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EX PARTE

September 16, 2016

VIA ECFS

The Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143, WC Docket No. 05-25; WC Docket No. 15-247, RM-10593

Dear Ms. Dortch:

Uniti Fiber,¹ a provider of infrastructure solutions, including cell site backhaul, has been following the Commission's efforts to reform its framework for regulation of Business Data Services ("BDS"). As the Commission appears close to completing its review of the substantial record in this proceeding, Uniti Fiber believes it is imperative that, as a competitive fiber provider ("CFP") it share its perspective on the impact some proposals in the record would have on Uniti Fiber and other similarly situated CFPs on the front lines of competition through broadband deployment.

Uniti Fiber is a leading provider of infrastructure solutions, principally cell site backhaul. Uniti Fiber delivers customized technology and access-agnostic solutions to carriers, enterprises, community and government institutions. Uniti Fiber's growing infrastructure spans approximately 590,000 fiber strand miles connecting more than 5,200 customer locations.

Uniti Fiber, like other CFPs, is concerned about the proposals regarding which market participants should have their pricing regulated if under the Commission's new regulatory framework a particular market is determined to be non-competitive.² Uniti Fiber's principal concern surrounds

¹ CS&L acquired PEG Bandwidth, LLC on May 2, 2016 and Tower Cloud, Inc. on August 31, 2016. Uniti Fiber is the integrated operations of PEG Bandwidth, LLC and Tower Cloud, Inc.

² Since Uniti Fiber operates exclusively in markets where it faces competition with numerous other fiber providers it is not taking a position on how the Commission should define particular

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proposals that would impose pricing rules on CFPs, and particularly in the mobile wireless backhaul market.³ These proposals turn nearly forty years of Commission precedent on its head, are unnecessary, and would deter competitive fiber deployment, therefore undermining the Commission's objectives in promoting competition.

As other CFPs have explained,⁴ regulating the rates of CFPs would not serve the public interest for the following reasons:

- Rate regulation is unnecessary because CFPs like Uniti Fiber face competition — at a minimum from the ILEC — at essentially every location served, and therefore already sell at competitive prices. Even where a CFP is the sole fiber provider to a cell site, that business is always awarded pursuant to a highly competitive bidding process and following arm-length negotiations with the wireless carrier(s) being served; so its pricing and all other terms and conditions for that location are necessarily competitive.
- Regulating CFP pricing, including subjecting to CFPs to a benchmark, departs from decades of Commission precedent encouraging competitive entry through light touch regulation.
- CFPs typically do not provide services on an element by element basis similar to how ILECs are required to provide services under the Commission's existing special access framework. CFPs instead sell their customers solutions that usually consist of various services and cross multiple ILEC boundaries, particularly in the mobile wireless backhaul market. Indeed, such projects involve fiber builds to anywhere from dozens to many hundreds of cell site locations spanning multiple states. Uniti Fiber has no practical way to deconstruct its complex solutions into the discrete service elements to which pricing benchmarks in each ILEC's territory would apply. The mere attempt to do so would increase its costs and create uncertainty, thus leading to the abandonment of construction projects that would otherwise advance competition.
- Regulatory uncertainty increases CFPs' cost of investment. Therefore an approach that leaves uncertain whether CFP solutions exceed those of a benchmark based on the ILEC's rates or costs would increase the CFP's costs and discourage CFPs from investing in new facilities.

markets and what competitive thresholds it should adopt to assess the competitiveness of those markets.

³ See Joint Initial Comments of CenturyLink, Inc. et al, at 69 (filed June 28, 2016).

⁴ See *Ex Parte* Letter from E. Branfman, Counsel for Lumos Networks Corp. (filed Aug. 29, 2016); *Ex Parte* Letter from E. Branfman, Counsel for Wilshire Connection LLC (filed Aug. 25, 2016); Joint Reply Comments of Lumos Networks Corp. and Lighttower Fiber Networks I, LLC, et al (filed Aug. 9, 2016) ("Lumos/Lighttower Reply Comments"); *Ex Parte* Letter from E. Branfman, Counsel for Lighttower Fiber Networks I, LLC et al. filed Aug. 3, 2016); Initial Comments of Lighttower Fiber Networks I, LLC, et al (filed June 28, 2016) ("Lighttower Initial Comments").

- CFPs have much different cost structures than the ILECs so that there would be no legal basis to use the costs of the ILEC to regulate CFP pricing.

CFPs Virtually Always Face Competition from the ILEC. Similar to other CFPs, Uniti Fiber is subject to competition at virtually every location served, including the ILEC. If the Commission elects to regulate the ILEC's rates, or regulate such rates in certain markets based on a competitive analysis, there would be no need to regulate CFPs' rates because no CFP could demand a higher price than the ILEC unless providing additional value.⁵ Verizon, which is advancing a proposal to subject certain competitors to regulation of their pricing, recognizes that "ordinarily, if there is a dominant provider of service in a market, subjecting only that provider to benchmarks would ensure just and reasonable rates" because "[i]f the dominant provider's rates are regulated, competitive providers would be expected to match or undercut those rates in order to attract customers."⁶

Nor would regulation of CFP pricing be appropriate even where the CFP is the only provider at a wireless carrier cell site. Even where Uniti Fiber bids to provide backhaul to rural cell sites, it always faces competition, typically from at least the ILEC. In such circumstance, the rate charged at that site was awarded under a highly competitive bidding process and with arms-length negotiations with the wireless carrier customer; so its pricing and all other terms and conditions for that location are constrained by such competition.

Neither CenturyLink nor Verizon offer a valid reason for departing from decades of Commission precedent that refrained from regulating competitors' pricing. As the Commission has historically recognized, "firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act ...[without] los[ing] ... market share as ... customers sought out competitors whose prices and terms are more reasonable."⁷

The Commission Should Retain its Light Touch Regulatory Regime for Competitors. The Commission has acknowledged a preference for competition, finding that "competition is best. Where competition exists, there is little for government to do except to maintain the traditional oversight of telecommunications services, because competition is the single best way of ensuring that customers benefit."⁸ For this reason, the Commission has long refrained from regulating new

⁵ See Lightower Initial Comments at 3-4, 5, 9-10; *E.g.*, Initial Comments of Birch Communications, Inc. *et al.* at 59 (filed June 28, 2016).

⁶ Initial Comments of Verizon, at 17 (filed June 28, 2016).

⁷ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, ¶ 88 (1980).

⁸ *In the Matter of Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *Investigation of Certain Business Data Services in 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, Tariff Investigation Order and

entrants to the same extent as incumbents.⁹ It did so because regulating pricing of competitive carriers in the same way dominant carrier pricing was regulated would “nullif[y] many consumer benefits that competition produces” including raising the costs for new entrants to compete and increasing the incumbent’s ability to use regulation to “harass[] and delay” competitive entry.¹⁰

Regulation of CFP Pricing Imposes New Burdens and Costs that CFPs are Ill-Equipped to Handle.

Unlike ILECs, CFPs are not organized to establish their prices based on price caps, rate caps, benchmarks or other methods of regulating CFP pricing. Uniti Fiber’s pricing systems would have to be modified to comply with any applicable benchmarks. Compliance with such regulation would impose significant new costs.

Further, Uniti Fiber does not sell services or elements, but provides its multi-location customers with complex solutions that would make it impossible in most circumstances to determine the applicable benchmark. These solutions may include virtual LAN services, Internet access, and diversity, frequently to customers with multiple locations that cross multiple states and ILEC territories. Uniti Fiber, like other CFPs typically, and based on customer preference, sells these solutions as a unified package and not element by element. Nor does Uniti Fiber typically vary pricing site by site as costs vary from location to location and state by state. Determining whether a solution offered to a particular customer meets an applicable pricing benchmark would be a daunting task that would discourage Uniti Fiber and other CFPs from selling such solutions.

Regulation of CFP Pricing Leads to Uncertainty and Discourages Investment. The absence of a direct correlation between CFP solutions and ILEC services and elements that would form the basis of a benchmark for CFP pricing would also create uncertainty regarding CFP compliance. This would likely impede investment in new facilities.

Like other CFPs, most new services that Uniti Fiber provisions require some new construction. Like other CFPs, Uniti Fiber spends a substantial portion of its revenue on capital expenditures, predominantly construction to deploy and obtain fiber (and thus fresh competition) to a new customer or new customer location. Before bidding on projects that require new fiber deployment, Uniti Fiber analyzes the potential for return on its investment, including the payback period. As with other firms that build fiber networks, Uniti Fiber will only bid projects where it can predict a return on investment meets a target tied to exceeding the cost of capital.¹¹ Imposing additional regulatory compliance costs changes that calculation, by adding uncertainty, which may raise the cost of capital or reduce likely revenue. As a result there are likely to be projects that would be abandoned or never bid on in the first place because the return on investment is insufficient.

Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4725, ¶ 5 (2016) (“*Business Data Services FNPRM*”).

⁹ *Competitive Common Carrier Services*, 85 FCC 2d at ¶ 97.

¹⁰ *Id.*, ¶ 99.

¹¹ Uniti Fiber’s cost of capital is much higher than for ILECs or incumbent cable operators.

There is No Legal Basis for Regulating CFP Pricing Based on ILEC Costs. The Commission should decline to adopt any framework that subjects CFP pricing to a benchmark based on ILEC existing rates.¹² Typically the Commission regulates a carrier's pricing because it determines that rates in excess of a particular threshold are unjust and unreasonable, relative to the providing carrier's costs.¹³ But if a benchmark is based on an ILEC's historical rates and then imposed on a CFP, with no consideration of the CFP's cost and other differences between the ILEC and CFP's cost structures, the Commission would be unable to justify its regulation of CFP pricing by showing that the CFP's rates in excess of the benchmark are unjust and unreasonable.¹⁴

This is particularly problematic because CFPs have much higher costs than ILECs.¹⁵ CFPs pay higher franchise and right-of way fees and pay building access fees when ILECs typically do not have to pay any fee at all. CFPs typically pay more for labor and fiber optic cable due to the smaller scale on which they operate. And more importantly the ILECs have extensive ubiquitous distribution networks that contain poles and conduit over which they exercise control or at least joint control. ILECs thus have lower costs to extend their networks since their networks tend to reach more places to begin with and they control the attachment of their cable to poles and conduit. CFPs, however, must negotiate pole attachment rights, pay extensive make ready charges and incur substantial delays while ILECs rearrange existing facilities where needed to accommodate new CFP attachments. These higher costs would not be captured under a strict application of an ILEC-based cap on pricing or benchmark.

For these reasons, the Commission should refrain from regulating CFP pricing in any order or rules it issues regarding the marketplace for Business Data Services.

¹² Initial Comments of Sprint Corp. at 66-70 (filed June 28, 2016).

¹³ See e.g., *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd. 4524, 4531 ¶ 38 (1991) (adopting "flexible cost-based approach" for evaluating whether rates were just and reasonable).

¹⁴ See *AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988) (FCC rules arbitrary when seemed to "guarantee the regulated company an economic loss."); *FPC v. Hope Nat. Gas*, 320 U.S. 591, 603 (1944) (The "investor ...has a legitimate concern with the financial integrity of the company whose rates are being regulated ... including that "there be enough revenue ... for operating expenses ...[and] the capital costs of the business." Returns should be "commensurate with returns on investments in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise ... to maintain ...credit and attract capital").

¹⁵ See Lighttower Initial Comments at 14-15.

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Respectfully submitted,

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