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Via Electronic Filing

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

Re: *Ex Parte* Letter: *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 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 Service*, RM-10593

Dear Ms. Dortch:

On the eve of resolving a proceeding that has been pending at the Federal Communications Commission ("FCC" or "Commission") for more than a decade, AT&T — the only nationwide wireless carrier to oppose reform of the broken business data services ("BDS") marketplace — makes a last-ditch effort to impede action on BDS reform. Sprint Corporation ("Sprint") hereby responds to one of the many flawed arguments in AT&T's recent submission in the above-captioned proceedings. AT&T asserts that the record provides no "legitimate economic or evidentiary basis" for the proposal that BDS at or below 50 (or 100) Mbps be presumed non-competitive.[1] AT&T instead contends that the "marketplace for non-Ethernet services below 50 Mbps is generally competitive" and that the "marketplace for Ethernet BDS is competitive for all bandwidths nationwide."[2]

Below, Sprint again demonstrates that the marketplace for lower-bandwidth BDS offerings is far from competitive and that the Commission therefore should adopt a presumption that this market is non-competitive. Sprint also reiterates that the Commission can address the remote possibility that the marketplace for such services in a particular area is effectively

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1 Letter from Christopher T. Shenk, Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 16 (filed Sept. 16, 2016) ("AT&T Ex Parte").

2 *Id*.

competitive by adopting a "safety valve" that would exempt from pricing regulation those few buildings where competition obviates the need for such constraints.

The Competitiveness of the BDS Marketplace Should Be Assessed on a Technology-Neutral Basis. AT&T apparently ignores the Commission's goal of adopting a "technology-neutral framework [that] will apply depending on the classification of a specific market as either competitive or non-competitive."[3] Instead, AT&T implies that the FCC should reverse course at this late date and review Ethernet offerings separately.[4] The Commission should recognize this tactic for what it is — just another last-minute attempt to forestall much-needed BDS reform.

As an initial matter, the record reflects widespread support for use of a technology-neutral framework in assessing the BDS marketplace.[5] Indeed, even the incumbent LECs acknowledge that such a system is appropriate. For example, NTCA concurs with Verizon and INCOMPAS that the Commission should "'promptly adopt a permanent framework for regulating *all* dedicated services in a technology neutral manner.'"[6] Similarly, in their joint reply

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[3] *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, ¶ 260 (2016) ("FNPRM"); *see also id*. ¶ 159 ("[T]he Further Notice seeks to develop a technology-neutral framework that no longer classifies BDS through the legacy prism of traditional services and company classifications.").

[4] *See*, *e.g.*, AT&T Ex Parte at 16 (separately referring to "Ethernet BDS" and "non-Ethernet BDS").

[5] *See* Comments of the Ad Hoc Telecommunications Users Committee at 9 (filed June 28, 2016) ("In the FNPRM, the Commission properly emphasizes that its approach to regulating BDS must be 'technology neutral.'"); Comments of Public Knowledge, Open Technology Institute at New America, Common Cause, Next Century Cities, Engine, and Schools, Health & Libraries Broadband Coalition at 5 (filed June 28, 2016) ("[T]he Commission's regulatory framework for BDS should be technology neutral and provider neutral."); Reply Comments of T-Mobile USA, Inc. at 2 (filed Aug. 9, 2016) ("The Commission's new regulatory framework for BDS should be technology neutral and include Ethernet and other packet-based BDS."). Unless otherwise noted, all comments and declarations cited herein were filed in WC Docket No. 05-25.

[6] Reply Comments of NTCA – The Rural Broadband Association at 2 (filed Aug. 9, 2016) (quoting Letter from Kathleen Grillo, Senior Vice President, Public Policy & Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (April 7, 2016)).

comments, the Mid-Size ILECs assert that the Commission should "adopt a framework that . . . is technology neutral . . ., while still being administratively feasible."[7]

Based on well-supported considerations of technological neutrality, the Commission correctly determined that "packet and TDM business data services are in the same market" for purposes of its competition analysis and proposed a single definition of BDS that covers all technologies.[8] These actions recognize that the capacity of the connection (rather than the technology used to deliver the service) is most germane in determining whether a connection is part of a particular product market.[9] Accordingly, the appropriate product market for consideration in the Commission's competitive analysis is BDS (both packet-based and TDM) further delineated by capacity (*e.g.*, at or below 50 Mbps, above 50 Mbps to 1 Gbps, and above 1 Gbps).

The Record Demonstrates that the Marketplace for BDS At or Below 50 Mbps is Not Competitive. The record is replete with data-driven evidence that there is virtually no competition in the BDS market for services with capacities at or below 50 Mbps.[10] For example, Dr. Rysman concluded that more than 77 percent of all locations with BDS demand are served by only one provider, about 22 percent have two providers, and only 0.1 percent are served by four or more.[11] In other words, monopolistic or duopolistic conditions characterize virtually the entire BDS marketplace. Dr. Baker similarly concluded that "[n]ationwide, 77.3% of buildings in the FCC's data have one in-building provider and almost all the rest (20.8%) have only two in-building providers."[12] At the census block level, Dr. Rysman found that over 95 percent of all

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[7] Joint Reply Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp. at 67 (filed Aug. 9, 2016).

[8] FNPRM ¶¶ 197-98 (regarding packet-based and TDM BDS), 279 (regarding proposed BDS definition).

[9] Comments of Sprint Corporation at 16 (filed Jan. 27, 2016; revised public version submitted on Apr. 14, 2016) ("Sprint Jan. Comments"); Reply Comments of Sprint Corporation at 12-13, 59 (filed Feb. 19, 2016; revised public version submitted on Apr. 14, 2016) ("Sprint Feb. Reply Comments").

[10] *See* Comments of Sprint Corporation at 17-20 (filed June 28, 2016) ("Sprint June Comments"); Reply Comments of Sprint Corporation at 23-26 (filed Aug. 9, 2016) ("Sprint Aug. Reply Comments"); Letter from Jennifer P. Bagg, Counsel, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at Attachment (filed Sept. 28, 2016) (summarizing the record regarding the lack of competition for BDS below 50 Mbps).

[11] Dr. Marc Rysman, *Empirics of Business Data Services* (rev. June 2016) at 15, Table 7 ("Rysman Rev. White Paper").

[12] Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 44 (filed Jan. 27, 2016; revised public version submitted on Apr. 14, 2016) ("Baker Decl."); *see also* Declaration of Stanley M. Besen and Bridger M. Mitchell ¶¶ 25-

census blocks where BDS is sold have at most two facilities-based providers, over 68 percent of blocks have one, and only about 1 percent have at least four.[13] Drs. Besen and Mitchell likewise found that more than 80 percent of all census blocks with BDS demand are served by only one provider, while four or more competitors are present in only 1.3 percent of census blocks.[14] Because these statistics include all BDS offerings, including higher bandwidths at which competition is more variable, the state of competition for BDS at or below 50 Mbps necessarily is even worse than these aggregated numbers suggest. This must be the case given that incumbent LEC revenues, even after accounting for Ethernet, account for around 82 percent of BDS revenues for 0-10 Mbps service and around 80 percent of the revenues for 10-50 Mbps service.[15]

Empirical results also establish that the rates charged by incumbent LECs decline substantially with rivalry, and thereby confirm that sellers can leverage the high concentration of the BDS marketplace to exercise market power. As the FCC's outside econometrician Dr. Rysman reported, "[r]egressions of ILEC rates for DS1 and DS3 lines show that competition in the building, and the census block, consistently lowers prices in economically and statistically significant ways."[16] After applying cluster robust-errors to Dr. Rysman's analysis, FCC staff confirmed that "it remains the case that overall the regressions show competition lowers ILEC prices by an amount that is statistically distinguishable from no effect."[17] Critically, after refining Dr. Rysman's regression specifications, Dr. Baker also reported that "ILEC prices decline substantially with rivalry" — by as much as "51% according to one estimate and 42% according to another" for DS1 connections.[18] Contrary to AT&T's claims, these results remain "valid," "informative," and biased *against* a finding of market power.[19]

Instead of contending seriously with these findings, AT&T again resorts to its tired, disingenuous argument that the mere presence of any type of nearby non-incumbent fiber

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26, Table 1, appended as Attachment 1 to Sprint Jan. Comments (revised public version submitted on Apr. 11, 2016) ("Besen/Mitchell Decl.").

13 Rysman Rev. White Paper at 16-17, Table 9.

14 Besen/Mitchell Decl. ¶¶ 27-28.

15 *Id.* ¶ 41. If it is not the case that the lower capacity services have a greater impact on these market share results, then the only logical conclusion is that competition is less variable at higher capacities than currently reflected in the record.

16 Rysman Rev. White Paper at 3.

17 Federal Communications Commission Staff, *Update on the Use of Cluster-Robust Standard Errors in Business Data Services Regressions* at 3 (rel. Aug. 22, 2016).

18 Supplemental Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 17 (dated Sept. 21, 2016; filed Sept. 22, 2016) ("Baker Sept. Supp. Reply Decl.").

19 *Id.* ¶¶ 9-20.

facilities amounts to effective competition for BDS at every location across a geographic area. In particular, AT&T argues that the presence of "competitive facilities" such as fiber within 2,000 feet or half a mile of its network means that it is subject to effective competition.[20] Sprint and others have firmly and clearly established that a company with fiber cannot extend a last-mile lateral from any location along a fiber route quickly and inexpensively enough to discipline prices — especially in response to demand for BDS at low bandwidths.[21] As reiterated below, a party with fiber facilities would need to overcome numerous obstacles to deploy BDS to an individual location.

The record is clear that no company can build a lateral connection unless there is a splice point located in close proximity to the specific customer location in question, and operators of fiber links do not install splice points in every census block.[22] Moreover, construction feasibility limits are *far* shorter than the 2,000 feet for which AT&T advocates. Indeed, as Dr. Baker recently explained, the data on which the 2,000 feet figure relies is fundamentally flawed, as it "reports nodes used to interconnect with third-party networks, not splice points to which last-mile facilities can be connected," and "reflects entry conditions" of another age – not today.[23]

Even when a splice point is nearby, construction of a lateral still may not prove economically viable in light of the substantial cost and other barriers to deploying BDS to serve a particular location, such as building permits and access to rights of way.[24] The Commission correctly recognizes in light of these significant impediments that the "distances competitive

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20 AT&T Ex Parte at 18.

21 *See* Sprint Feb. Reply Comments at 20-31; Sprint June Comments at 9-11; Sprint Aug. Reply Comments of at 5-11; Comments of Birch Communications, Inc., BT Americas Inc., EarthLink, Inc., and Level 3 Communications, LLC at 32 (filed Jan. 27, 2016) ("Joint CLEC Jan. Comments"); Comments of TDS Metrocom, LLC at 21 (filed Jan. 27, 2016) (outlining impediments that have rendered buildout economically infeasible).

22 *See* Third Declaration of Matthew J. Loch ¶ 9, appended as Attachment A to Reply Comments of TDS Metrocom, LLC (filed Feb. 19, 2016) ("Although we have fiber in hundreds of census blocks, TDS CLEC only has splice points in approximately 10% of the census blocks that its fiber ring runs through.").

23 Baker Sept. Supp. Reply Decl. ¶ 6.

24 *See* Declaration of Ed Carey, appended as Exhibit C to Sprint June Comments; CostQuest White Paper #1, appended as Attachment A to Letter from Jennie B. Chandra, Vice President of Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC (filed June 8, 2015) ("CostQuest White Paper"); Comments of Cox Communications, Inc. at 11 (filed June 28, 2016); Comments of Birch Communications, Inc., EarthLink, Inc., and Level 3 Communications, LLC at 22-25 (filed June 28, 2016) ("Joint CLEC June Comments"); Comments of Windstream Services, LLC at 30-37 (filed Jan. 27, 2016) ("The barriers to building and extending fiber networks are high, including when a carrier may have an extensive fiber network in a metro area or within the geographic bounds of a single zip code.").

LECs are generally willing to extend their facilities to reach potential customers . . . are quite short," that competitive carriers cannot "connect their networks" to all locations "'near . . . their fiber transport facilities,'" and that barriers to entry "cannot be easily overcome," even in areas of high demand.[25]

The record provides no reasoned basis on which the Commission could abandon these findings. To the contrary, the record fully supports the conclusion that build-out barriers deter entry in many cases and nearly foreclose entry altogether in response to high rates for low bandwidth services.[26] For example, Level 3 has explained that it is "infrequently the case that

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[25] FNPRM ¶¶ 211, 227 (quoting Joint CLEC Jan. Comments at 7).

[26] While AT&T does not address this issue in its letter, Sprint also reiterates that the Ethernet over HFC ("EoHFC") data submitted in the record by certain large cable companies do not alter the conclusion that the marketplace for lower capacity BDS remains generally non-competitive. First, even cable providers agree that differences between cable networks and incumbent LEC networks render HFC-based services inferior to and only an occasional substitute for BDS. *See*, *e.g.*, Reply Comments of Windstream Services, LLC at 18-19 (filed Aug. 9, 2016) ("Windstream Aug. Reply Comments"); Joint CLEC Jan. Comments at 17-18; Comments of Comcast Corporation at 31-32 (filed June 28, 2016); Comments of Charter Communications, Inc. at 9 -10 (filed June 28, 2016) ("Charter Comments"); Comments of Cox Communications, Inc. at 9 (filed June 28, 2016) ("Cox Comments"); Comments of the National Cable & Telecommunications Association at 28 (filed June 28, 2016) ("NCTA Comments"). Second, cable providers report that construction and capacity constraints foreclose the possibility of offering EoHFC services at scale — and will continue to do so even as cable networks evolve to newer technological standards. *See*, *e.g.*, Cox Comments at 4, 17-19; NCTA Comments at iv, 27-30; Comments of the American Cable Association at 28 (filed June 28, 2016). Third, even ignoring the performance, construction, and network capacity constraints reported by the cable industry, ample data-driven analysis indicates that including EoHFC services in the competitive analysis does not change the conclusion that the vast majority of locations nationwide do not face sufficient competition to discipline prices. *See*, *e.g.*, Revised Supplemental Declaration of William P. Zarakas ¶¶ 9-10, 12, appended to Letter from Jennifer P. Bagg, Counsel, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Mar. 24, 2016; revised public version submitted on Apr. 14, 2016); Windstream Aug. Reply Comments at 15. Indeed, parties have established conclusively that the validity of the data analysis submitted in the record prior to submission of the EoHFC data is not altered by the cable data. *See*, *e.g.*, Revised Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶¶ 27, 32 (filed June 28, 2016; revised public version submitted on July 14, 2016) (The "validity of the estimation results I have presented . . . is not called into question by the data."); Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 44 (filed Aug. 9, 2016); Further Supplemental Declaration of William P. Zarakas ¶¶ 6, 9, 13, appended to Sprint Aug. Reply Comments ("While the inclusion of the supplemental cable data causes an increase in the total number of census blocks in which cable companies have deployed facilities capable of providing BDS, these data do not

Level 3 can deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or below[,]. . . because the distance between a customer location and a splice point . . . usually exceeds the construction feasibility limits."[27] Worse yet, the CostQuest study concludes that "an economically rational CLEC will not self-deploy to serve a single customer with less than 1 Gbps of capacity per building even if [the] building offers a more attractive option than wholesale lease payments . . . because the revenue hurdle is higher than the cross-over point in the build-versus-buy analysis."[28]

Marketplace realities underscore the validity of these accounts. As the Joint CLECs appropriately conclude, the "lack of successful and effective entry . . . suggest[s] that successful entry is slow or difficult" and "further confirms the limited prospects of future loop deployment."[29] In addition, as Dr. Baker explains, the purported ease of entry in the BDS marketplace cannot be squared with the incumbent LECs' "common practice" of "publish[ing] wholesale price lists on which prices vary by building," which "lead[s] to price variation across buildings within a Census block" and eviscerates the "claim that potential competition from nearby rivals constrains ILEC prices."[30]

The Commission Should Adopt a Presumption that BDS At or Below 50 Mbps Is Not Competitive. As described above, there is overwhelming evidence in the record justifying a presumption that the market for BDS offerings at or below 50 Mbps is non-competitive.[31] There also is widespread support for adoption of this presumption, although a number of parties actually urge the Commission to set the threshold at 100 Mbps.[32] Given the extremely limited number of circumstances in which three or four competitors offer service at or below either 50 or 100 Mbps, it would be more consistent with the FCC's stated goal of implementing an "administratively feasible test" to presume that these services are not competitive across the

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materially alter the results of my prior analyses – there are only one or two BDS providers present in the vast majority of census blocks.").

[27] Declaration of John Merriman on Behalf of Level 3 Communications, Inc. ¶ 6, appended to Joint CLEC June Comments.

[28] CostQuest White Paper at 2.

[29] Joint CLEC Jan. Comments at 32, 36.

[30] Baker Sept. Supp. Reply Decl. ¶ 7.

[31] *See also* Comments of Competitive Carriers Association at 3 (filed June 28, 2016) ("As the Commission has recognized and as the record evidence makes clear, competition for lower-capacity BDS is practically non-existent.").

[32] *See* Reply Comments of the Competitive Carriers Association at 3 (filed Aug. 9, 2016); Joint CLEC June Comments at 7, 46-47; Comments of TDS Metrocom, LLC at 10-12 (filed June. 28, 2016); Reply Comments of TDS Metrocom, LLC at 3 (filed Aug. 9, 2016); Comments of Windstream Services, LLC at 7, 32-33 (filed June 28, 2016); Windstream Aug. Reply Comments at 8-10, 22.

board.[33] As Sprint has discussed previously, the administrative burden of conducting an accurate competitive market test for lower-capacity BDS offerings would increase significantly should the Commission decline to adopt such a presumption. In particular, the Commission would need to either: (1) return to a location-based test for all BDS or (2) establish different competitive market tests for different BDS capacities, given the important differences in potential competitors' limited ability to supply new lower-capacity BDS lines.[34] To the extent the Commission is concerned that a presumption of non-competitiveness implies that "there are no areas where ILECs face competition for DS1 and DS3 services,"[35] it can and should adopt the "safety valve" that Sprint previously suggested.[36] This mechanism would allow "providers to rebut this presumption through a challenge process at the level of the individual location," thereby eliminating regulation in the few locations where competition for lower-capacity BDS actually exists.[37]

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In its filing, AT&T correctly notes that the "Commission is bound by the Administrative Procedure Act and can adopt rules only if they are supported by the evidentiary record in this proceeding."[38] Contrary to AT&T's claims, however, the record clearly establishes that the Commission has an ample basis for treating BDS at or below 50 (or even 100) Mbps as presumptively non-competitive in all areas, irrespective of the underlying technology. To do otherwise would require the Commission to ignore a robust record built upon the most extensive data collection in FCC history. Yet again, the Commission should ignore AT&T's attempts to divert the FCC from its goal of implementing well-reasoned, technology-neutral reforms that will repair the BDS marketplace.

Respectfully submitted,

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33 FNPRM ¶ 209; *see generally id*. (repeatedly seeking comment on the "administrative feasibility" of its proposals).

34 Sprint June Comments at 20-21.

35 AT&T Ex Parte at 19 (emphasis removed).

36 Sprint June Comments at 4, n.17.

37 *Id.* at 16, n.61.

38 AT&T Ex Parte at 3.