Public Knowledge

October 19, 2016

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 for Price Cap Local Exchange Carriers, **WC Docket No. 05-25**; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, **RM-10593**

Dear Ms. Dortch:

On October 17, 2016, Phillip Berenbroick and Yosef Getachew of Public Knowledge; Michael Calabrese of New America's Open Technology Institute; John Windhausen of the Schools, Health & Libraries Broadband Coalition ("SHLB Coalition"); John Howes of the Computer & Communications Industry Association; and Matt Wood of Free Press (collectively, "Competition Advocates"), met with Stephanie Weiner and Gigi Sohn of Chairman Wheeler's office, and discussed issues in the above-captioned proceedings.

The Competition Advocates urged the Federal Communications Commission ("Commission") to proceed quickly to reform the business data service ("BDS") market to promote competition and address unjust and unreasonable prices that enterprise, wholesale, and mobile wireless backhaul customers pay for TDM and packet-based BDS services.

The Competition Advocates support Chairman Wheeler's plan to prevent BDS providers from exercising market power with regards to TDM services.[1] For more than a decade, business customers, community anchor institutions, government agencies, and wireless carriers have paid unreasonably high prices for TDM services. Ultimately, these costs are passed on to consumers in the form of higher prices on goods and services.

While supportive of the Chairman's TDM proposals, the Competition Advocates support a two-year, rather than three year, implementation of the downward adjustment of TDM rates and a larger reduction in rates. Additionally, although Chairman Wheeler's plan proposes a rate reduction of 11%, the record justifies a rate reduction of 17% to 20%.[2] Given the fact that the

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[1] *See* Chairman Wheeler's Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market (rel. Oct. 7, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db1007/DOC-341659A1.pdf.

[2] *See* Declaration of Chris Frentrup and David E.M. Sappington, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 11 (filed Aug. 31, 2016) (supporting a one-time reduction in the price cap index of at least 17.1%); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593, ¶ 63 (filed Jan. 27, 2016) (finding it would be appropriate to reduce current rates by at least 19.7%).

Commission has been aware of incumbent provider market power and the unreasonable rates, terms, and conditions in the BDS market for over a decade, and that incumbent providers have been aware of this proceeding and have had ample time to account for potential changes to the Commission's regulatory approach, a shorter rate adjustment period and a larger rate reduction is merited to allow business customers and consumers to begin to see these cost savings as soon as possible.

Further, earlier this year the Consumer Federation of America estimated that overcharges and abusive pricing in the BDS market totaled approximately $20 billion per year over the past five years, and have indirectly cost American consumers over $150 billion since 2010.[3] According to CFA, half of the $40 billion in annual BDS charges are overcharges that are the result of incumbent LEC market power, and those costs are passed through to consumers.[4] A rate reduction of 17% to 20% is relatively modest in light of the unreasonable monopoly and duopoly prices that incumbent providers have charged for more than a decade.

While the Competition Advocates support (subject to the modifications proposed above) the initial steps the Commission appears poised to take to address unjust and unreasonable rates for TDM services, the Commission should also address the high cost of Ethernet services. The Competition Advocates believe the Commission's Order should address the excessive rates that BDS customers pay for all services over which incumbent providers possess and exercise market power, regardless of the underlying technology.

The Competition Advocates explained that the Commission's reforms must be technology-neutral and future proof, in accordance with the principles underlying the Further Notice of Proposed Rulemaking ("FNPRM") in this proceeding.[5] Changing technologies – from legacy TDM services to packet-based services – do not magically lower the extremely high financial and operational barriers to competitive deployment of the facilities needed to provide BDS. Likewise, the change from TDM to Ethernet technology does not eliminate incumbent LEC market power at locations in which that provider faces no effective competition. The data collected by the Commission show that that in the vast majority of BDS customer locations, there is little or no competition.[6] Further, the record demonstrates that the Herfindahl-Hirschman

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[3] Mark Cooper, Consumer Federation of America, The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits 1, 33-35 (2016), *available at* http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf.

[4] *Id*. at 1, 5.

[5] *See* 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, 31 FCC Rcd 4723, 4725-26 ¶¶ 4-8 (2016) ("[T]he new regulatory framework should be technology-neutral. Technological distinctions must not be allowed to obscure economic reality or distort regulatory policy. . . . [T]he Commission should construct regulation to meet not only today's marketplace, but tomorrow's as well.").

[6] *See id.* 4799 ¶ 175 (explaining Dr. Jonathan Baker's findings that "'almost all buildings (at least 95%) have no more than two providers'"); *id.* 4800 ¶ 178 (describing Susan Gately's findings that "'the ILEC is the only provider with a facilities-based dedicated connection (special

Index "exceeds 5,000 in approximately 99 percent of census blocks" where BDS is provided by an incumbent LEC.[7] These findings were inclusive of packet-based BDS services. Thus, the record does not support disparate treatment of TDM and packet-based services.

Additionally, SHLB Coalition explained that if the Commission does not address supracompetitive rates for packet-based BDS services, community anchor institutions will not benefit from the Commission's reforms. Community anchor institutions predominantly purchase packet-based services, and at least 71% of E-rate funded services purchased by schools and libraries are Ethernet services. This percentage will only rise as telecommunications providers continue to shift to packet-based services and discontinue TDM-based offerings.[8] To adequately address the high BDS costs that anchor institutions face, the Commission must address unjust and unreasonable Ethernet rates.

While the Competition Advocates believe that the record clearly demonstrates a lack of competition for all BDS services today, the Commission appears poised to publish an FNPRM to seek additional information on packet-based services. The Competition Advocates explained that if the Commission determines an FNPRM on Ethernet BDS services is necessary, the Commission should move forward as quickly as possible, and warned that the Commission should not presume or find, without adequate support in the record, that there is effective competition in any market for packet-based BDS services. Instead, the FNPRM should be premised on the fact that the Commission's failure to regulate Ethernet BDS services in the BDS reform Order is based solely on so-called administrability concerns for regulating the prices of such packet-based technologies.

Lastly, if the Commission fails to address Ethernet rates in the BDS reform Order, it should not eliminate the rules it adopted in its 2015 *Technology Transitions Order* ensuring that wholesale BDS inputs remain available at reasonably comparable rates, terms, and conditions for purchasers when incumbent providers seek section 214 authority to discontinue, reduce, or impair their TDM networks.[9] As the Commission keenly observed in earlier proceedings, without a wholesale access requirement, "we risk allowing the benefits of competition to be lost

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access) at roughly 3 out of every 4 building/cell tower locations with special access demand'"); *id.* 4801 ¶ 181 (discussing Dr. Stanley Besen and Dr. Bridger Mitchell's findings that "'approximately 73 percent of special access purchaser locations are served by a single ILEC with no other facilities- based supplier reported present'" and that "'almost all purchaser locations, 97 percent, are served by only one or two suppliers . . . .'").

[7] *Id*. 4802 ¶ 183 (quoting Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Docket. No. 05-25, at 20-21) (originally filed Jan. 27, 2016 and revised consistent with protective orders Apr. 11, 2016)).

[8] Letter from Schools, Health & Libraries Broadband Coalition to Chairman Tom Wheeler, Commissioner Mignon Clyburn, Commissioner Jessica Rosenworcel, Commissioner Ajit Pai, and Commissioner Michael O'Rielly, WC Docket Nos. 16-143 & 05-25, at 1-2 (filed Oct. 18, 2016).

[9] *See* Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, 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 Service, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, 30 FCC Rcd 9372, 9433 ¶¶ 131-132 (2015).

irrevocably."[10] The Commission explained then that it was not prepared accept the elimination of wholesale BDS competitors while it sought answers to key questions regarding the BDS market and how it should address the lack of competition.[11] Because the current BDS reform proposal does not include a plan to adopt and implement rules to ensure purchasers of BDS have access to packet-based services at just and reasonable rates, the Commission's interim rules should remain in place. Without this protection, incumbent BDS providers will be incentivized to discontinue their regulated TDM services and charge exorbitant rates for packet-based services of comparable speeds in order to drive competitive BDS providers out of the marketplace altogether. Given the Commission's intention to publish a subsequent FNPRM on packet-based BDS services, the Commission should continue with its interim rule until it adopts new rules to facilitate competition and ensure just and reasonable rates for both TDM and Ethernet technologies.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

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[10] *Id.* 9450 ¶ 141.
[11] *See id*. 9447 ¶ 136.