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August 19, 2016

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

Re: Business Data Services, WC Docket No. 16-143
Special Access, WC Docket No. 05-25

Dear Ms. Dortch:

On August 17, 2016, the undersigned and Jennifer McKee of the National Cable & Telecommunications Association (NCTA), Michael Pryor of Cooley LLP, and Dr. Michael Katz of the University of California at Berkeley, met with Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel, and Claude Aiken, Legal Advisor to Commissioner Clyburn, to discuss the above-referenced proceeding. The positions expressed by NCTA were consistent with its comments and reply comments in this proceeding, and in particular with the economic report of Dr. Katz and Dr. Bryan Keating that was attached to NCTA's reply comments.[1]

NCTA explained that the BDS marketplace generally is working well, with competitors of all types investing in new facilities to serve business customers and a clear record of declining prices. In the face of this evidence of investment and competition, any new regulation should be narrowly tailored to situations where it is clear that the benefits of regulation outweigh the significant costs. In particular, we explained that there is no basis whatsoever for imposing rate regulation on cable operators and other competitive providers who possess no market power with respect to any segment of the BDS marketplace.

Dr. Katz explained that none of the proponents of regulation had made a compelling case that significant new regulation would be beneficial. Even accepting the evidence of ILEC market power as accurate, standing alone the presence of market power is insufficient to demonstrate that regulation will produce better results than the marketplace. That is particularly true in a marketplace as complex as the one for BDS, which is characterized by "multiple competing providers offering a wide range of products that have quality levels that are difficult to measure and are constantly evolving due to innovation."[2] In such a setting, "it is even more

[1] Reply Declaration of Michael L. Katz and Bryan G.M. Keating, attached to Reply Comments of the National Cable & Telecommunications Association, WC Docket No. 16-143 (filed Aug. 9, 2016) (Katz/Keating Declaration).

[2] Katz/Keating Declaration at 21.

important to have sound evidence of significant potential benefits of *ex ante* price regulation before imposing it," but in this case "the record indicates that *ex ante* price regulation – especially if applied to all BDS providers in a large number of markets declared to be non-competitive markets – would very likely impose greater costs than benefits."[3]

Beyond the obvious and significant administrative costs rate regulation would trigger, Dr. Katz explained that the Commission should be particularly concerned about the effect that regulation would have on investment incentives and incentives for innovation and quality. Regulation that reduces the rates companies can charge for these services (whether through direct regulation or through regulation of the market leader) necessarily reduces the return on new investment, which in turn makes it less likely that such investment will take place. In addition, it is well established that setting a ceiling on prices creates incentives for regulated companies to reduce quality. This should be of particular concern given the important role that quality of service plays in the BDS marketplace. Moreover, as even proponents of regulation have acknowledged,[4] there is no meaningful way for the Commission to incorporate a measure of quality into rules governing BDS rates.

Dr. Katz also noted that the costs of regulation are likely to be asymmetric. If the Commission were to set regulated rates too low, the resulting harms would be irreparable. On the other hand, if non-regulated rates were "too high" competition could address the problem, for example via entry. The asymmetric costs of regulation suggest that any regulation that the Commission chooses to impose should be both limited and gradual.

NCTA explained that most of the proposals for new regulation of BDS rates, particularly the framework submitted by Verizon and INCOMPAS over the last few months, are not supported by the evidence and would result in significant consumer harm. In particular, we explained that a "competitive test" of four providers with *connections* in a census block was nonsensical given that—of those census blocks that have any BDS customers at all—more than 50 percent have a single BDS customer and more than 80 percent have three or fewer customers. Such an approach is not a meaningful competitive test, but simply a plea for the broadest possible regulation without regard to competition or costs. We also explained that a test that only counts providers that have a connection to a building is impossible to reconcile with evidence that competition in the marketplace typically occurs through a bidding process in which providers compete for business in buildings where they have not yet deployed facilities.

Finally, NCTA discussed the fact that many of the services that cable operators offer to business customers are made available on a private carrier basis. We explained that private carriage is a longstanding method by which competitive providers choose to offer service and that many non-cable providers, such as BT Americas, also seem to follow this approach in their

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[3] *Id*.

[4] Verizon Comments at 8.

offerings to business customers.[5] We explained that the record would not support a finding that all BDS was offered on a common carriage basis or that common carriage should be compelled and we questioned the value of making all providers offer service on a common carrier basis as some parties have suggested. We also explained that any mandate that competitive providers sell services or facilities to incumbent providers would be a particularly poor method of promoting competition.[6]

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: T. Litman
C. Aiken

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[5] Reply Comments of BT Americas at 11-13.

[6] Katz/Keating Declaration at 13-14 ("First, if a firm is forced to share with rival suppliers the fruits of its costly investments, then that firm will have weaker investment incentives than it otherwise would because its investments will not be a source of differentiation or competitive advantage. In other words, the fundamental element of competing to gain advantage on rivals will be lost.").