



September 21, 2016

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
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 Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593*

Dear Ms. Dortch:

On August 16, 2016, AT&T filed a written *ex parte* presentation in the dockets captioned above in which it purported to summarize an August 12 meeting with Commission staff from the Wireline Competition Bureau and the Office of the General Counsel.

Though the purpose of the meeting appears to have been the presentation of a PowerPoint deck discussing “BDS X-factor Issues” prepared by an economic consulting firm, AT&T inserted in its transmittal letter for the deck a puzzling broadside against the Ad Hoc Telecommunications Users Committee. Specifically, AT&T’s written summary of its *ex parte* meeting referred to the “Ad Hoc Telecommunication [sic] Users Committee’s proposal for using fully-distributed accounting costs based on stale and economically arbitrary allocation factors and depreciation schedules,” which AT&T apparently believes are “inappropriate for estimating any required reset to current BDS prices.” AT&T also claimed that the “accounting machinations advanced by Ad Hoc are antithetical to the concept of economic value or the purpose of price cap regulation” and that “Ad Hoc’s analysis would suggest that all buildings over 30 years old should be rent-free to their tenants because such buildings are fully depreciated on an accounting basis.”

Ad Hoc has not, however, made any proposal like that described by AT&T. Ad Hoc has not advanced any “accounting machinations,” “allocation factors,” or “depreciation schedules” nor has it proposed using fully-distributed accounting costs to “reset” BDS prices, which may explain AT&T’s failure to cite in its letter any Ad Hoc filings (or, for that matter, any other filings in the record for these dockets).<sup>1</sup>

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<sup>1</sup> Ad Hoc’s proposal for resetting BDS prices is clearly described in its Reply Comments and is based upon a traditional analysis of productivity and the continued application of the price cap rules. See Ad Hoc Reply Comments, filed August 9, 2016, at 12-17 and supporting declaration by Ad Hoc’s economic consultant Susan M. Gately.



Ad Hoc could therefore ignore AT&T's letter as the result of a simple mistake regarding the content of Ad Hoc's pleadings or the identity of whichever party in fact made these arguments (though the Committee was unable to identify any party making such arguments). But the role of accounting costs under the price cap rules is important enough that all parties should have a clear understanding of it and should analyze properly Ad Hoc's statements about it. Accordingly, Ad Hoc offers the following information in response to AT&T's apparent confusion regarding Ad Hoc's pleadings in this proceeding.

By way of reminder, Ad Hoc pointed out in its Reply Comments that the price cap rules do not (and, indeed, cannot) prescribe the rates that incumbent local exchange carriers ("ILECs") like AT&T charge for interstate access services such as business data services ("BDS").<sup>2</sup> The price cap rules instead establish a voluntary "safe harbor" for rate levels (sometimes referred to as a "no suspension zone") within which an ILEC's tariffed rates will not be subject to challenge and/or suspension by the Commission. Instead of ordering ILECs to charge "safe harbor" rates, which would constitute a rate prescription, the Commission's rules create an incentive for ILECs to charge "safe harbor" rates voluntarily, by permitting ILECs to earn much higher profits than they could under traditional rate of return regulation (hence the term "incentive regulation"). But the rules also incent ILECs to charge "safe harbor" rates via the threat of a formal rate suspension and tariff investigation if an ILEC were to attempt to tariff rates higher than the "safe harbor" levels.

The further notice of proposed rulemaking ("FNPRM") in this proceeding<sup>3</sup> proposed to abandon tariff filings as a before-the-fact or *ex ante* price caps enforcement mechanism and to use instead an unspecified, customer-initiated, after-the-fact or *ex post* rate challenge process, in effect outsourcing the FCC's enforcement responsibilities to BDS customers.

Ad Hoc's Reply Comments observed that such an approach would be both unfair and counterproductive. It would be unfair because it would impose upon customers the burden of policing the ILECs but without the statutory tools and powers for doing so that are available only to the FCC. It would be counterproductive because it would not create the same compliance incentive as the *in terrorem* effect of a potential FCC rate investigation. Ad Hoc also pointed out that the FNPRM's proposal presumes that customers would have sufficient information about a carrier's costs (which, under current legal standards, are a necessary part of any *ex post* process like the one proposed in the FNPRM) when in fact the Commission has systematically eliminated all of the rules requiring ILECs to make such information available. Ad Hoc stated that,

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<sup>2</sup> Ad Hoc Reply Comments at 6-12.

<sup>3</sup> *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*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016) ("FNPRM").



under these conditions and for these purposes, a customer-initiated process like that contemplated by the FNPRM is nothing but a Potemkin village.

In order to preserve the existing price cap incentives for BDS providers to keep prices at reasonable levels, Ad Hoc in its Reply Comments urged the Commission to specify certain requirements for any *ex post* customer-initiated process to ensure that such a process is sufficiently robust and allocates procedural burdens fairly. Those requirements included (1) the availability of refunds for past overcharges, not merely rate reductions on a going forward basis, (2) a detailed specification of the cost and cost allocation data that carriers would be required to produce in order to justify rates above the “safe harbor” level, (3) a requirement that providers justify any inconsistency between those data and past trends in costs and cost relationships established by previously-filed ARMIS data or showings in interconnection negotiations or state proceedings under Section 251, and (4) holding any rate increases in abeyance pending resolution of a rate challenge.<sup>4</sup>

If these requirements are what AT&T was attempting to target in its *ex parte* filing, then its hyperbolic mischaracterization of them merely confirms that Ad Hoc was correct to identify them as effective measures for incenting BDS providers to charge rates consistent with the Commission’s price caps rules, thereby benefitting carriers and customers alike by obviating the need for *ex post* challenges.

Sincerely,

A handwritten signature in black ink that reads "Colleen Bortley". The signature is written in a cursive, flowing style.

cc: Pamela Arluk  
William Dever  
Justin Faulb  
William Kehoe  
Christopher Koves  
Omar Nayeem  
Eric Ralph  
Shane Taylor

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<sup>4</sup> Ad Hoc Reply Comments at 10-11.