower Initial Comments at 20-22; American Cable Ass'n Initial Comments at 39-41; Comcast Initial Comments at 41-44; Cox Initial Comments at 21-22.
[14] *Ex parte* letter from Curtis L. Groves, Verizon, to Marlene Dortch, at 6-7 (filed Sept. 27, 2016).
[15] Verizon Reply Comments at 13.

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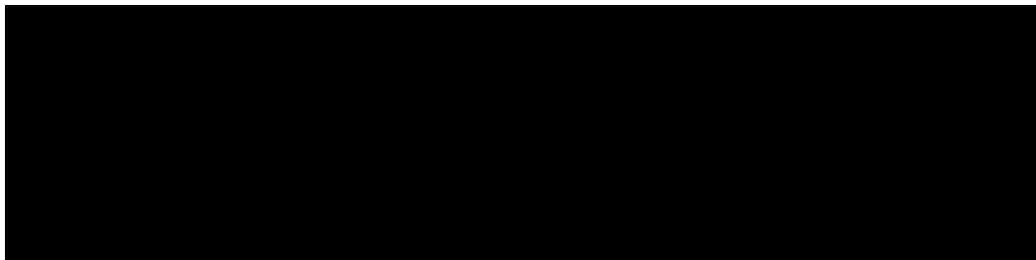
Finally, Verizon's proposal is defective because it ignores the results of the proposed reassessment of competition by including a presumption that in approximately three years, all CFPs should be subject to benchmarks in non-competitive areas, and places the burden of justifying a waiver on a CFP that believes it should not be subject to benchmarks. This means that a CFP considering whether to invest in Ethernet in 2017, 2018 or 2019 will have to assume that benchmarks will soon apply, thus deterring investment. The expense and delay inherent in a proceeding to rebut Verizon's presumption of market power in any given location would act as a serious deterrent to investment in that location. There is no reason to presume that a CFP will have market power just because three years have passed. All three Competitive Fiber Providers have been offering Ethernet for much longer than that and do not have market power today, so the passage of another three years is not likely to vest them with market power. Competitive Fiber Providers agree with Comcast that the applicable legal standard precludes the Commission from reversing its long-standing position that non-dominant carriers are not subject to rate regulation simply because three years have elapsed, without a finding that any such carrier "has obtained sufficient market power to warrant the imposition of rate regulation."[16]

III. Applying benchmarks to CFPs would be counterproductive, reducing competition

Not only is applying benchmarks to CFPs unnecessary, it would reduce competition and thus be counterproductive. First, there would be considerable uncertainty, given the differences between ILEC network architecture and that of CFPs, how the benchmarks will be applied. The benchmarks would be based on the ILEC's tariffed pricing of DS1s, which are point-to-point circuits. CFPs do not sell circuits, they sell bundled solutions to customer problems, and these solutions cannot be mapped to discrete service elements.[17] Each of the attached declarations provides examples showing why this is the case. Mr. Sandman's Declaration provides the following example: **BEGIN HIGHLY CONFIDENTIAL**



[16] *Ex parte* letter from Kathryn A. Zachem, Comcast, to Marlene H. Dortch, at 4 (filed Oct. 3, 2016).
[17] Sandman Dec. ¶¶ 7, 9-12; Biltz Dec. ¶¶ 8; Adkins Dec. ¶¶ 4-6.

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. . .[18] **END HIGHLY CONFIDENTIAL**

The Biltz and Adkins Declarations provide similar examples.[19]

In addition, at the customer's request, CFPs frequently offer a higher level of quality than is provided by the ILEC's tariffed service. The Commission is considering allowing for enhanced quality of service.[20] It is absolutely imperative for it to do so, as "enhanced quality of service costs a provider money."[21] But allowing for enhanced quality does not fully solve the problem. As noted in the Biltz Declaration: "Even if allowance is made for enhanced quality of service, there is no unambiguously correct method of calculating the appropriate adjustment for it. Therefore, even if we were to charge what we believe in good faith is an appropriate increased amount to account for increased quality of service, we would be running the risk of having our price challenged as in violation of the FCC's rules."[22] This could embroil a CFP in burdensome and costly litigation. Moreover, as discussed below, uncertainty has negative consequences totally apart from the burden of possible litigation.

Moreover, CFPs routinely offer bundled solutions to customers that include locations in the territories of multiple price cap ILECs. The ILECs may offer service not only at different rates from one another, but also on the basis of different rate structures. These packages are sold at a single bundled price As Mr. Sandman observed, "We will have great

[18] Sandman Dec. ¶ 9; *see* also ¶¶ 9-10 (providing additional Lightower examples).
[19] Biltz Dec. ¶¶ 9-11; Adkins Dec., ¶ 13;
[20] BDS FNPRM, 31 FCC Rcd. at 4884, ¶ 432.
[21] Biltz Dec. ¶ 18; *see* Sandman Dec. ¶ 15; Adkins Dec. ¶ 11.
[22] *Id.*

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difficulty attempting to fashion contracts for such customers that we can be confident comply with the benchmarks in the territories of multiple price cap LECs."[23]

Furthermore, CFPs offer burstable bandwidth and are beginning to offer Software Defined Networking ("SDN"), in which the customer may be receiving bandwidth of 50 Mbps one day and 1 Gbps the next day. There is uncertainty as to what the benchmark would be for such service.[24] Tariffed TDM BDS does not offer this type of variable bandwidth. As Mr. Adkins of UPN stated, **BEGIN HIGHLY CONFIDENTIAL** [25]

END HIGHLY CONFIDENTIAL Obviously, the Commission should not want to deter a CFP from offering a more advanced solution desired by customers.

Second, because different carriers have different costs, applying a benchmark to a CFP that is calculated on the basis of the costs of the ILEC is not consistent with the rationale of the benchmarks, which is to prohibit a rate that is unjust and unreasonable. As discussed above, the rationale for regulating BDS rates has been that they are unjust and unreasonable in violation of Section 201(b). Price caps have been based on the costs of the price cap carrier, and the proposal entails benchmarks based on the price caps, so if the rates of CFPs were benchmarked to the same rate caps, they would likewise be based on the costs of the price cap carrier.[26] This would conflict with the principle that a rate is too high and therefore unjust and unreasonable, in violation of Section 201(b), on the basis of a comparison of the rate for the service with *the specific provider's cost of providing the service*. The "Commission typically focuses on the costs of providing the underlying service when ensuring that rates for service are just and reasonable under section 201(b)."[27]

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[23] *See* Biltz Dec. ¶ 24; Adkins Dec. ¶ 18.
[24] Adkins Dec. ¶ 19; Sandman Dec. ¶¶ 20-21.
[25] Adkins Dec. at ¶ 17.
[26]The FCC has recognized that the price cap regime did not wholly separate the link between "accounting costs and prices" that exists under rate of return regulation. That is the case because the rates to which the price cap formulae were originally applied resulted from rate of return regulation, and therefore overall price cap revenue levels continued generally to reflect the accounting and cost allocation rules used in rate of return regulation. *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005).
[27]*Rates for Interstate Inmate Calling Services*, 28 FCC Rcd. 14107, 14133 ¶ 50 (2013) *pets. for stay granted sub nom Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan 13, 2014). *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture,* Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd. 5235-36, ¶¶ 2-3, (1992);

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The attached declarations demonstrate that CFPs experience higher costs than ILECs for a variety of reasons, including:

- CFPs frequently must pay right-of-way, franchise and building access fees that are not incurred by ILECs.[28]
- Cost of capital incurred by CFPs is higher than that incurred by ILECs.[29]
- Because CFPs purchase equipment and materials in smaller quantities than do ILECs, CFPs incur higher unit costs for purchase of equipment and materials.[30]
- Because an ILEC typically sells more service in any given area than a CFP, the ILEC experiences economies of scale in the labor needed to bury underground cable and string aerial cable.[31]

If the Commission is going to subject a CFP to the same benchmarks as the ILEC operating in the same geographic market, it must provide for adjustments based on cost differences; otherwise, the CFP would be subject to being sanctioned for rates that are *not* unjust and unreasonable, when measured against the CFP's (rather than the ILEC's) costs. It is not clear, however, how much of an adjustment should be made for cost differences such as the ones identified above. The attached declarations show, for example that while CFPs are aware of their own cost of capital and are aware that it is higher than the ILEC's, they do not know the ILEC's cost of capital and therefore do not know how much of an adjustment is warranted.[32]

Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, and Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd. 4524, 4531 ¶ 38 (1991) (adopting "flexible cost-based approach" for evaluating whether rates for new services offered by price cap ILECs companies were just and reasonable).

[28] Biltz Dec. ¶¶ 19.e, f; Adkins Dec. ¶¶ 12.c, d, 13; Sandman Dec. ¶ 16.b, c. *See also* BDS FNPRM, 31 FCC Rcd. at 4824, ¶ 226; Baker Decl. at ¶ 40; Comments of Garland Connect, LLC, WC Docket No. 05-25, at Attachment A, ¶ 4(a) (filed Feb. 5, 2015) (Declaration of AT&T attorney asserts that AT&T expert witness will testify as to "the industry custom of not charging [ILECs] . . . for the cost of space and power associated with their facilities used to provide service within a building").

[29] Sandman Dec. ¶ 16.a; Biltz Dec. ¶ 19.a; Adkins Dec. ¶¶ 8, 12.a, 14.

[30] Adkins Dec. ¶ 12.b.; Biltz Dec. ¶ 19.b.

[31] Adkins Dec. ¶ 12.e.; Sandman Dec. ¶ 16.c; Biltz Dec. ¶ 19c.

[32] Sandman Dec. ¶ 17; Biltz Dec. ¶ 21; Adkins Dec. ¶ 14.

Applying the same benchmark to both ILEC and CFP is also problematic because of differences in rate structure. For example, ILECs typically recover costs of construction through a nonrecurring charge, while CFPs have innovated by recovering the same costs through MRCs, thus in effect advancing or lending the costs of construction to the customer.[33] Therefore, the CFP's MRC is higher than the ILEC's, and the CFP would bear the burden of demonstrating that because the CFP's NRC is lower, the CFP's higher MRC is justified. Moreover, CFPs quite reasonably include in the MRC the cost of the capital invested, but it is not self-evident whether the rate of interest factored in by the CFP would be considered reasonable by the Commission or a court if a challenge were brought.[34]

Given the uncertainties discussed above with respect to cost differentials and differences in rate structure, CFPs would be subject to substantial uncertainty not experienced by the ILEC as to how much, if any, of a price increase in excess of the benchmark would be judged unreasonable. This uncertainty also would have a negative impact on the willingness of lenders and investors to invest capital in a CFP.[35] For example, at stated in the Biltz Declaration, "Those with capital to invest or lend are concerned about risk. Lumos is a publicly traded company and we have received a large number of calls from shareowners – and potential shareowners – asking what impact the FCC's decision in this docket will have on Lumos."[36] Given that the business of CFPs is highly capital intensive, this reduction in willingness of lenders and investors to provide capital to CFPs would increase the CFP's cost of capital and reduce the competitive pressure the CFP can bring to bear on the ILEC.[37]

The increased risk resulting from the implementation of the benchmark proposal would cause the CFP not to undertake many projects that would be built absent the application of benchmarks on the CFP.[38] For example, even though the benchmarks have not yet been adopted, the risk inherent in the proposal has caused Lumos to **BEGIN HIGHLY CONFIDENTIAL**

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[33] Sandman Dec. ¶ 18-19; Biltz Dec. ¶ 22; Adkins Dec. ¶ 15
[34] Biltz Dec. ¶ 23; Adkins Dec. ¶ 16; *see* Sandman Dec. ¶ 18.
[35] Sandman Dec. ¶ 14; Biltz Dec. ¶ 14-15; Adkins Dec. ¶ 7
[36] Biltz Dec. ¶ 8.
[37] Adkins Dec. ¶¶ 7-8; Sandman Dec. ¶ 4; Biltz Dec. ¶¶ 14-15. In addition to increased cost of capital, CFPs would experience "another layer of costs" to "retain personnel to handle . . . complaints and review potential deals for . . . risk." Sandman Dec. ¶ 13; *see* Adkins Dec. ¶ 6 (having to defend prices "before the FCC or a court would result in expense and distraction from our core mission of building fiber-based networks and providing BDS and other fiber-based services.")
[38] Sandman Dec. ¶¶ 7-9, 11-13, 23; Biltz Dec. ¶ 15; Adkins Dec. ¶¶ 7-8.

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[REDACTED][39] **END HIGHLY CONFIDENTIAL** As Mr. Sandman observed, "Trying to align the apples of service element oriented pricing benchmarks to the oranges of Lightower's business creates so much risk and uncertainty that it threatens to seriously disrupt Lightower's business model and would therefore result in *less* competition, *fewer* options for customers, and *more* market power for the dominant carrier."[40]

The bottom line is that applying benchmarks to CFPs would reduce competition for Ethernet BDS. As Mr. Biltz concluded, "the uncertainty from the imposition of benchmarks. . .would reduce the number of competitive buildouts that Lumos would undertake, thereby reducing competition and customer options in the locations that we would otherwise serve. These results are clearly contrary to the public interest and to the Commission's long stated desire of facilitating the development of broadband and fiber-based services."[41] As the Commission noted in its Order, "competition is best."[42] If the Commission's goal is to achieve the "best" result in this proceeding, it should not apply benchmarks to CFPs, thereby preserving their ability to provide BDS customers with the benefits of competition.

Please contact the undersigned with any questions regarding this filing.

Respectfully Submitted,

/s/ Eric J. Branfman

Eric J. Branfman
Joshua M. Bobeck

Counsel for Lightower Fiber Networks I, LLC et al., Lumos Networks Corp. and Unite Private Networks

Attachment

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[39] Biltz Dec. ¶ 15.
[40] Sandman Dec. ¶ 11.
[41] Biltz Dec. ¶ 25; *see id* ¶ 15; Sandman Dec. ¶¶ 11,23 (benchmark proposal "creates so much risk and uncertainty that it threatens to seriously disrupt Lightower's business model and would therefore result in *less* competition, *fewer* options for customers, and *more* market power for the dominant carrier"); Adkins Dec. ¶ 19.
[42] BDS FNPRM, 31 FCC Rcd. at 4725, ¶ 5.

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cc: (via Hand Delivery)

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