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July 21, 2016

VIA ECFS ***NOTICE OF EX PARTE***

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

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

Dear Ms. Dortch:

On July 19, 2016, Chris Murray, Jeanne Dale, and Mark Jeary of EarthLink, Inc. ("EarthLink") and I met with Deena Shetler, David Zesiger, Belinda Nixon, Joseph Price, Pam Arluk, and Marvin Sacks of the Wireline Competition Bureau. During the meeting, we made the following points.

First, we described EarthLink's business. We explained that EarthLink uses business data services purchased at wholesale as inputs to its downstream retail services, and we described the types of business customers EarthLink typically serves. For example, EarthLink provides services to a diverse set of clients such as The Autism Society, Genesco, Dunn-Edwards Paints, Honeybaked Ham, GNC, and Meridian Community Care, among many others.[1]

Second, we explained that the Commission could limit incumbent LECs' opportunities to lock up wholesale demand by using circuit portability plans if it (1) mandates substantial

[1] *See* EarthLink Enterprise, Our Customers, https://www.earthlink.com/why-earthlink/our-customers (last visited July 20, 2016); EarthLink Business, Meridian Community Care Case Study (2013), https://www.earthlink.com/~/media/3d1de4c168cd412ebcc92a9162a630e5.pdf.

reductions in incumbent LEC business data services prices (e.g., by lowering price caps governing the sale of DS1 and DS3 services) and (2) limits the term of circuit-specific plans that incumbent LECs may offer in non-competitive areas.[2]

Third, we explained that the Commission should extend its decision to prohibit the use of all-or-nothing provisions in the tariff pricing plans under review in the Business Data Services Tariff Investigation proceeding to all incumbent LEC tariffs and contracts for business data services in non-competitive areas.[3] We further explained that, in complying with the all-or-nothing prohibition, incumbent LECs should be prohibited from using Verizon's approach to complying with the all-or-nothing prohibition in the CDP. Specifically, in revising its tariffs pursuant to the Commission's *Tariff Investigation Order*, Verizon modified its all-or-nothing provisions to permit each customer to designate the circuits the customer wishes to include in a discount plan by assigning them to a specific Access Customer Name Abbreviation ("ACNA").[4] We explained that requiring customers to elect a discount plan at the ACNA level is overly burdensome because it is costly and difficult to switch circuits between ACNAs.[5] Accordingly, we explained that the Commission should require the incumbent LECs to permit their customers to designate the circuits to include in a discount plan by using Access Service Requests ("ASRs"). In particular, customers could use the Variable Term Agreement ("VTA") field on the ASR form to designate when a circuit is to be included in a discount plan. This method of designation would be easy to administer because Verizon already uses the VTA field to process orders on other buying plans.

Fourth, we explained that incumbent LECs should be required to allow customers to count Ethernet toward any TDM volume commitment. We stated that doing so would curb incumbent LECs' ability to coerce customers into large volume commitments for Ethernet and would decrease customers' exposure to shortfall and early termination penalties.[6] We explained

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[2] *See, e.g.*, Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM 10-593, at 100-03 (filed June 28, 2016) ("Joint CLECs Comments").

[3] *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*, Tariff Investigation Order & Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, ¶ 110 (2016) ("*Tariff Investigation Order*").

[4] The Verizon Telephone Companies Tariff FCC Nos. 1, 11, 14 and 16, Restructure of Shortfall Penalties Price Cap Rate Change/Restructure Filing and Modification of "All-Or-Noting" Provisions in Compliance with the Commission's Tariff Investigation Order, Description and Justification, Transmittal No. 1335, at 2-3 (July 1, 2016).

[5] *See, e.g.*, Petition of Windstream Services, LLC, INCOMPAS, EarthLink, and Sprint Corp. to Reject or Suspend and Investigate Verizon Transmittal No. 1335, at 2 (filed July 8, 2016).

[6] *See* Joint CLECs Comments at 103.

that such a requirement would also enable wholesale customers to more easily adjust purchases to account for unanticipated fluctuations in the pace at which customers replace TDM services with Ethernet services.[7]

Fifth, we explained that the Commission should limit the term of any volume plan to a period no longer than one year in non-competitive Business Data Services markets.[8] This is because long-term arrangements have the effect of delaying customers' opportunities to purchase lower-cost or alternative services and increase the risk that they will incur shortfall and early termination penalties.[9]

Sixth, we reiterated that the D.C. Circuit's decision in *BellSouth v. FCC* does not preclude the Commission from enforcing the requirements of Sections 201(b) and 202(a) to address the practices addressed herein.[10]

Seventh, we explained that it is standard business practice for buyers and sellers of Business Data Services to buy and sell services on a building-by-building basis. That is, when a wholesale customer seeks to purchase Business Data Services from a particular provider, the wholesale provider sends the customer a list of the buildings to which the provider can provision services. In addition, the provider generally sets the price of the Business Data Services by address based on the level of competition that each particular building is subject to, with lower prices associated with those buildings subject to higher levels of competition.

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[7] *Id.* at 97.

[8] *See id.* at 96-97.

[9] *See id.* at 100-01.

[10] *See* Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, WC Docket No. 15-247, at 62-64 (filed Feb. 5, 2016) (citing *BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006)).

Please do not hesitate to contact me if you have any questions or concerns regarding this submission.

Respectfully submitted,

/s/ Thomas Jones
Thomas Jones

Counsel for EarthLink, Inc.

cc: Deena Shetler
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Marvin Sacks