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October 14, 2016

Ex Parte

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

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

As the Commission finalizes its new framework for business data services, the draft Order now circulating does not mandate wholesale rate discounts for Ethernet service. And although Windstream and others continue to argue that the Commission should require a price differential between wholesale and retail business data services,¹ there is no factual or legal basis for the Commission to do so.² A wholesale discount solely for other carriers is unnecessary to ensure reasonable prices for end users of business data services.

There is no legal basis for a rule mandating that carriers provide the same business data services at different rates to different customers, and none of the provisions in Title II of the Communications Act permit, much less require, this result. First, the Commission has long interpreted Sections 201 and 202 as “prohibiting customer or use restrictions—*i.e.* restrictions that categorically deny certain customers the same rates, terms, and conditions available to others the same rates—as unreasonably discriminatory.”³ Second, although Section 251(b) requires all LECs to provide telecommunications services on a resale basis without unreasonable or discriminatory conditions, it does not mandate a discount for wholesale customers. Third, the “avoided cost” standard of Section 251(c)(4) does not apply to exchange access services, which include business data services.⁴ And even if that section could be stretched to apply in this context contrary to the Commission’s rules, it would only permit state commissions, not this Commission, to set specific

¹ See, e.g., Letter from John T. Nakahata et al., Harris, Wiltshire & Grannis LLP, Counsel to Windstream Services, LLC, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 05-25 & RM-10593 (Oct. 6, 2016); Letter from Thomas Jones, Willkie Farr & Gallagher LLP, Counsel for Level 3 Communications, LLC, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593, at 4 (Sept. 29, 2016).

² See Reply Comments of Verizon at 34-39, WC Docket No. 05-25 & RM-10593 (FCC filed Feb. 19, 2016) (“Verizon Feb. 19, 2016 Reply”); Comments of Verizon at 9-10, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (FCC filed June 28, 2016) (“Verizon June 28, 2016 Comments”); Reply Comments of Verizon at 17-18, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (FCC filed Aug. 9, 2016) (“Verizon Aug. 9, 2016 Reply”).

³ See Reply Comments of AT&T at 56-57, WC Docket Nos. 16-143, 15-247, RM-10593 (FCC filed Aug. 9, 2016).

⁴ 47 C.F.R. § 51.605(b). See Reply Comments of Hawaiian Telecom at 15-16, WC Docket Nos. 16-143, 15-247, RM-10593 (FCC filed Feb. 19, 2016).

wholesale discounts based on a general standard that the Commission sets forth. This would lead to an unworkable patchwork of wholesale discounts in each state, which would be fundamentally at odds with the interstate nature of business data services.⁵

Furthermore, the record in this proceeding does not support Windstream's allegation of a price squeeze for Ethernet services and its requests for a guaranteed spread between wholesale and retail rates. The comments did not address the key elements the Commission has said must be present to show an unlawful price squeeze.⁶ For example, the Commission has noted that proving a price squeeze is complex and, among other things, requires an evidentiary showing that overcomes the accused carrier's legitimate business justifications.⁷ The Commission also recognized that "key elements of a price squeeze inquiry" are "input costs, revenues, and internal costs."⁸ In this proceeding, no commenter has provided evidence sufficient to meet these elements for business data services.

Claims of an anticompetitive price-squeeze in business data services also are at odds with economic logic and the facts of the marketplace. As the Commission has recognized, exclusionary pricing behavior is possible only if a monopolist is likely to succeed in driving actual or potential rivals from the market, which is doubtful once facilities-based competitors have entered the marketplace. Even if one competitor exits the market, "[a]nother firm can buy the facilities at a price that reflects expected future earnings and, as long as it can charge a price that covers average variable cost, will be able to compete with the incumbent LEC."⁹ Thus, "[i]n telecommunications, where variable costs are a small fraction of total costs, the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed."¹⁰ Here, it is not credible to suggest that ILECs would be able to drive cable operators and other facilities-based providers of Ethernet services from the marketplace. Facilities-based competitive entry for these services has been increasing, not decreasing, when Windstream alleges it has faced a squeeze.

And even if it were the case that wholesale rates do exceed retail rates for like services, as a matter of economics and antitrust law, that does not necessarily demonstrate an anticompetitive price squeeze but instead just prompts further inquiry into the justifications for such pricing.¹¹ So if the Commission were to find evidence of little or no gap between retail and wholesale rates, it

⁵ See Reply Comments of AT&T at 56-57, WC Docket Nos. 16-143, 15-247, RM-10593 (FCC filed Aug. 9, 2016).

⁶ Verizon Feb. 19, 2016 Reply at 34-39.

⁷ *Joint Application by SBC Communications Inc., et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Order on Remand, 18 FCC Rcd 24474, ¶ 7 (2003).

⁸ *Application by SBC Communications Inc., et al., for Authorization To Provide In-Region, InterLATA Services in California*, Memorandum Opinion and Order, 17 FCC Rcd 25650, ¶ 154 (2002) ("*SBC InterLATA Services Order*").

⁹ *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 80 (1999) ("*Pricing Flexibility Order*").

¹⁰ *Id.*

¹¹ See, e.g., *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23 (1st Cir. 1990) (That a price squeeze may eliminate rivals' margins does not mean that it harms *competition* in the relevant sense); 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 756b, at 11 (2d ed. 2002) ("Even when a monopolist at one essential stage 'monopolizes' a second stage, consumer harm cannot be inferred and is difficult to identify.").

would still need to conduct a more searching inquiry to determine whether that gap is justified by costs, competition, or other legitimate reasons. As the Commission has repeatedly recognized, the appropriate venue to conduct that inquiry and address price-squeeze claims is in a Section 208 complaint proceeding,¹² and the draft Order is consistent with that approach.¹³

In addition, the Commission should only be concerned by the spread between wholesale and retail rates where there is a dominant provider with market power. Here, the Commission has not found any Ethernet provider has market power. To the contrary, the Commission has proposed “discarding the traditional classification of ‘dominant’ and ‘nondominant’ carriers.”¹⁴ Verizon and INCOMPAS also proposed a “framework that moves away from the current dominant/non-dominant regulatory structure.”¹⁵ And the draft Order now circulating would level the playing field for Ethernet providers by granting them “uniform forbearance” from dominant-carrier requirements.¹⁶ In a marketplace where there is no dominant provider—such as the marketplace for Ethernet services—the relationship between wholesale and retail pricing is not legally significant.¹⁷

Finally, whatever concerns about the spread between wholesale and retail rates have existed until now, once the Commission adopts and implements an order that ensures just and reasonable prices for business data services, those concerns should dissipate. A framework that ensures reasonably priced services should resolve the concerns regarding alleged price squeezes. And it would be premature at best to take additional steps, like mandating a wholesale rate discount, to address price-squeeze concerns before these new rules take effect and are incorporated into the marketplace.

Very truly yours,



¹² See, e.g., *Pricing Flexibility Order* ¶ 131 (“[C]oncerns about a potential price squeeze are best addressed in the context of a complaint filed under section 208 of the Act alleging that a rate charged pursuant to a contract tariff or volume or term discount is unreasonably low and thus violates section 201.”); *SBC InterLATA Services Order* ¶ 156 & n.562 (“[T]he appropriate venue for the price squeeze allegation . . . is a complaint under section 208 of the Act.”).

¹³ Chairman Wheeler’s Proposal To Promote Fairness, Competition, and Investment in the Business Data Services Market, at 2, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf.

¹⁴ *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, ¶ 4 (2016).

¹⁵ Letter from Kathleen Grillo, Verizon, and Chip Pickering, INCOMPAS, to Marlene Dortch, FCC, WC Docket No. 05-25 & RM-10593, at 2 (FCC filed Apr. 7, 2016).

¹⁶ Chairman Wheeler’s Proposal To Promote Fairness, Competition, and Investment in the Business Data Services Market, at 3, http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf.

¹⁷ See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 504 U.S. 398 (2004) (firm with no antitrust duty to deal with its competitors has no antitrust duty to provide competitors with a “sufficient” level of service); *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109, 1114 (2009).