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**VIA ECFS**

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

**Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; 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***

Dear Ms. Dortch:

The record in the above-captioned proceedings makes abundantly clear that there is no sound policy justification for expanding rate regulation of incumbent providers or new entrants in the BDS marketplace. Consistent with Commission precedent<sup>1</sup> and expert submissions in these proceedings,<sup>2</sup> prescriptive rate regulation is appropriate only in the presence of secure monopoly conditions. Such conditions are not present in today's BDS marketplace, which is more competitive than ever before. The record contains substantial evidence of continuing investment, expanding output, and declining prices—all hallmarks of a dynamic and increasingly

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<sup>1</sup> See, e.g., *AT&T Submarine Systems, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585 ¶ 9 (1998), *aff'd sub nom., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999) (explaining that, when the Commission is determining whether “the public interest” requires the application of common carrier regulation, including rate regulation, on a particular service provider, the Commission’s “focus” is on whether the provider “has sufficient market power” to be able “to charge monopoly rents” for the service).

<sup>2</sup> See, e.g., Declaration of Dr. Joseph V. Farrell ¶ 53, attached as Exhibit A to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016) (explaining that regulators should “tread lightly in markets where market power is uncertain, modest or fragile,” particularly in light of the “difficulties and consequences of price regulation in markets that are not secure monopolies”); Declaration of Dr. John W. Mayo ¶ 81, attached as Exhibit B to Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593 (filed Jun. 28, 2016) (“There is simply no support within the body of economic research for imposing price cap regulation on an entire market of competitors, including new entrants that, under any conceivable interpretation, do not enjoy monopoly power.”).

competitive marketplace.<sup>3</sup> The record also demonstrates that subjecting competitive providers to rate regulation—either directly through the imposition of price caps or benchmarks, or indirectly through expanded regulation of incumbents’ rates—would be affirmatively harmful, as it would significantly chill further investment in broadband facilities and thus undercut the very competition the Commission seeks to promote.<sup>4</sup>

For similar reasons, there is no need for *non-price* regulation of new entrants in the BDS marketplace, including wholesale access mandates. Notwithstanding the suggestion in the Further Notice of Proposed Rulemaking that all BDS providers are common carriers subject to wholesale access requirements and related mandates under Sections 201 and 202 of the Communications Act,<sup>5</sup> Comcast and many other providers offer various business data services on a private carrier basis, and thus are not subject to those provisions.<sup>6</sup> Nor should private

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<sup>3</sup> See Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 17-20 (filed Jun. 28, 2016) (“Comcast Comments”) (describing the ways in which “the BDS marketplace, long dominated by incumbent LECs, is more competitive than ever before”); Reply Comments of Comcast Corp., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 7-13 (filed Aug. 9, 2016) (“Comcast Reply Comments”) (summarizing the “ample evidence” in the record of the rapid growth of competition in the BDS marketplace).

<sup>4</sup> See Comcast Comments at 40-51 (explaining how “[i]mposing rate regulation on cable BDS providers and other new entrants would only *thwart* competitive entry and investment in the BDS marketplace just when it may be most needed”); Comcast Reply Comments at 13-17 (collecting record evidence describing the harms presented by expanding rate regulation in the BDS marketplace).

<sup>5</sup> 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 and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 ¶ 257 (2016) (“FNPRM”).

<sup>6</sup> See Comcast Comments at 15-17, 62-66 (explaining that Comcast provides many of its BDS offerings on a private carrier basis); see also Comcast Reply Comments at 32-33 (noting that “[t]he record makes clear that many competitive BDS providers operate on a private carrier basis in serving various customer segments,” and collecting citations to record submissions); Reply Comments of BT Americas, WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 11-12 (filed Aug. 9, 2016) (“BT Americas Reply Comments”) (arguing that competitors without market power must remain free to provide BDS on a private carriage basis). Some proponents of subjecting cable BDS providers to Title II regulation assert that all cable BDS offerings are common carrier services. See, e.g., Ex Parte Letter of Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 and 05-25 (filed Aug. 19, 2016). But such bare assertions cannot overcome the sworn declarations and other evidence that Comcast and other providers have submitted in the record, demonstrating that they carefully designed particular BDS offerings (such as Comcast’s cell backhaul and network-to-network

carriers be subject to wholesale access mandates as a policy matter; given their lack of market power, any refusal to provide service on a wholesale basis would not foreclose access to end users or otherwise undermine competition.<sup>7</sup>

If the Commission nevertheless decides to adopt a regulatory backstop to ensure the availability of wholesale BDS from private carriers that are not subject to Sections 201 and 202,<sup>8</sup> it should consider establishing a regime modeled on the Commission’s data roaming rules from the wireless context, which create a baseline duty to negotiate on a commercially reasonable basis.<sup>9</sup> Such a rule could establish a basic duty to deal while preserving private carriers’ flexibility to price their services free from government-imposed caps or benchmarks.

Under the data roaming rules, “[a] facilities-based provider of commercial mobile data services is required to offer roaming arrangements to other such providers” and must do so “on commercially reasonable terms and conditions.”<sup>10</sup> The Commission determines whether a provider has satisfied these requirements “based on the totality of the circumstances,” and has identified more than a dozen factors that it considers in making that determination.<sup>11</sup> Those

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interface offerings) to fit within the well-established private carrier paradigm. *See, e.g.*, Comments of Comcast Corporation, WC Docket Nos. 16-143, 15-247, and 05-25, Declaration of David Allen, ¶ 13 (filed June 28, 2016); Comments of Charter Communications, Inc., WC Docket Nos. 16-143, 15-247, & 05-25 and RM-10593, at 18 (filed Jun. 28, 2016) (indicating that Charter makes individualized determinations regarding whether and on what terms it will provide BDS); BT Americas Reply Comments at 11-13 (describing why its BDS offerings satisfy private carriage criteria). Moreover, the fact that Comcast may advertise certain retail BDS offerings does nothing to establish that *other* BDS offerings are indiscriminately made available to the public. It is particularly unpersuasive for Verizon to claim that all cable BDS offerings *must be* common carrier services when Verizon itself attests that it offers Ethernet services as a private carrier. *See* FNPRM ¶ 257 n.671 (noting Verizon’s assertion that it has entered into 3,300 private carriage contracts for non-TDM services).

<sup>7</sup> *See* Comcast Comments at 66-72; Comcast Reply Comments at 34-35.

<sup>8</sup> Notably, BDS providers that operate on a common carrier basis—including all incumbent local exchange carriers (“ILECs”) (except insofar as Verizon provides Ethernet services on a private carrier basis pursuant to a default grant of forbearance, *see* FNPRM ¶ 257 n.671) and competitive providers that voluntarily hold themselves out as common carriers—already are required to furnish service to retail or wholesale customers “upon reasonable request,” 47 U.S.C. § 201(a), among other obligations under Title II.

<sup>9</sup> *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, 26 FCC Rcd 5411 ¶ 42 (2011) (“2011 Data Roaming Order”) (establishing requirement that “all facilities-based providers of commercial mobile data services [must] offer data roaming arrangements to other such providers ... on commercially reasonable terms and conditions”); *see also* 47 C.F.R. § 20.12(e) (codifying these obligations).

<sup>10</sup> 47 C.F.R. § 20.12(e).

<sup>11</sup> *2011 Data Roaming Order* ¶ 86.

factors include “whether the host provider . . . has engaged in a persistent pattern of stonewalling behavior,” “whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement,” “whether there are other options for securing a data roaming arrangement in the areas subject to negotiations,” and “whether a host provider’s decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable.”<sup>12</sup> The data roaming rules also state specifically that “[p]roviders may negotiate the terms of their roaming arrangements on an individualized basis,”<sup>13</sup> thus preserving the ability of the host provider to offer data roaming as a non-common carrier.

The same types of factors could be applied to ensure that BDS providers that operate as private carriers negotiate in good faith with wholesale customers that seek to resell BDS offerings to retail customers. In support of such a requirement, the Commission could rely on Section 706 of the Telecommunications Act of 1996.<sup>14</sup> The D.C. Circuit has held that Section 706 “vests [the Commission] with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”<sup>15</sup> If the Commission determines that establishing an obligation to negotiate commercially reasonable wholesale arrangements would promote broadband deployment—*e.g.*, by enabling facilities-based competitive providers to build out their networks over time, while relying on resold circuits to fill in gaps in network coverage<sup>16</sup>—and if it designs the rules in a manner that maintains sufficient flexibility to avoid the investment-undermining effects of more heavy-handed mandates, then Section 706 should provide a statutory foundation for such rules. Notably, the FNPRM in this proceeding specifically cites Section 706 as a possible basis for establishing rules governing non-ILEC BDS providers.<sup>17</sup> Moreover, the D.C. Circuit has made clear that a baseline duty to deal that preserves room for individualized negotiations does not constitute common carriage and may lawfully be imposed on non-common carriers.<sup>18</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> 47 C.F.R. § 20.12(e)(i).

<sup>14</sup> 47 U.S.C. § 1302.

<sup>15</sup> *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014); *see also* 47 U.S.C. § 1302.

<sup>16</sup> *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 ¶ 3 (2005) (justifying the adoption of targeted unbundling mandates for high-capacity loops and dedicated transport as “a result that will promote the deployment of competitive facilities” in the long run).

<sup>17</sup> *See* FNPRM ¶ 268.

<sup>18</sup> *See Cellco P’ship v. FCC*, 700 F.3d 534, 548 (D.C. Cir. 2012) (explaining that the data roaming rules do not impose common carriage mandates largely because they “leave[] substantial room for individualized bargaining and discrimination in terms”). Although the Commission principally relied on Title III as authority for the data roaming rules, it also pointed to Section 706 as authority for those rules, *see 2011 Data Roaming Order* ¶ 64 & n.179, and the D.C. Circuit expressly recognized that ruling in affirming the

The application of these concepts in the BDS context would be technologically and competitively neutral, as the classification of a particular service—rather than any legacy industry category—would determine which governing standard applies. Specifically, as noted above, incumbent LECs (with the exception of Verizon) provide all BDS services on a common carrier basis, as do competitive providers that have voluntarily opted to make indiscriminate service offerings to the public. Such common carriers as a matter of law are subject to Sections 201 and 202 of the Act, so there is no need for an additional regulatory overlay to ensure reasonable wholesale access from those providers. Over time, if the Commission were to determine that a provider claiming private carrier status (a) in fact is operating on a common carrier basis, based on a voluntary “holding out,” or (b) should be compelled to operate as a common carrier because the Commission finds it has attained market power,<sup>19</sup> then such a provider would become subject to Sections 201 and 202, rather than the commercial reasonableness standard described above. Conversely, an ILEC that today is compelled to operate as a common carrier could obtain forbearance down the road from Sections 201 and 202—as Verizon did in 2006<sup>20</sup>—based on changes in market conditions, and then would become subject to the commercial reasonableness backstop.<sup>21</sup> In all events, all BDS providers, whether they operate today as common carriers or private carriers, would be subject to a baseline duty to deal and Commission oversight in the event of disputes.

Although some parties have criticized the wireless data roaming rules as insufficient to curb the market power of AT&T and Verizon Wireless in the mobile broadband arena, and thus have called for grounding data roaming rules in Title II authority,<sup>22</sup> those concerns are inapposite here. The dominant providers of BDS, as noted, are *already* subject to Sections 201 and 202 in this context, and would be relieved of those common carrier obligations only if the Commission

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Commission’s order. *See Cellco*, 700 F.3d at 541 (noting that the Commission identified Section 706 as a “source[] of regulatory authority for the data roaming rule[s]” and declining to disturb that conclusion).

<sup>19</sup> As Comcast and others have pointed out, the FNPRM in this proceeding does not provide notice of any potential legal compulsion for private carriers to operate as common carriers, *see, e.g.*, Comcast Comments at 62, but the Commission could provide such notice if circumstances warranted in the future. In addition, the Commission would need a record demonstrating a threat of monopoly rents to justify any such mandate. *See supra* n.1.

<sup>20</sup> *See* FNPRM ¶ 257 n.671.

<sup>21</sup> As an alternative to seeking forbearance from the statutory requirements, an ILEC that sought to discontinue a common carrier BDS offering presumably could seek discontinuance authorization under Section 214, at which point the Commission could evaluate whether it would be in the public interest to allow the ILEC to offer BDS on a private carrier basis subject to the commercial reasonableness framework.

<sup>22</sup> *See, e.g.*, Letter of Rebecca Murphy Thompson, CCA, to Marlene Dortch, FCC, GN Docket No. 14-28, WT Docket No. 05-265, at 3 (filed Jul. 20, 2016).

found that doing so served the public interest.<sup>23</sup> Given that providers that operate on a private carrier basis are non-dominant (with the possible exception of Verizon to the degree it continues to assert its private carriage classification for some arrangements), they do not possess the sort of market power that gives rise to foreclosure concerns, and in any event, the commercial reasonableness standard and the multifactor test described above are more than adequate to ensure good-faith negotiations. Moreover, competitive wireless carriers' concerns about the current data roaming rules appear to center on the difficulty of establishing the unreasonableness of *rates* under those rules, whereas in this context, the goal would be to ensure *access* (as the record contains no hint that competitive BDS providers charge unreasonable rates). In short, to the extent the Commission seeks to ensure that competitive BDS providers offer wholesale service on a commercially reasonable basis—as opposed to seeking to use the data roaming standard as a rate-regulation mechanism—the wireless rules offer a constructive model.

In conclusion, although Comcast does not believe it is necessary to subject private carriers to any regulation in the increasingly competitive BDS marketplace, a baseline duty to deal for private carriers would address one of the issues raised in this proceeding and may be found to be in the public interest. Judicial precedent indicates that a commercial reasonableness standard should be sustainable as a legal matter, and pursuing such an approach would have the added benefit of avoiding a needless legal battle over whether the Commission can simply “deem” providers to be common carriers or compel them to operate as such notwithstanding the absence of any evidence of market power.

Respectfully submitted,

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<sup>23</sup> While some parties assert that Verizon remains dominant in providing packet-based services some markets, the Commission has proposed to rescind the earlier “deemed granted” forbearance from Sections 201 and 202. *See* FNPRM ¶ 517.