



Writer's Direct Dial: 703.755.6730
Facsimile Number: 703.755.6740
Sheba.Chacko@bt.com

REDACTED – FOR PUBLIC INSPECTION

August 9, 2016

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
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:

Hereby submitted on behalf of BT Americas Inc. (“BT”) is the redacted version of BT’s reply comments in response to the Order and Further Notice of Proposed Rulemaking released on May 2, 2016 in the above-referenced proceeding.¹ This redacted document is submitted pursuant to the terms of the *Modified Protective Order*,² *Second Protective Order*,³ *Data Collection Protective Order*,⁴ *Business Data Services Data Collection Protective Order*,⁵ and the

¹ *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 and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 (2016).

² *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*, Modified Protective Order, 25 FCC Rcd. 15168 (2010).

³ *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*, Second Protective Order, 25 FCC Rcd. 17725 (2010).

⁴ *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*, Order and Data

REDACTED – FOR PUBLIC INSPECTION

Marlene H. Dortch
August 9, 2016
Page 2

Tariff Investigation Protective Order,⁶ as well as the *Protective Order Extension Order*.⁷ Pursuant to instructions from Commission staff, the original Highly Confidential version and two copies of this submission are being filed with the Secretary's Office and an electronic copy of the Highly Confidential version is being submitted to Mr. Christopher Koves in the Pricing Policy Division of the Wireline Competition Bureau.

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

Sincerely,



Sheba Chacko
Senior Counsel & Head, Americas Regulation and Global
Telecoms Policy
BT Americas Inc.

Attachment

Collection Protective Order, 29 FCC Rcd. 11657 (2014); see also *Wireline Competition Bureau Now Receiving Acknowledgments of Confidentiality Pursuant to Special Access Data Collection Protective Order*, Public Notice, 30 FCC Rcd. 6421 (2015).

⁵ *Investigation of Certain Price Cap Local Exchange Carrier Business 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*, Order and Protective Orders, 30 FCC Rcd. 13680, App. A (2015).

⁶ *Id.* at App. B.

⁷ *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*, Order, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, DA 16-722 (rel. June 24, 2016).

REDACTED – FOR PUBLIC INSPECTION

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
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 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
)	

**REPLY COMMENTS OF
BT AMERICAS**

Sheba Chacko
Senior Counsel & Head, Americas Regulation and
Global Telecoms Policy
BT AMERICAS, INC.

August 9, 2016

REDACTED – FOR PUBLIC INSPECTION

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	MANDATED PRICE REDUCTIONS FOR BUSINESS DATA SERVICES IN NON-COMPETITIVE AREAS WILL RESULT IN ECONOMIC BENEFITS TO SOCIETY AS A WHOLE, AND CAN BE EXPECTED TO INCREASE THE LEADING BUSINESS DATA SERVICE PROVIDERS’ GROSS REVENUES.	3
III.	ADOPTION OF NEW REGULATIONS TO CONSTRAIN THE INCUMBENT LECS EXERCISE OF MARKET POWER IN THE PROVISION OF BUSINESS DATA SERVICES IS NECESSARY TO BRING THE U.S. INTO COMPLIANCE WITH ITS WTO COMMITMENTS.....	5
IV.	BUSINESS DATA SERVICES PROVIDERS THAT ARE NOT THE LEADING PROVIDER IN A GIVEN MARKET, OR AN AFFILIATE OF THE LEADING PROVIDER IN THAT MARKET, MUST BE PERMITTED TO SELL BUSINESS DATA SERVICES ON A PRIVATE CARRIAGE BASIS.	9
V.	CONCLUSION	13

REDACTED – FOR PUBLIC INSPECTION

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
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 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
)	

**REPLY COMMENTS OF
BT AMERICAS**

BT Americas, Inc. (“BT Americas” or “BT”) submits these reply comments in response to the Order and Further Notice of Proposed Rulemaking (“*Order and FNPRM*”) released on May 2, 2016 in the above-referenced proceeding.¹

I. INTRODUCTION AND SUMMARY

In the *Order and FNPRM*, the Commission finds that incumbent LECs possess market power in the provision of Business Data Services, and the comments filed in response to the

¹ *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 and Further Notice of Proposed Rulemaking*, 31 FCC Rcd. 4723 (2016) (“*Order and FNPRM*”).

REDACTED – FOR PUBLIC INSPECTION

FNRPM add further weight to that finding. In addition, the *Order* finds that certain practices of the incumbent LECs were unjust and unreasonable, and therefore in violation of Section 201(b) of the Communications Act of 1934, as amended (the “Act”).² BT files separately here to address three issues of particular concern.

First, an economic analysis prepared by Dr. J. Scott Marcus demonstrates that regulations requiring price reductions for Business Data Services in non-competitive geographic areas will increase the overall welfare of society *and are likely to increase* the leading Business Data Service providers’ gross revenues.³ Dr. Marcus explains that society will benefit through customer re-acquisition of consumer surplus, reduction in deadweight loss, and beneficial spill-over effects. Dr. Marcus shows that because the quantity of Business Data Services that customers purchase increases more than proportionally in response to changes in price, price reductions for Business Data Services of up to 25 percent can be expected to dramatically increase the amount of Business Data Services purchased, resulting in an *increase* in gross revenues for Business Data Services providers.

Second, the Commission’s failure to maintain regulations that constrain the market power possessed by the incumbent LECs in the provision of Business Data Services is not just inconsistent with the requirements of the Communications Act, it also violates the U.S. government’s Schedule of Specific Commitments made in the context of the WTO’s General Agreement on Trade in Services (the “GATS”), the GATS Annex on Telecommunications, and

² 47 U.S.C. § 201(b).

³ See J. Scott Marcus, “Welfare Effects of Reductions in the Price of Ethernet-based Leased Line Equivalents in the U.S.,” WIK-Consult (July 2016), 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) (“Marcus Analysis”).

REDACTED – FOR PUBLIC INSPECTION

the Telecommunications Reference Paper.⁴ Adoption of new regulations, as stated in the comments filed by competitive LECs and as further detailed herein, would bring the U.S. back into compliance.

Third, the Commission states in the *Order and FNPRM* that Business Data Services are telecommunication services, and that Business Data Services providers are therefore common carriers.⁵ In its decision adopting rules in this proceeding, the Commission must clarify that Business Data Services providers that are not the leading provider of such services in a relevant market, and are not an affiliate of the leading provider, remain free to offer Business Data Services on a private carriage basis.

II. MANDATED PRICE REDUCTIONS FOR BUSINESS DATA SERVICES IN NON-COMPETITIVE AREAS WILL RESULT IN ECONOMIC BENEFITS TO SOCIETY AS A WHOLE, AND CAN BE EXPECTED TO INCREASE THE LEADING BUSINESS DATA SERVICE PROVIDERS' GROSS REVENUES.

As demonstrated in the record of this proceeding, prices for Business Data Services have for many years reflected the market power held by the current leading provider of such services, the incumbent LECs.⁶ The Marcus Analysis shows that the higher prices that result from such

⁴ See World Trade Organization, *The United States of America, Schedule of Specific Commitments*, GATT Doc. GATS/SC/90/ (Apr. 15, 1994) (“Schedule of Commitments”); WTO Telecommunications Reference Paper, incorporated as Supplement 2 to the Schedule of Commitments (“Reference Paper”).

⁵ See *Order and FNPRM* ¶ 257 n.672.

⁶ See, e.g., Comments of Birch Communications, Inc., BT Americas Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Docket No. 05-25, RM-10593, at 48-56 (filed Jan. 27, 2016) (“Joint CLEC Comments”); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, ¶ 107 (Jan. 22, 2016), attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (originally filed Jan. 27, 2016) (refiled as revised Apr. 14, 2016) (“[Incumbent LECs] are likely able to exercise market power in most markets, and would be expected to charge prices above competitive levels unless prevented by regulation.”).

REDACTED – FOR PUBLIC INSPECTION

market power allows the leading provider to appropriate part of the consumer surplus that would exist at competitive prices; in this sense welfare is appropriated by the leading providers.⁷ More importantly, because service customers are required to pay more for the service than they would at competitive prices, service customers reduce their purchases of the service. This reduction in economic activity accrues to no one's benefit, and is therefore a deadweight loss of societal welfare.⁸ Finally, prices reflecting the existence of market power also have spillover effects into the broader economy. One study estimating the size of the lost spillover effects due to Business Data Service prices exceeding competitive levels found a lost opportunity for 132,000 jobs and \$14.5 billion in real Gross Domestic Product since 2003.⁹ Regulations that require price reductions for Business Data Services to levels that more closely approximate price levels that would exist in a competitive market will largely reverse these effects, thereby benefiting competition and society as a whole.

Significantly, the required Business Data Services price reductions are not likely to reduce the gross revenues of the incumbent LECs. Instead, reducing Business Data Services prices for incumbent LECs by anywhere from 5 percent to 25 percent in non-competitive markets is likely to *increase* the incumbent LECs gross revenues.¹⁰ As explained by Dr. Marcus, this is because the quantity of Business Data Services that customers want to purchase increases more than proportionally in response to a change in the price of Business Data Services.

⁷ See Marcus Analysis at 9-10.

⁸ See *id.*

⁹ See *id.* at 10 (citing Rappoport et al., *Macroeconomic Benefits from a Reduction in Special Access Prices* (2003)).

¹⁰ See *id.* at 24.

REDACTED – FOR PUBLIC INSPECTION

Economists refer to this concept as the price elasticity of demand, and services that respond to price changes like Business Data Services respond are likely highly elastic.¹¹ Dr. Marcus finds that if the price elasticity of demand is in fact -1.5, then price reductions of 5 percent, 10 percent, 15 percent, 20 percent, and 25 percent each result in *higher* revenues for metro Ethernet services than would be the case if prices stayed the same.¹²

III. ADOPTION OF NEW REGULATIONS TO CONSTRAIN THE INCUMBENT LECS EXERCISE OF MARKET POWER IN THE PROVISION OF BUSINESS DATA SERVICES IS NECESSARY TO BRING THE U.S. INTO COMPLIANCE WITH ITS WTO COMMITMENTS.

For more than a decade the United States government (“U.S.”) has failed to fully comply with its WTO commitments on telecommunications services. While in its GATS Schedule of Commitments the U.S. committed to ensuring that appropriate measures are maintained to prevent major suppliers of circuit- and packet-switched Business Data Services from engaging in anti-competitive behavior,¹³ the U.S. did not in fact do so. Between 1999 and 2008 the Commission prematurely deregulated Business Data Services by rolling back price regulation of circuit-switched access services and granting forbearance from economic regulation of Ethernet

¹¹ *See id.* at 9, 12-13. Dr. Marcus states that true price elasticity of demand for Business Data Services is somewhere between -1.0 and -2.0, the highly elastic range.

¹² *See id.* at 14-17, Figure 2. Figures 4-10 of the Marcus Analysis depict in graphs the increases in total leading provider revenues, increase in consumer surplus, reduction in deadweight loss, and increase in beneficial spillover effects for varying possible reductions in the price of Business Data Services. *See id.* at 19-23.

¹³ *See* Schedule of Commitments; Reference Paper. In its Schedule of Commitments, the U.S. committed to “undertake[] the obligations contained in the Reference Paper” with respect to “Telecommunications Services” including “Packet-switched data transmission services,” “Circuit-switched data transmission services” and “Private leased circuit services” without any limitations relevant to this proceeding. Business Data Services are such packet and circuit-switched data transmission services, and hence the U.S. is obligated to ensure that the provision of Business Data Services also complies with the terms of the Reference Paper.

REDACTED – FOR PUBLIC INSPECTION

services offered by certain major suppliers.¹⁴ It forbore from collecting regulatory accounting data from major suppliers of Business Data Services,¹⁵ allowed consolidation of major incumbent LECs and IXC's without effective safeguards against anticompetitive behavior, and rolled back antitrust protections via the *Trinko* and *linkLine* decisions.¹⁶ As a result, major suppliers¹⁷ of Business Data Services were able to charge supra-competitive rates for Business Data Services, and to engage in price squeeze, tying, and other anticompetitive activity described extensively by Level 3, BT, and others (together, "Joint CLECs").¹⁸ As explained below, permitting these actions violated both Article 1 and Article 2 of the Reference Paper.

¹⁴ See *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 24, 93-99 (1999), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001); *Verizon Telephone Companies' Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to their Broadband Services is Granted by Operation of Law*, News Release (Mar. 20, 2006); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260 (2008).

¹⁵ See generally *Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 23 FCC Rcd. 13647 (2008); *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules et al.*, Memorandum Opinion and Order, 23 FCC Rcd. 7302 (2008); *Petition of Qwest Corporation for Forbearance from Enforcement of the Commission's ARMIS and 492A Reporting Requirements Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 23 FCC Rcd. 18483 (2008).

¹⁶ *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438 (2009).

¹⁷ Incumbent LECs materially affect the terms of participation with respect to price and supply of TDM and most Ethernet-based Business Data Services and therefore are major suppliers. See, e.g., *Order and FNPRM* ¶ 52 ("Incumbent LECs are the primary facilities-based suppliers of legacy TDM services and increasingly provide packet-based BDS."); *id.* ¶ 56 ("Incumbent LECs are the primary wholesale supplier of services and leased lines to competitive providers.").

¹⁸ See generally Joint CLEC Comments.

REDACTED – FOR PUBLIC INSPECTION

Article 1 of the Reference Paper addresses the competitive safeguards that the U.S. must have in place to prevent major suppliers of Business Data Services from behaving in an anticompetitive manner. It states that “[a]ppropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.”¹⁹ While the Commission is in the process of analyzing remedies to be put in place to address market failures in the Business Data Services market, it remains the case that today U.S. major suppliers of Business Data Services can behave in an anti-competitive manner with respect to the rates, terms, and conditions regarding these services.²⁰ Hence the U.S. is not meeting its general obligations as stated in Article 1 of the Reference Paper with respect to Business Data Services.

In addition, in the Reference Paper Article 2 the U.S. committed to ensure the availability of linking with suppliers of public telecommunications transport services, such that users of one supplier may communicate with users of another supplier, and to access services provided by another supplier.²¹ Specifically, Article 2.2 provides that for such purposes packet- and circuit-

¹⁹ Reference Paper § 1.1.

²⁰ *See generally* Joint CLEC Comments.

²¹ Business Data Services are plainly covered by Reference Paper Article 2. First, Business Data Service is a “[p]ublic telecommunications transport service,” defined as “any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, *inter alia*, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer’s information.” GATS Annex on Telecommunications § 3(b). Moreover, Article 2.1 of the Reference Paper explains that the obligations contained in Article 2 should apply to “linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.” Reference Paper § 2.1. Under the plain language of Article 2.1, the obligations of Article 2

REDACTED – FOR PUBLIC INSPECTION

switched data transmission services including access services would be provided by major suppliers (a) “under non-discriminatory terms, conditions . . . and rates and of a quality no less favourable than that provided for its own like services or for like services of . . . its subsidiaries or other affiliates;” (b) “in a timely fashion, on terms, conditions . . . and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled”; and (c) “upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.”²² However, as noted above, major suppliers are not constrained from pricing these services at supra-competitive rates, imposing anticompetitive terms and conditions on purchasers, or refusing to provide adequate rate transparency.²³ Hence the U.S. is not meeting its obligations as stated in Article 2 of the Reference Paper with respect to Business Data Services.

This proceeding presents the Commission with an opportunity to bring the U.S. into compliance with its WTO obligations by putting into place certain competitive safeguards against the abuse of market power by incumbent LECs. These safeguards include the following:

1. As described in the comments submitted by the Joint CLECs, the rates of the leading provider in each relevant non-competitive Business Data Services market must be subject

apply to access services for which specific commitments were made – i.e., packet- and circuit-switched data transmission services and hence Ethernet and TDM Business Data Services.

²² Reference Paper § 2.2.

²³ *See generally* Joint CLEC Comments.

REDACTED – FOR PUBLIC INSPECTION

to *ex ante* regulation that, to the extent practicable, limits rates to those that would prevail in competitive markets.²⁴

2. The Commission should adopt the constraints proposed by the Joint CLECs with respect to anticompetitive terms and conditions in incumbent LEC Business Data Services tariffs and agreements.²⁵ Where such anticompetitive terms and conditions in an incumbent LEC's tariffs or agreements (including agreements with an incumbent LEC's affiliates) apply to both Business Data Services and non-Business Data Services, the incumbent LEC should be subject to the same constraints to prevent the incumbent LEC from leveraging its market power over Business Data Services into non-Business Data Services product markets.
3. Any tariff or contract that requires a customer to purchase a minimum volume of Business Data Services must not set that volume above 50 percent of the amount purchased by the customer in the immediate prior billing period.

IV. BUSINESS DATA SERVICES PROVIDERS THAT ARE NOT THE LEADING PROVIDER IN A GIVEN MARKET, OR AN AFFILIATE OF THE LEADING PROVIDER IN THAT MARKET, MUST BE PERMITTED TO SELL BUSINESS DATA SERVICES ON A PRIVATE CARRIAGE BASIS.

As the Joint CLECs have explained, the Commission should apply *ex ante* rate regulation to leading providers of Business Data Services in relevant markets classified as non-competitive.²⁶ Moreover, the Commission should also mandate that leading competitors offer

²⁴ See Comments of Birch Communications, Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 36-84 (filed June 28, 2016) (“Joint CLEC FNPRM Comments”).

²⁵ See *id.* at 57-62.

²⁶ See *id.* at 62-75.

REDACTED – FOR PUBLIC INSPECTION

Business Data Services as telecommunications services in non-competitive relevant markets. However, there is no basis for requiring that competitors without market power offer Business Data Services as telecommunications services where they meet the criteria for private carriage.

Leading competitors should be required to operate as common carriers. The record in this proceeding demonstrates the propriety of regulating the leading provider of Business Data Services in each relevant geographic market as a common carrier, whether or not the leading provider or its affiliates might otherwise qualify as private carriers. The FCC has asserted authority to compel private carriers to offer service on a common carrier basis if the public interest so requires.²⁷ In assessing when to assert this authority, the Commission has focused on “the availability of alternative common carrier facilities” over which a customer could obtain comparable services.²⁸ As demonstrated in the record of this proceeding, the current leading providers in each geographic market are the incumbent LECs,²⁹ and the incumbent LECs at present hold market power in the provision of Business Data Services.³⁰

To be clear, the common carrier regulations adopted in this proceeding should be applied to affiliates of the leading Business Data Service provider in each relevant market as well. In *Association of Communications Enterprises v. FCC*, the D.C. Circuit held that “the Commission may not permit an ILEC to avoid [Section] 251(c) obligations as applied to advanced services by

²⁷ See *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21585, ¶ 7 (1998) (citing *Cable & Wireless, PLC*, Cable Landing License, 12 FCC Rcd. 8516, ¶¶ 13-17 (1997)).

²⁸ See *Cable & Wireless* ¶ 15.

²⁹ See, e.g., Joint CLEC FNPRM Comments at 58 (“In light of current market conditions, incumbent LECs are clearly the leading competitor in all relevant Business Data Services markets.”).

³⁰ See, e.g., *id.* at 18-35; Joint CLEC Comments at 10-55.

REDACTED – FOR PUBLIC INSPECTION

setting up a wholly owned affiliate to offer those services.”³¹ Under the rationale in the D.C. Circuit’s decision, an affiliate of the leading provider of Business Data Services in a given market should not be permitted to offer Business Data Services on a private carrier basis if the leading provider itself cannot do so. To find otherwise would open up an avenue for the leading provider to avoid common carrier regulation by offering regulated services on a private carrier basis through its affiliates.

Non-leading competitors should not be required to operate as common carriers. In contrast, requiring that a competitor that has no market power, like BT, make its Business Data Services available to all potential customers that request such service could impose unreasonable and even crippling costs on BT Americas and its affiliates providing service in the U.S. First, BT Americas does not offer Business Data Services on a standalone basis. Furthermore, when BT Americas provides Business Data Services incorporated into its managed network services offerings, BT Americas carefully and thoroughly analyzes opportunities to provide such integrated Business Data Services and managed network services to determine if the opportunity would provide sufficient return on investment to justify devoting the resources necessary to pursue the opportunity and win the contract for the integrated service. Imposing a legal obligation to provide Business Data Services to any entity requesting the service would require BT Americas to change its business model and provide a service that it does not make economic sense for BT Americas to offer on a standalone basis. It would not allow BT Americas to decline to provide service where BT Americas determines that such investments would not be

³¹ *Ass’n of Commc’ns Enters. v. FCC*, 235 F.3d 662, 668, (D.C. Cir. 2001).

REDACTED – FOR PUBLIC INSPECTION

prudent, which could deter BT Americas and similarly-situated providers from offering integrated Business Data Service and managed network service offerings at all.

When distinguishing between offering telecommunications on a common-carrier basis and offering telecommunications on a private carrier basis, “the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking ‘to carry for all people indifferently.’”³² By contrast, a provider is not offering service on a common carrier basis if “its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.”³³ Indeed, so long as a provider offers service in this manner, it “may serve a significant clientele” and still retain its status as a private carrier.³⁴

The Business Data Services provided by BT Americas to selected customers as part of a package of services plainly meet the criteria of private carriage. BT Americas’ customers are generally large, sophisticated, typically multinational, enterprises that issue Requests-for-Proposals (“RFPs”) for a complex package of interrelated integrated services, of which Business Data Services are a component. Note that the package of services is *by definition* determined by the customer, not BT Americas. Nonetheless, BT Americas is very selective as to the RFP opportunities it chooses to pursue. This is because it can cost BT Americas up to **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED] **[END HIGHLY CONFIDENTIAL]** to pull together a team to bid on an RFP and to pursue an opportunity through the many months until a contract

³² *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC* (“*NARUC IP*”), 533 F.2d 601, 608 (D.C. Cir. 1976) (quoting *Semon v. Royal Indem. Co.*, 279 F.2d 737, 739 (5th Cir. 1960)) (internal alterations omitted).

³³ *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC* (“*NARUC P*”), 525 F.2d 630, 641 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

³⁴ *Id.* at 642.

REDACTED – FOR PUBLIC INSPECTION

is won and negotiated. The factors BT Americas analyzes to select opportunities include

[BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

Finally, if the RFP process culminates in the selection of BT Americas as the service provider, BT Americas and the customer engage in substantial and extensive negotiations to tailor the contract to the needs of the customer. Such a process is the antithesis of the off-the-rack offer of a common carrier. Plainly, BT Americas does not hold itself out to all or some subset of potential Business Data Services purchasers as being able to fulfill their needs, but makes “individualized decisions, in particular cases, whether and on what terms to deal.”³⁵

V. CONCLUSION

For the foregoing reasons, the Commission should adopt regulations reducing Business Data Services prices of the leading provider in non-competitive areas, as such action will generate economic benefits for society as a whole and will not harm the leading providers. Moreover, the Commission must adopt regulations otherwise constraining the market power of the leading providers as described above to bring the U.S. back into compliance with its WTO telecommunications commitments. Finally, the Commission must clarify that Business Data Services providers that are leading providers, and their in-region affiliates, must operate as

³⁵ *Id.* at 641.

REDACTED – FOR PUBLIC INSPECTION

common carriers whereas those that are not leading providers or affiliates of leading providers remain free to offer Business Data Services on a private carriage basis, which services would not be subject to common carrier regulation.

Respectfully submitted,

/s/ Sheba Chacko_____

Sheba Chacko
Senior Counsel & Head, Americas Regulation and
Global Telecoms Policy
BT AMERICAS, INC.
11440 Commerce Park Dr.
Reston, VA 20191
(703) 755 6730

August 9, 2016