



The Internet & Television Association
25 Massachusetts Avenue, NW | Suite 100
Washington, DC 20001
(202) 222-2300

Steve Morris
Vice President &
Associate General Counsel
o (202) 222-2454 e smorris@ncta.com

September 27, 2016

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

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

Dear Ms. Dortch:

On September 23, 2016, Jennifer McKee and the undersigned of NCTA – The Internet & Television Association (NCTA), Michael Pryor of Cooley LLP, David Don of Comcast, Alex Hoehn-Saric and Maureen O’Connell of Charter Communications, Jennifer Prime of Cox Communications, and Jerry Lambert of Mediacom Communications (collectively the NCTA Group), met with Deena Shetler, Eric Ralph, Pam Arluk, Bill Kehoe, and Rhonda Lien of the Wireline Competition Bureau and William Dever of the Office of General Counsel to discuss NCTA’s September 14, 2016 submission in the above-referenced proceedings.¹

The NCTA Group explained that there is substantial evidence in the record that the BDS marketplace is intensely competitive. Hundreds of competitive providers of all types – cable operators, competitive fiber providers, and traditional competitive LECs – have entered the BDS marketplace and invested billions of dollars in new facilities.² As a result of this competition,

¹ See Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 (filed Sept. 14, 2016) (NCTA Proposal).

² Indeed, in the same week that the expert economist representing companies like Level 3 and Windstream argued that extensive new regulation is needed because it is virtually impossible for his clients to construct new facilities, *see* Supplemental Reply Declaration of Jonathan Baker, WC Docket No. 16-143 (filed Sept. 21, 2016) at 3-8, executives from those same companies have been clearly telling the media and Wall Street that they are significantly expanding their networks and plan to continue doing so more than ever before. Fierce Telecom, *Level 3’s Patel Says 5G Backhaul Represents a Good Fit for Our Metro Fiber Network* (Sept. 16, 2016) (Level 3’s Chief Financial Officer Sunit Patel stated that the company is “looking to build more and more fiber in the metro every year, connecting a higher number of buildings every year than we have historically in every region.”); Press Release, *Windstream Expands Metro Fiber Network in Minneapolis* (Sept. 21, 2016) (Windstream announced “a major expansion of its advanced metro fiber network in Minneapolis. Windstream’s expansion will provide the area’s growing business community with world-class fiber and fixed-wireless infrastructure that connects even more local data centers and commercial buildings with Windstream’s high-speed, highly available nationwide fiber network.”).

incumbent LECs have lost substantial market share and prices for all types of BDS have been declining. Any suggestion that radical new regulation is warranted because the BDS marketplace is broken cannot be reconciled with this overwhelming evidence of real world investment and competition.

In the face of this evidence, there is no basis on which the Commission could adopt the proposal for BDS regulation submitted by Verizon and INCOMPAS, which would find that BDS is noncompetitive in 99% of the country. The breadth of regulation proposed is completely unjustified by the record and imposing rate regulation in areas where competitive providers are investing in facilities and competing for business customers would be contrary to sound economic theory and decades of Commission policy.³ These flaws in the Verizon/INCOMPAS proposal are compounded by the draconian regulation that would apply in any area deemed noncompetitive. It is simply not plausible to think the Commission could cut rates by 20 percent or more across virtually the entire BDS market, as Verizon and INCOMPAS propose, without depressing investment in this marketplace for years to come.

Rather than adopt the Verizon/INCOMPAS proposal, the NCTA Group explained that the NCTA Proposal was far more appropriate for regulating today's BDS marketplace. The NCTA Proposal attempts to identify areas where there is no investment or competition today and where future investment and competition are unlikely to emerge. In these areas, business customers are most likely to benefit from federal regulation, provided such regulation accounts for the higher costs of serving such areas. By focusing rate regulation solely on companies that have market power, the NCTA Proposal is fully consistent with decades of Commission precedent and well-established economic principles.⁴ Such an approach is far more likely to withstand judicial scrutiny than the Verizon/INCOMPAS proposal, which ignores the substantial evidence of competition in the record, upends decades of successful Commission policy, and is not grounded in meaningful economic analysis.

We also discussed various implementation issues that would arise if the Commission were to adopt the NCTA Proposal. As a general matter, the NCTA Proposal would be far easier to implement than the Verizon/INCOMPAS proposal because regulation would apply in several thousand census tracts rather than hundreds of thousands of census blocks. In addition, because regulation would apply only to legacy services provided by incumbent LECs, the Commission could rely on its existing price cap regime and would not need to create an entirely new and untested regulatory regime for Ethernet services.⁵ The NCTA Group expressed its willingness to

³ See, e.g., Letter from Joseph Farrell, et al., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 at 2 (filed Sept. 14, 2016) (Economists' Letter) ("[W]e urge the Commission to adhere to widely accepted principles of regulatory economics that enjoy broad support in the record and in the economic literature by adopting a competitive market test targeted squarely at combating supracompetitive rents in entrenched monopoly markets, rather than regulating markets with multiple facilities-based competitors present.").

⁴ *Id.* at 3 ("As commenters across the spectrum rightly acknowledge, the rationale for ex ante rate regulation hinges entirely on protecting customers from a dominant provider's abuse of market power; in turn, there is no plausible argument for regulating BDS providers that lack market power.").

⁵ As AT&T has demonstrated, the benchmark regime proposed by Verizon and INCOMPAS is completely arbitrary and should be a non-starter for the Commission. Letter from Christopher Shenk, Counsel for AT&T, to

continue working with the Commission staff on other implementation issues, such as development of an expedited complaint process and updates to the Form 477 to capture information on the availability and adoption of BDS.

The NCTA Group reiterated that unwarranted BDS regulation would hinder, not help, the deployment of fiber networks that will be used for 5G backhaul. The record demonstrates that 5G backhaul will require substantial deployment of new fiber facilities and that regulation of BDS rates will discourage such deployment.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: D. Shetler
E. Ralph
P. Arluk
W. Kehoe
R. Lien
W. Dever