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Via ECFS

October 17, 2016

***Ex Parte***

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

**Re: Special Access for Price Cap Local Exchange Carriers, WC Docket No. 05-25;  
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services  
Tariff Pricing Plans, WC Docket No. 15-247; Business Data Services in an Internet  
Protocol Environment, WC Docket No. 16-143**

Dear Ms. Dortch:

On October 14, 2016, Jennifer Prime of Cox Communications, Inc. ("Cox") and the undersigned met with Claude Aiken, Wireline Legal Advisor to Commissioner Clyburn.

At this meeting, we discussed Chairman Wheeler's proposed BDS rules as outlined in the Fact Sheet released on October 7, 2016.<sup>1</sup> We stated that the Chairman's decision to exclude cable companies and Ethernet services from *ex ante* rate regulation was consistent with the strong record of competition for these services. Although we also concurred in the decision to focus regulatory efforts on incumbent LEC TDM-based BDS, we expressed concern over the decision to impose new regulation on those services on a nationwide basis without any assessment of whether there was sufficient competition in any area to constrain ILEC pricing.

We also expressed Cox's concern with a blanket finding that all BDS is a common carrier service. Cox explained that there was insufficient notice for the Commission to revise its common carriage jurisprudence, which equates "telecommunications services" with common carriage as defined in *NARUC*.<sup>2</sup> We urged the Commission to seek further comment on the

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<sup>1</sup> Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market, available at <https://www.fcc.gov/document/chmn-wheelers-update-business-data-services-rules> ("Fact Sheet")

<sup>2</sup> *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21587-88 ¶ 6 & n. 12 (1998) ("*Vitelco Order*") ("the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services") (citing *Cable and Wireless*, 12 FCC Rcd 8516, 8521-22 (1970) ("*Cable and Wireless*"), *aff'd sub nom., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) ("it is reasonable to read the statute as adopting the *NARUC I* framework."). See also *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 425 U.S. 992 (1976).

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question of whether and to what extent BDS is or should be offered on a common carriage basis and argued that it must seek further comment before changing the Commission's conclusions in *Vitelco* or *Cable and Wireless*. We further explained that, to the extent the record addressed this issue, the record supports a finding that BDS is offered on a private carriage basis and that purported record evidence of indiscriminate BDS offerings, such as Verizon's submission of BDS advertisements, was insufficient to make a blanket common carriage finding.

Finally, we discussed the potential scope of the complaint process outlined in the Fact Sheet. Cox explained that the Fact Sheet's statement that the rates of "new entrants and parties with smaller market shares are unlikely to be questioned" in this proposed new complaint process should constitute a clear demarcation between incumbent LEC TDM services, which could be subject to a new enforcement process, and rates of cable companies or other new entrants, that entered the market after enactment of the 1996 Act, which should not.

If you have any questions, please contact the undersigned.

Respectfully submitted,

/s/ Michael H. Pryor  
Michael H. Pryor

cc (via email): C. Aiken