

Via ECFS

EX PARTE NOTICE

August 1, 2016

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

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

On July 28, 2016, Chip Pickering, CEO, and the undersigned, Vice President of Regulatory, from INCOMPAS met with Chairman Wheeler; Howard Symons, FCC General Counsel; Matthew DelNero, Chief of the Wireline Competition Bureau; and, Stephanie Weiner, Senior Legal Advisor to the Chairman.

In the meeting Mr. Pickering conveyed that the \$45 billion business data services market has been stifled by a lack of competition and consequentially high prices. He stressed the urgent need for meaningful price reform for these services and the overall beneficial effects such reform would have on the wireless industry, businesses, anchor institutions and the economy in general. He echoed the opinion wireless providers jointly expressed that “access to high capacity BDS at reasonable prices—as Chairman Wheeler says “fast and fair”—is vital for wireless providers to meet the current demand for wireless broadband services and to build next generation mobile broadband networks”¹ and, as Commissioner Rosenworcel has stated, these services “facilitate commercial transactions, and underpin communications that American businesses rely on every day.”² The stability and advancement of schools, healthcare providers, libraries and other anchor

¹ Letter from Steven Berry, President and CEO, Competitive Carriers Assoc., Chip Pickering, CEO, INCOMPAS, Vonya McCann, Senior VP, Govt. Affairs, Sprint, Kathleen O’Brien Ham, Senior VP, Govt. Affairs, T-Mobile, and Grant Spellmeyer, VP, Fed. Affairs and Public Policy, U.S. Cellular to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Apr. 21, 2016).

² *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*

institutions—the gateways to our communities—also depends on being able to obtain affordable, high-capacity broadband connections. As the Executive Director of the Schools, Health & Libraries Broadband Coalition (SHLB Coalition) has stated “the need to rein in the prices” for business data services is one of the most important recommendations of its recently released Action Plan.³ Given the important role of business data services in our communities, it is not a surprise that price reductions for these services will create beneficial spill-over effects for the economy as a whole.

Mr. Pickering explained the findings in the WIK-Consult Report, which we provided to the Chairman during the meeting. The study demonstrates that the spill-over effects of price reductions in the broader economy are substantial. Specifically, an annual boost to GDP that is 2.6 times as great as the direct reduction in prices.⁴ Mr. Pickering also explained that these considerable societal benefits need not come at the expense of the incumbent providers. As a result of price elasticity of demand for these services, a reduction in price is likely to have little effect on the gross revenues of providers and may even lead to an increase in gross revenue.⁵ Moreover, the fact that business data services prices can be substantially reduced and still exceed incremental costs is supported by CenturyLink’s CFO’s characterization of these services as “high margin” for the incumbent. Moreover, its CEO recognized the benefit in cost savings a reduction would provide when purchasing the business data services outside its incumbent region.⁶

Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723, at 198 (2016) (“Further Notice”) (Statement of Commissioner Jessica Rosenworcel).

³ John Windhausen, Jr. “Why we need affordable broadband for anchor institutions and communities,” (July 11, 2016), <http://about.bgov.com/blog/affordable-broadband-anchor-institutions-communities/>.

⁴ J. Scott Marcus, “Welfare Effects of Reductions in the Price of Leased Line Equivalents in the U.S.,” at 10, WIK-Consult (July 2016) (“WIK-Consult Report”), attached to Letter from Karen Reidy, VP, Regulatory Affairs, INCOMPAS, to Tom Wheeler, Chairman, FCC, WC Docket Nos. 16-143 & 15-247, RM-10593 (filed July 28, 2016).

⁵ *Id.* at 26.

⁶ In describing net exposure from FCC reform between business data services (referred to as special access in the transcript) revenue versus any costs for network access, R. Stewart Ewing, CenturyLink’s Chief Financial Officer, states that “it’s wholesale revenue basically, and its high margins. . . . So there aren’t a lot of continuing incremental expenses associated with providing that service. It’s mostly the investment that was required to build a service out. There’s some maintenance costs, but it’s probably pretty minimal.” CenturyLink, Inc. FQ1 2016 Earnings Call Transcript at 11, <http://ir.centurylink.com/Cache/1500085040.PDF?Y=&O=PDF&D=&fid=1500085040&T=&iid=4057179>. CenturyLink’s Chief Executive Officer, Glen F. Post, also stated that the company would “benefit on the cost side as well” from FCC reform, referring to the cost benefit the

While there has been significant innovation in the communications industry generally, this sector of the industry—despite having a user base that should attract competition⁷—has been constrained to the point that more than 99 percent of commercial buildings have only one or two providers (the vast majority only one),⁸ purchasers of business data services pay unreasonably high rates,⁹ and most purchasers opt for lower bandwidth services.¹⁰ Prices for business data services that are well in excess of the prices that would exist in a competitive market have resulted in “deadweight loss” (*i.e.*, loss of consumption that should have taken place) and a considerable reduction in social welfare.¹¹

company would experience from FCC reform where it purchases business data services outside its incumbent region. *Id.* at 12.

⁷Wireless carriers, banks, enterprises, schools, libraries, hospitals, educational institutions, as well as small mom and pop stores, small start-up businesses, doctors’ offices, medical clinics, etc., rely on these vital services in the operation of their services.

⁸ *Further Notice* ¶ 220. As the Commission found in the *Further Notice*, “costs and conditions exist in the [Business Data Service] market with enough significance in any measure of a geographic market to deter rapid competitive entry or expansion, including high capital expenditures, large sunk costs, long lead times, scale economies, and cost disadvantages.” *Id.* ¶ 224.

⁹ As evidence of unjust and unreasonable rates and market failure for a core enterprise broadband service (Ethernet), INCOMPAS (then COMPTTEL) commissioned an analysis that compared Ethernet prices of AT&T and CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in the NECA Access Service FCC Tariff #5 (NECA Tariff #5). Both AT&T and CenturyLink are far larger and operate in more dense areas than the carriers concurring in NECA Tariff #5 and, accordingly, should enjoy significantly greater economies of scale and scope. Consequently, the cost experienced by AT&T and CenturyLink should be *less* than the NECA Tariff #5 carriers. Yet, prices charged by AT&T and CenturyLink were often greater *by an order of magnitude*. Comments of COMPTTEL, WC Docket No. 05-25, at 10-11 and Attachment (filed Apr. 16, 2013). Recently, the Consumer Federation of America found that the overcharges resulting from the market failure in the Business Data Services markets have costs consumers over \$150 billion over the past five years. Mark Cooper, “The Special Problem of Special Access: Consumer Overcharges and Corporate Excess Profits,” at 33-35, Consumer Federation of America (Apr. 2016), <http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf>.

¹⁰ *Further Notice* ¶ 189.

¹¹ WIK-Consult Report at 8.

This is the state of the market after a decade of forbearance grants and price flexibility that was supposed to spur new entry. Instead these policies have had the opposite result. Economically viable builds by new entrants are curbed by the inability of new entrants to obtain reasonably priced access at locations of multi-location customers where the economics do not support building a new connection; lack of competition has provided the incumbents little to no incentive to build or compete out of region or to sufficiently upgrade existing facilities; and, and cable providers' entry into the provision of business data services is limited because they face the same barriers to entry that other competitors face, and, in any event, they generally provide best-efforts services that lack symmetrical capacities and service level guarantees and therefore do not even qualify as business data services.¹² It is time for a new policy approach that truly spurs competition, innovation and a virtuous cycle of investment, not only in infrastructure but also in the technology that rides over that infrastructure.

Mr. Pickering underscored that the framework jointly submitted by INCOMPAS and Verizon on June 27, 2016¹³ is a balanced approach resulting from significant compromise, is supported by the record, and should be adopted by the Commission. It is a framework that recognizes the absence of existing competition in the vast majority of commercial locations and the significant economic challenges to new facilities-based deployment, while at the same time encouraging new entry, innovation and, where economically feasible, network deployment. Its three tiered approach to a competitive market test not only ensures competitive options for customers at every bandwidth, it encourages providers to quickly improve their services (*i.e.*, to offer service at bandwidths of above one Gbps).

Mr. Pickering emphasized that price reform for both TDM- and packet-based services must be *meaningful*, and *enforceable*, in order to accomplish the Commission's objective of transforming this critical market and achieving the ensuing economic benefits. The Commission's *Further Notice* supports the proposal in the INCOMPAS/Verizon June 27 Letter for a one-time adjustment to the rates for TDM-based business data services in areas served by price cap ILECs to account for the freeze in rates under the *CALLS Order*. The average of the calculations in the *Further Notice* for such adjustments is approximately 15 percent.¹⁴ The data used in these calculations, however, included broadcasting as well as telecommunications services. As the record demonstrate, using data limited to the telecommunications industry

¹² See, e.g., Comments of Comcast Corporation, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 10-11 (filed June 28, 2016). In addition, "[t]he vast majority of businesses seeking Ethernet services demand full carrier-grade performance and SLAs that [Ethernet-over-HFC] cannot provide." *Id.* at 31.

¹³ Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 & 05-25 (filed Jun. 27, 2016) ("INCOMPAS/Verizon June 27 Letter").

¹⁴ See *Further Notice* ¶¶ 407 tbl. 7, 410 tbl. 8, 411 tbl. 9.

supports a significantly higher reduction.¹⁵ The record also supports significant price reductions for Ethernet services in non-competitive areas.¹⁶ This includes Ethernet services at all bandwidth levels.¹⁷

The proposal put forth jointly by Verizon and INCOMPAS represents a rare achievement that is a culmination of years of hard work and recent compromise from diverse interests—wireless providers, backhaul providers, competitive providers, incumbent providers, and international providers—working together to provide a balanced solution to an issue that has plagued the industry for numerous years. This could not have happened without the Commission’s recognition that comprehensive reform is necessary. We applaud the Chairman’s commitment to “bring this home” and to “ensure that non-competitive market conditions cannot disadvantage business customers and their ability to compete and innovate in downstream markets.”¹⁸ Meaningful price reform for this marketplace will best promote competition, investment, innovation and advance the speed and capacity of mobile broadband services such as 5G.

Respectfully submitted,

/s/ Karen Reidy

Karen Reidy

cc: Chairman Tom Wheeler
Howard Symons
Matt DelNero
Stephanie Weiner

¹⁵ Comments of Sprint Corporation, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 50-53 (filed June 28, 2016).

¹⁶ See Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, ¶¶ 10-19, attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed June 28, 2016) (refiled July 14, 2016).

¹⁷ See *id.*; see also *id.* ¶¶ 20-22.

¹⁸ Remarks of FCC Chairman Tom Wheeler, INCOMPAS Policy Summit, April 11, 2016, Gaylord National Hotel & Convention Center, National Harbor, Md., <https://www.fcc.gov/document/remarks-chairman-wheeler-incompas-policy-summit>.