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October 18, 2016

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: ***Special Access Rates for Price Cap Local Exchange Carriers,*** **WC Docket No. 05-25;** ***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**

REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

Pursuant to the Protective Orders in the above-captioned proceedings,[1] Comcast Corporation ("Comcast") submits the redacted public version of the attached ex parte notification via electronic delivery. Comcast will separately submit a Highly Confidential version of this filing via hand delivery. The {{ and }} symbols denote Highly Confidential Information.

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1 *In the Matter of Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order and Protective Orders, WC Docket No. 15-247, DA 15-1387 (rel. Dec. 4, 2015); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Modified Protective Order, WC Docket No. 05-25, DA 10-2075 (rel. Oct. 28, 2010); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, WC Docket No. 05-25, DA 10-2419 (rel. Dec. 27, 2010); *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, Order and Data Collection Protective Order, WC Docket No. 05-25, DA 14-1424 (rel. Oct. 1, 2014).

Please contact the undersigned should you have any questions regarding this matter.

Respectfully submitted,

/s/ Matthew A. Brill

Matthew A. Brill
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Attachments

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Dear Ms. Dortch:

On October 14, 2016, the undersigned, along with David Don and Mary McManus of Comcast Corporation ("Comcast"), met with Claude Aiken, Legal Advisor to Commissioner Clyburn; Amy Bender, Legal Advisor to Commissioner O'Rielly; Nicholas Degani, Legal Advisor to Commissioner Pai; and Travis Litman, Legal Advisor to Commissioner Rosenworcel in connection with the above-referenced proceedings. During these discussions, we emphasized that (1) the current record cannot support a finding that all business data services ("BDS") are offered on a common carrier basis; (2) the Chairman's October 7 Fact Sheet correctly recognizes that it is unnecessary and would be both contrary to the record and counterproductive to subject the robustly competitive Ethernet segment to *ex ante* rate regulation; and (3) evidence of an increasingly competitive BDS marketplace also warrants treading lightly in applying rate regulation to legacy TDM services offered by incumbent local exchange carriers ("ILECs"). In addition, on October 18, 2016, the undersigned spoke by telephone with Mr. Litman, and on the same day, Kathryn Zachem of Comcast spoke by telephone with Matthew DelNero, Chief of the Wireline Competition Bureau, and Stephanie Weiner, Associate General Counsel and Special Advisor to Chairman Wheeler, regarding the same matters.

No Common-Carrier Regulation of Non-Dominant Private Carriers. We began by explaining that, while the Fact Sheet suggests that BDS providers will be treated as common carriers (with "rare exceptions"),[1] it is not necessary and would be unlawful to subject

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[1] *See* Fact Sheet, "Chairman Wheeler's Proposal To Promote Fairness, Competition, and Investment in the Business Data Services Market," at 2 (Oct. 7, 2016), *available at*

competitive BDS providers—which in many cases offer service on a private carrier basis—to mandatory, across-the-board common carrier regulation. Under both the applicable statutory definition and the *NARUC I* test, the key determinant of whether a carrier provides a common carrier "telecommunications service" is "'the characteristic of holding oneself out to serve indiscriminately.'"[2] The D.C. Circuit has made clear that the Commission must determine whether a provider is acting as a common carrier on an *offering-by-offering* basis, and may not deem a diverse array of offerings to be common carriage based on "evidence" about just a few.[3] We explained, in light of this precedent, that the current record simply cannot support the conclusion that all BDS products are offered on a common carrier basis, and that any such blanket finding likely would not survive judicial review. We noted that the FNRPM's bald and unsupported assertion that *all* BDS services are common carriage did not provide fair notice of the complicated, fact-bound issues that must be considered as part of any effort to classify each and every BDS offering as common carriage. And as Comcast explained in a recent letter, the record developed in this proceeding demonstrates that various providers—including cable providers, competitive fiber providers, and even Verizon itself (the chief proponent of industry-wide common-carrier regulation)—offer numerous BDS products on a private carrier basis.[4]

We further explained that, even apart from these notice and record deficiencies, it is unnecessary as a policy matter to subject private carriers without market power to possible complaints challenging the "reasonableness" of their rates. We noted that competitors' rates are necessarily disciplined by incumbents' pricing, and any refusal by a non-dominant provider to offer service on a wholesale basis would not foreclose access to end users or otherwise undermine competition. In addition, deeming all BDS to be common carriage would impair the flexibility and experimentation that, under the private carriage rubric, cable providers and others have employed to make competitive inroads in the BDS marketplace. As Comcast has explained, it structured its cellular backhaul service and E-Access service "in reliance on the operational flexibility the private carriage model entails."[5] Such flexibility would be severely diminished in a regime where competitive providers were forced to serve all comers and were subject to the threat of complaints under Sections 201 and 202.

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http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf ("Fact Sheet").

2 *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 927 (D.C. Cir. 1999) (quoting *Nat. Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 642 (D.C. Cir. 1976)).

3 *See Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480-81 (D.C. Cir. 1994) ("The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [the offerings at issue] on a common carrier basis.").

4 *See generally* Letter of Matthew A. Brill, Counsel for Comcast, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 15-247, & 05-25 (filed Oct. 5, 2016) ("Comcast Oct. 5 Letter").

5 *Id.* at 2.

We accordingly urged the Commission not to attempt a blanket resolution of the classification question in its forthcoming order and instead to address the issue on a case-by-case basis. In particular, a party filing a complaint under Sections 201 or 202 should bear the threshold burden of demonstrating that the specific service at issue is in fact offered on a common carrier basis. Moreover, given the strong evidence of robust Ethernet competition in the record and the absence of any evidence of market power in the Ethernet segment,[6] a complainant seeking to challenge an Ethernet provider's rates or practices should be required to overcome a strong presumption that those rates or practices are reasonable.[7] We emphasized that the Commission should not attempt to prejudge the facts surrounding any particular BDS-related dispute in its forthcoming order. If the Commission desires to develop the record further on classification or related issues, it can do so as part of any Further Notice.

Moreover, we noted that if the Commission decides to adopt a regulatory backstop to ensure the availability of wholesale BDS from private carriers, it could do so in a minimally invasive manner without the litigation risk and regulatory overhang that would accompany a blanket common carriage classification. In particular, the Commission could establish a wholesale access regime for private carriers along the lines proposed by Comcast in a letter filed last month—which would create a baseline duty to negotiate on a commercially reasonable basis, modeled on the Commission's data roaming rules from the wireless context.[8]

No Rate Regulation for Cable Providers and Other New Entrants. We also expressed Comcast's strong agreement with the conclusion in the Fact Sheet that it would be inappropriate and, indeed, counterproductive to subject Ethernet services to *ex ante* rate regulation. As the Fact Sheet observes, the market for packet-based Ethernet services is characterized by "emerging competition and falling prices"—rendering *ex ante* rate regulation unnecessary.[9] The record compels that conclusion. Notably, a group of seven leading economists—including two former FCC Chief Economists—recently submitted a letter explaining that the record is replete with evidence of substantial investment in new facilities, growing demand, expanding output, and

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6 *See infra* at notes 9 and 10 and accompanying text.

7 *Cf. Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746 ¶ 8 (2010) (explaining, in the context of complaints alleging "unfair" acts under the program access rules, that "a complainant is unlikely to satisfy" the applicable standard when the complaint involves "readily replicable . . . local news and local community or educational programming," while the opposite presumption applies to complaints involving non-replicable regional sports networks).

8 *See* Letter of Kathryn A. Zachem, Comcast, to Marlene H. Dortch, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, at 3-6 (filed Sep. 9, 2016). Such a regime would encourage wholesale dealing while doing as little damage as possible to the flexibility and experimentation that has helped drive competition in the BDS marketplace.

9 Fact Sheet at 2.

"sharply" declining Ethernet prices.[10] We further explained that it is beyond dispute that cable providers lack market power in the BDS arena, and that no party has justified imposing rate regulation on providers that lack market power; to the contrary, doing so would represent a radical departure from settled precedent and established antitrust principles.

We emphasized in particular that the Fact Sheet's contemplated application of rate regulation to low-bandwidth TDM services does not justify rate regulation for low-bandwidth Ethernet services. As noted below, the only even *potentially* credible evidence of market power in the record relates solely to TDM services.[11] By contrast, the record contains substantial evidence reflecting an increasingly dynamic and competitive marketplace for Ethernet services, and that evidence is by no means limited to high-bandwidth Ethernet offerings. In fact, as AT&T explained at length in an October 6 letter, Drs. Israel, Rubinfeld, and Woroch replicated Dr. Rysman's regressions focusing only on Ethernet services and found conclusive evidence of robust Ethernet competition at "all bandwidths," both "above and below 50 Mbps."[12] This analysis, along with record evidence showing that low-bandwidth Ethernet services are available from a variety of providers (including cable providers like Comcast that offer Ethernet over hybrid fiber-coax facilities with performance assurances),[13] lays to rest any notion that the low-bandwidth Ethernet segment exhibits any sort of market failure warranting rate regulation.

The Fact Sheet also is correct in observing that applying *ex ante* rate regulation to Ethernet services would threaten efforts "to promote continued investment in packet-based BDS."[14] As Dr. John W. Mayo explained in his June 28 declaration in this proceeding, Comcast's economic models strongly indicate that the imposition of rate caps would have substantially reduced the network build-out Comcast undertook in recent years and would materially curtail such build-out in the future.[15] In particular, Dr. Mayo found that, for a representative set of recent cell backhaul opportunities, if a price cap of just 10 percent below the actual price had been imposed on Comcast for those opportunities, {{ }} of fiber build-

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10 *See* Letter of Drs. Joseph Farrell, Mark Israel, Michael Katz, Bryan Keating, John Mayo, Daniel Rubinfeld, and Glenn Woroch, WC Docket Nos. 16-143, 15-247, & 05-25, at 2 (filed Sep. 14, 2016) ("Joint Economists' Letter").

11 *See infra* at 5-6.

12 *See* Letter of Christopher T. Shenk, Counsel for AT&T Inc., to Marlene Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593, at 10-13 (filed Oct. 6, 2016).

13 *See, e.g.*, Letter of Matthew A. Brill, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 1-4 (filed Mar. 25, 2016); Letter of Matthew A. Brill, Counsel for Comcast Corp., to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed Apr. 26, 2016).

14 Fact Sheet at 2.

15 *See* Declaration of Dr. John W. Mayo ¶¶ 86-94, attached as Exhibit B to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016) ("Mayo Decl.").

outs likely would not have occurred, and that such price caps would stifle future build-outs at least to the same degree.[16] Other commenters likewise have detailed how Ethernet rate regulation would inevitably deter future entry and diminish competition.[17]

While the Fact Sheet contemplates another FNPRM that would explore possible measures concerning "pricing for packet-based BDS,"[18] we explained that a new proceeding on these issues is unnecessary given that the record *already* contains ample evidence of robust and growing competition in the Ethernet BDS segment. In fact, any further proceeding almost certainly would yield even more evidence of robust competition, particularly given that such competition will continue to grow in the coming months and years. If the Commission nevertheless feels compelled to continue its examination of the Ethernet segment in a future proceeding, it should explore based on then-current data (1) whether market failure exists in the Ethernet segment in a manner that warrants rate regulation—despite all current evidence to the contrary—and (2) whether the asserted benefits of such an approach would outweigh the significant costs.

The approach set forth in the Fact Sheet—which would apply price caps only to ILECs' TDM BDS offerings, based on the conclusion that "evidence of market power is strongest" with respect to such services rather than on technological differences between TDM and Ethernet services[19]—in no way undermines the policy goal of technological neutrality. The Commission has long adopted differential regulatory approaches to services employing different technologies based entirely on economic and marketplace considerations.[20] Since the release of the FNPRM,

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16 *Id.*

17 *See, e.g.*, Comments of Lightower Fiber Networks, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 2-3 (filed Jun. 28, 2016) (noting that Ethernet rate regulation would result in "a substantial reduction in capital spending and a concomitant reduction in competition"); Comments of Charter Communications, Inc., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 9-10 (filed Jun. 28, 2016) (explaining that rate regulation "would throw a very negative variable into Charter's consideration of whether continuing to provide BDS over HFC makes economic sense"); Comments of Cox Communications, Inc., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 21-22 (filed Jun. 28, 2016) (noting that Ethernet rate regulation "could reduce [Cox's] revenue to the point where construction would no longer be viable on some projects"); Comments of American Cable Association, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 39-40 (filed Jun. 28, 2016) (explaining that, for smaller cable BDS providers serving "higher-cost or greater-risk locations," the imposition of Ethernet rate regulation would make further buildout "uneconomical").

18 Fact Sheet at 3.

19 Fact Sheet at 1.

20 *See, e.g.*, *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 16978 ¶¶ 272, 315-19 (2003) (distinguishing

the record developed in this proceeding has confirmed the wisdom of the Commission's historical practice of limiting *ex ante* rate regulation to TDM BDS offerings. As NCTA has explained, the record shows that DS1 and DS3 services "remain by far the most prominent BDS products" and those "that competitors may be least able economically to replicate given the relatively low revenue opportunity afforded at the DS1/DS3 level."[21] Moreover, these TDM offerings are the *only* products for which the record contains any credible (albeit weak) evidence of market power. Dr. Rysman and Commission staff found evidence of market power *only* with respect to ILECs' TDM-based DS1 and DS3 services.[22] By contrast, neither the Rysman White Paper nor the staff's analysis found any evidence of market power in connection with high-bandwidth BDS offerings or low-bandwidth services sold by cable providers.[23] Notably, as several economists have pointed out, Dr. Rysman's analysis significantly *underestimates* the level of competition, due to his reliance on stale 2013 data and flaws in his methodology.[24] We explained that, while evidence of more robust competition in the record certainly justifies treading lightly with respect to regulating TDM rates, it cannot serve as a rational basis for *extending* price caps to Ethernet services under the banner of "technological neutrality."

While a group claiming to represent the interests of schools and libraries has continued to call for *ex ante* rate regulation to be "applied in a technology-neutral way to both TDM and Ethernet services,"[25] they ignore that (1) record evidence of market power relates *only* to TDM

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between fiber-based services and non-fiber-based services and ruling that only the latter should be subject to unbundling, based on evidence indicating that such an approach would stimulate fiber deployment and that competitive providers could deploy OCn loops economically).

21 *See* Letter of Steven Morris, NCTA, to Marlene Dortch, Secretary, FCC, WC Dockets Nos. 16-143 & 05-25, at 6 (filed Sep. 14, 2016).

22 *See* Dr. Marc Rysman, Revised White Paper, "Empirics of Business Data Services," at 3 (rev. Jun. 2016) ("Rysman White Paper") (finding "evidence of ILEC market power" in "[r]egressions of ILEC rates for DS1 and DS3 lines"); FCC Staff, "Distinguishing the Effects of Competition on ILEC Prices under Price Cap only Regulation, Phase I Pricing Flexibility, and Phase II Pricing Flexibility," at 4 (rel. Jun. 28, 2016) ("Staff ILEC BDS Report") (finding that "ILEC market power is steadily increasing with pricing flexibility" for DS1 and DS3 services).

23 *See* Rysman White Paper at 23 (finding "insignificant results on local competition for high bandwidth customers"); Staff ILEC BDS Report at 4 ("With respect to high bandwidth connections, . . . there is little indication of the presence of market power."); FCC Staff, "Competitive Effect of Cable Network Infrastructure ," at 1 (rev. Jul. 8, 2016) (finding that "the presence of the potential cable competition generally does not have a statistically significant effect" on DS1 and DS3 services).

24 *See* Joint Economists' Letter at 3.

25 *See* Press Release, "SHLB Pushes for Business Data Service Reform," Oct. 7, 2016, *available at* http://www.shlb.org/news/shlb/2016/10/PRESS-RELEASE-SHLB-Pushes-for-Business-Data-Service-Reform; *see also* Letter of John Windhausen, Jr., SHLB

services, and (2) Ethernet services sold to schools and libraries *already* are subject to rate regulation. On top of the generally applicable E-rate discounts, the requirement for E-rate providers to charge the "lowest corresponding price" to schools and libraries—*i.e.*, "the lowest price the provider charges to similarly situated non-residential customers for similar services"—directly regulates the rates for Ethernet services as sold to those purchasers.[26] The E-rate rules also contain several provisions aimed at "encouraging consortia purchasing" and other forms of "bulk buying" by schools and libraries, thus helping to drive down prices of E-rate services—including Ethernet BDS sold to schools and libraries—even further.[27] Thus, even apart from the effects of Ethernet competition, these E-rate rules ensure that Ethernet BDS remains affordable to schools and libraries, and obviate any need to take the kind of across-the-board action on Ethernet rates that these parties continue to demand.

Limited Rate Regulation for Incumbent Providers. We concluded by emphasizing that the evidence of a dynamic and increasingly competitive BDS marketplace also militates in favor of treading lightly in applying rate regulation to ILECs' TDM offerings, as pervasive pricing controls likely would undercut rather than promote competition. We explained that any pricing controls the Commission adopts in this proceeding should minimize as much as possible the distortionary effects inherent in rate regulation.

We noted that, even for incumbents, rate regulation is inappropriate in the absence of secure monopoly conditions,[28] which generally are not present in today's BDS marketplace given the growth of competitors' Ethernet offerings.[29] Moreover, expanding price cap regulation broadly across many geographic markets—even if directly applicable only to legacy services offered by the ILEC in each of those markets—would artificially depress competitors' prices nationwide (as competitors' rates necessarily are disciplined by the leading provider's rates), thus diminishing entry incentives and investment. As Dr. Anna-Maria Kovacs put it in a recent paper filed in this proceeding, "rate regulation of BDS [that] lowers the incumbent's prices and

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Coalition, to Chairman Wheeler et al., FCC, WC Docket Nos. 16-143 and 05-25, at 2-3 (filed Oct. 18, 2016).

26 47 C.F.R. § 54.511(b); *Fed.-State Joint Bd. on Universal Serv. Changes to the Bd. of Directors of the Nat'l Exch. Carrier Ass'n, Inc.*, Fourth Order on Reconsideration, 13 FCC Rcd 5318 ¶ 133 (1997).

27 *See Modernizing the E-rate Program for Schools and Libraries*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870 ¶ 83 (2014).

28 *See* Declaration of Dr. Joseph V. Farrell ¶ 53, attached as Exhibit A to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016) (explaining that regulators should "tread lightly in markets where market power is uncertain, modest or fragile," particularly in light of the "difficulties and consequences of price regulation in markets that are not secure monopolies"); Mayo Decl. ¶ 81 ("There is simply no support within the body of economic research for imposing price cap regulation on an entire market of competitors, including new entrants that, under any conceivable interpretation, do not enjoy monopoly power.").

29 *See* Joint Economists' Letter at 2-3.

thus lowers the price umbrella under which competitors operate will harm competitive providers' financials and their ability to invest in their networks."[30]

We accordingly expressed concern with the Fact Sheet's proposal to force rates for ILECs' TDM services down by 11% and to apply an *additional* 3% X-factor reduction annually, and noted that such measures could cause collateral damage in the broader market for low-bandwidth BDS. We explained that competitive providers, which will need to undercut ILECs' artificially depressed rates to win business, may well find it uneconomical to continue investing in low-bandwidth BDS and shift that investment to high-bandwidth BDS—a dynamic that would lead to *reduced* competition in the low-bandwidth segment at a time when the Commission believes competition is lacking. Thus, we urged the Commission to consider more modest adjustments to ILECs' TDM rates.

Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

/s/ Matthew A. Brill

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30 *See* Dr. Anna-Maria Kovacs, "Business Data Services: The Potential Harm to Competitive Facilities Deployment," at 7 (Oct. 2016), attached to Letter of Dr. John W. Mayo to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Oct. 5, 2016).