LERMAN SENTER PLLC

WASHINGTON, DC

S. JENELL TRIGG
202.416.1090
202.429.4636 FAX
STRIGG@LERMANSENTER.COM

April 13, 2017

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

Re: *Ex parte* Filing, Business Data Services in an Internet Protocol Environment, *et al.*, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

The Wireless Internet Service Providers Association ("WISPA")[1] is generally supportive of the Commission's efforts to lessen the regulatory burdens and foster increased competition in the provision of business data services. WISPA, however, writes separately to address one specific issue with the *Draft Report & Order* currently on circulation in the Business Data Services proceeding,[2] an issue that is critical to the deployment of business data services and other services to every part of the country.

In the *Draft Report & Order*, the Commission proposes to eliminate tariffs and deregulate the provision of business data services at the wholesale level.[3] This directly contravenes then-Commissioner Pai's dissenting statement in the *Title II Order*:

> What I cannot find – and what our precedent does not countenance – is any instance where the FCC eliminated economic regulations without first performing any market analysis or finding competition sufficient to constrain anti-competitive pricing and behavior.[4]

---

[1] WISPA is the trade association of more than 800 members that represents the interests of fixed wireless Internet service providers ("WISPs") that provide IP-based f broadband services to consumers, businesses and anchor institutions across the country. WISPA estimates that WISPs serve more than 3,000,000 people, many of whom reside in rural areas where wired technologies like FTTH, DSL and cable Internet access services are not available and a competitive wholesale market does not exist.

[2] *Business Data Services in an Internet Protocol Environment, et al.*, Report and Order, WC Docket No. 16-143, *et al.*, FCC-CIRC1704-04 ("*Draft Report & Order*").

[3] *Draft Report & Order*, ¶¶ 249-53 and Appendix A, Sections 61.201 and 61.203.

[4] *Protecting and Preserving the Open Internet*, 30 FCC Rcd 560, 5978 (2015), Dissenting Statement of Commissioner Ajit Pai.

If adopted as proposed, the *Draft Report & Order* would be fundamentally flawed and would do nothing to foster competition in the business data services market or provide the critical infrastructure to new entrants and small broadband providers that wish to bring retail broadband access and business data services to rural America and other unserved communities.[5] WISPA respectfully requests that the Commission reverse its tentative decisions to (1) refrain from adopting ex ante rules that would govern the offerings of wholesale business data services, and (2) limit relief solely to complaints filed pursuant to Section 208.[6] To address these concerns, WISPA recommends adoption of rules that require business data service providers with market power to price wholesale rates below the retail rates they offer and to negotiate in good faith with any retail broadband provider that requests business data services. Without a few basic rules to address inherently anti-competitive situations, small business providers that lack choice in who provides them with business data services will remain competitively disadvantaged, to the detriment of consumers that benefit from retail competition.[7]

First, WISPA emphasizes that the absence in the rules of per se boundaries for any wholesale provider with market power whose actions hamper or prevent retail competition in its market would be inconsistent with Chairman Pai's "Digital Empowerment Agenda." Such unreasonable market entry barriers not only hamper small and/or new broadband providers from offering competitive business data services to residential and business customers, but is also an impediment to those innovative entrepreneurs "with drive and determination" that depend on access to such services "to transcend their individual circumstances and transform our country."[8] If WISPA's members, who are often the only retail broadband service option available to unserved communities, cannot acquire wholesale services at just and reasonable rates, more and more "lower-income areas, communities of color, and those who were already less connected get

---

[5] *See* Letter from Laurence Brett Glass d/b/a/ LARIAT, to Marlene Dortch, FCC Secretary (filed April 4, 2017) ("LARIAT Letter") at 2 ("LARIAT has found the anticompetitive practices of pricing wholesale services above retail – or of refusing to provide Special Access services to competitive ISPs at all – to be its primary impediment to deployment to unserved areas").
WISPA also highlights an apparent oversight by the Commission in dealing with PSTN interconnection and how it is impacted by the *Draft Report & Order's* deregulation of special access. The *Draft Report & Order* applies the same deregulation to DS0, DS1 and DS3 TDM transport circuits, but it does not acknowledge the current use of special access to interconnect competitive PSTN providers to ILEC networks and to E911 Selective Routers. Allowing ILECs to withdraw special access tariffs could result in the forced disconnection of many CLECs, which often provide the voice services underlying the VoIP offerings of WISPA's members, which are required under the *Connect America Fund* rules to be considered an unsubsidized competitor. Because the Commission has not addressed PSTN interconnection issues in the USF/ICC transformation proceeding (*see Connect America Fund et al.,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *aff'd sub nom.,* In re: FCC 11-161, 753 F.3d 1015 (10th Cir. 2014)), its expansive deregulation in the instant proceeding will put consumers and small businesses in rural America at risk of losing competitive voice, broadband and other services.
[6] *Draft Report & Order*, ¶¶ 250-53.
[7] WISPA's proposal would apply whether the business data service provider is a common carrier or a private carrier. Otherwise, a provider could seek refuge in the common carriage limitations of Title II. Further, small businesses are less likely to have the resources necessary to bring expensive Section 208 complaints and long-lasting anti-trust cases. The public interest is better served by enabling small providers and new entrants' use of their resources in "developing new offerings, upgrading networks, or improving security." *See Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106, Order Granting Stay Petition In Part, FCC 17-19, ¶ 14 (rel. March 1, 2017).
[8] Remarks of FCC Commissioner Ajit Pai at The Brandery, *A Digital Empowerment Agenda*, Cincinnati, Ohio (Sept. 13, 2016).

left behind. And for them, that means less access to high-speed broadband *and* fewer of the benefits of competition, including more affordable broadband."[9]

Second, WISPA is concerned that the *Draft Report & Order* brushes aside the wealth of administrative record support providing real-world examples of anti-competitive actions by incumbent Local Exchange Carriers ("LECs") with market power.[10] Instead, the *Draft Report & Order* categorizes such examples as "anecdotal evidence" that fall short of being "concrete evidence that incumbent LECs charge their wholesale customers higher rates that they charge retail customers for like business data services."[11] But "concrete evidence" is not necessary when there are only one or two wholesale providers in a market, especially when the wholesale provider also offers retail services in direct competition to the small or new provider. In those circumstances, the outcome will be clear, and "concrete evidence" of a market failure can be presumed. Incumbent providers with market power will use that market power to diminish or thwart any competition. This result is even more obvious where the larger wholesale provider is vertically integrated and provides retail broadband service in competition with the smaller retail provider. Some of the real-world examples of such anti-competitive actions cited to in lengthy footnote 581 of the *Draft Report & Order* are from large and midsized providers, such as Sprint and TDS.[12] If Sprint, a company with billions of dollars in capitalization, has issues with securing reasonable wholesale rates for special access from an incumbent, WISPA's much smaller members are at a far greater disadvantage.[13]

Allowing any business data service provider to exercise market power by refusing to deal with or hindering a competitor's ability to provide business data services at a competitive retail level not only undermines the Commission's bipartisan efforts to focusing on closing the digital divide, but is also an obvious market entry barrier for small businesses and new entrants. The Commission has a statutory mandate to identify and eliminate market entry barriers for small businesses under Section 257 of the Communications Act of 1934, as amended,[14] and to identify the significant economic impact of its proposed rules on small entities under the Regulatory Flexibility Act, as amended.[15] The approach described in the *Draft Report & Order* contravenes these statutory provisions.

Chairman Pai recently emphasized that systematic economic analyses are an important element of the Commission's rulemaking process, stating that "[t]he FCC should have the economic experts it needs to identify market failures and study whether the benefits of

---

[9] *Id.* at 3 (emphasis in original).
[10] WISPA recognizes that ILECs are often not the only incumbent in a market; large cable companies can also have market power.
[11] *Draft Report & Order*, ¶ 251.
[12] *Id. at* n.581 (citing to Letter from Paul Margie, Counsel to Sprint, to Marlene H. Dortch, FCC Secretary, WC Docket No. 05-25, RM-10593, at 5 (filed Sept. 24, 2015) (Sprint lost a longtime enterprise broadband customer "because an ILEC undercut Sprint's pricing by nearly $1 million per year because the ILEC's retail rates were less than the inflated wholesale access costs that Sprint pays for last-mile [business data services] circuits" from the same incumbent LEC); and TDS Reply at 11 (citing the Fifth Loch Declaration, para. 5) ("AT&T's publicly posted bid prices for retail 20 and 50 Mbps Ethernet Internet services were a few hundred dollars per month lower than the price AT&T offered TDS CLEC for the wholesale Ethernet loop portion of the retail service AT&T bid" to the customer)).
[13] *See* LARIAT Letter at 2.
[14] *See* 47 U.S.C. § 257.
[15] *See generally* 5 U.S.C. §§ 601, *et seq.*

Commission action would be warranted given the costs—in-house autarky, if you will. This is essential. *Otherwise, well-intentioned but unsound policies can become unintended barriers to growth and innovation.*"[16] The difficulties experienced by competitive providers to secure reasonable wholesale prices from a business data service provider with market power are supported by longstanding economic principles. Significantly, in markets where there are not several wholesale providers, there is no chance for the market to police or correct itself contrary to the Commission's assumptions in the *Draft Report & Order*.[17] A requirement to provide reasonable wholesale rates and to fairly deal in such negotiations is critical to ensure viable competition. The Commission cannot detariff the requirements to provide just and reasonable rates on a wholesale basis as proposed in the *Draft Report & Order*, and then take a hands-off approach with full knowledge that some markets are simply not competitive.

Simply stated, unless the wholesale market is competitive, or alternatively, broadband data service providers with market power are required to deal fairly in good faith and offer wholesale rates that are below retail rates, the retail market for business data services will not be competitive. Deregulating before there is meaningful competition does not benefit consumers and is not in the public interest.[18]

Therefore, for the above reasons, WISPA requests that the Commission adopt rules that require a business data service provider with market power to price wholesale rates below the retail rates they offer and to negotiate in good faith with any retail broadband provider that requests business data services.

---

[16] Remarks of FCC Chairman Ajit Pai at the Hudson Institute, *The Importance of Economic Analysis at the FCC*, Washington, DC (April 5, 2017) (emphasis added).

[17] *See Draft Report & Order*, ¶ 5 (providing "a new framework for business data services that minimizes unnecessary government intervention and allows market forces to continue working to spur entry, innovation, and competition"). The irony of this statement is that there has been no entry, innovation or competition in certain markets because market forces have never worked to provide a level playing field between a large incumbent and small providers or new entrants.

[18] *See generally* Consumer Federation of America and Consumers Union, *Lessons from 1996 Telecommunications Act: Deregulation before Meaningful Competition Spells Consumer Disaster* (Feb. 2000).

If you have any questions regarding this matter, please contact the undersigned.

Respectfully submitted,

/s/ *S. Jenell Trigg*
Stephen E. Coran
S. Jenell Trigg
Counsel to the *Wireless Internet Service Providers Association*

cc: Chairman Pai
Commissioner Clyburn
Commissioner O'Rielly
Jay Schwarz
Claude Aiken
Amy Bender
Kris Monteith