

November 4, 2016

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth 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 for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593

Dear Ms. Dortch:

CenturyLink, Inc. (“CenturyLink”) writes to address the treatment of special access transport (as opposed to last-mile “channel terminations”) in the above-referenced dockets. As detailed below, the record is bereft of evidence necessary to support the application of a rate reset or an annual X-factor to transport offerings, or the re-application of price caps to transport services in areas currently subject to pricing flexibility. The Commission therefore should exempt transport business data services (“BDS”) from its new regime or, in the alternative, issue a Further Notice of Proposed Rulemaking (“FNPRM”) to assemble a sufficient record on the treatment of BDS transport.

As CenturyLink and others have shown, there is insufficient record evidence to justify re-regulating transport services or subjecting them to mandatory rate reductions.¹ Rather, the record amassed thus far demonstrates that facilities-based transport competition is extensive and

¹ CenturyLink has also previously identified numerous problems with applying additional regulation and rate cuts to *any* DSn services. *See, e.g.*, Letter from Russell P. Hanser & Brian W. Murray, Wilkinson Barker Knauer, LLP, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 1-12 (filed Oct. 28, 2016) (“CenturyLink Oct. 28 Letter”).

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well-developed.² Competitive fiber rings have been built over the course of three decades, with more than twenty non-ILEC providers deploying competitive fiber transport facilities in some areas with BDS demand.³ When operating outside its incumbent footprint, CenturyLink routinely uses non-ILEC transport to carry traffic from channel terminations it purchased from an ILEC. Indeed, less than half of those transport circuits carrying traffic outside the ILEC wire center are provided by the ILEC. Even if there were a basis for subjecting channel terminations to the regulation contemplated by the Fact Sheet,⁴ there would be no rationale for subjecting the vibrantly competitive transport sector to such mandates. Even the most enthusiastic proponents of BDS regulation have recognized the folly of arguing that there is a lack of transport competition.⁵ Instead, they have focused their advocacy on last-mile channel terminations, as evidenced by their advocacy urging the Commission to assess competition on a “building-by-building” or “location-by-location” basis – an approach that necessarily would exclude any “route-by-route” assessment.⁶ This bifurcation of transport and channel terminations for analytical and rulemaking purposes is not surprising, given a long line of Commission precedent and longstanding business practices that maintain a firm distinction between these offerings.⁷

Notably, the portrayal of BDS transport competition in the current record may even be conservative, given the nature of the Commission’s data collection. That data collection, of course, was focused on channel terminations. Although the Commission (through the Wireline Competition Bureau) did ask CLECs to identify an element of a circuit as “channel mileage” or “local transport” (Table II.A.14), CLECs exercised discretion in terms of how to characterize these circuit elements, leading to a variety of responses that may have under-counted the extent of CLEC-deployed transport. Moreover, neither the original NPRM nor the analysis by the Commission’s expert, Dr. Marc Rysman, contains any meaningful discussion of transport – in fact, transport connections were removed entirely from Dr. Rysman’s analysis.⁸ Given the

² See, e.g., *id.* at 7-8. See also Letter from Mike Saperstein, Vice President, Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 1 (filed Oct. 28, 2016) (noting the “particularly competitive nature of the transport market”).

³ Letter from James P. Young, Sidley, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 4-11 (filed Oct. 25, 2016) (“AT&T Oct. 25 Letter”).

⁴ *Fact Sheet: Chairman Wheeler’s Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market* (Oct. 7, 2016) (“*Fact Sheet*”).

⁵ See AT&T Oct. 25 Letter at 5-7.

⁶ CenturyLink Oct. 28 Letter at 8.

⁷ See AT&T Oct. 25 Letter at 8-9.

⁸ See *id.* at 10. See also Revised Rysman Report at 6 (“My approach of aggregating to the level of the circuit rules out separate analysis of the transport market. In this paper, I focus only on the market for

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current record, then, there is simply no basis on which to regulate BDS transport in the same aggressive manner the Fact Sheet envisions for channel terminations. The Commission should accordingly limit any reform effort to the last-mile channel terminations that have been at the center of this proceeding.

To the extent the Commission is unwilling to exclude BDS transport from its new regime at this time, it must issue a further notice seeking additional data that will allow it to analyze the transport market segment more thoroughly. It is axiomatic that an agency “must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.”⁹ A rule that “runs counter to the evidence before the agency” is inherently arbitrary and capricious.¹⁰ Time and again, the Commission has recognized the importance of these principles and issued an order coupled with a further notice when faced with a record sufficient to resolve some but not all of the issues before it.¹¹ The Commission should, at most, follow its historic practice and issue a similar further notice here. Absent such action, the record simply does not provide a sound basis on which to further regulate BDS transport.

Critically, the Commission can commence a targeted FNPRM on the transport issue without jeopardizing its goal of implementing a new BDS framework beginning in July 2017.¹² An FNPRM adopted at the November 17, 2016 open meeting could call for comments to be filed in the mid-to-late winter, affording the Commission several months to reach and adopt conclusions as to transport in time for a July 1, 2017 effective date. In short, there is no tension

circuits provided to customers (sometimes called the channel termination market), although the transport market may also be interesting to study.”).

⁹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰ *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997-98 (D.C. Cir. 2008) (internal citations omitted); *see also, e.g., Northeast Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1128, 31 (D.C. Cir. 1984).

¹¹ *See, e.g., Closed Captioning of Internet Protocol-Delivered Video Programming et al.*, Second Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 29 FCC Rcd 8687 ¶ 15 (2014) (“[W]e proceed to this [*Order*] based on the ample record already compiled, including the additional comments filed recently in response to the public notice. In contrast, for those issues on which we do not have an adequate record for a decision, we seek further comment in the attached *Further Notice of Proposed Rulemaking*.”); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 ¶ 32 (2007) (adopting rules that did not reach certain parties because Commission lacked “an adequate record on which to decide whether such a prohibition [wa]s warranted” and adopting FNPRM “to develop such a record and, based on it, evaluate whether action is called for”).

¹² *See Fact Sheet* at 1 (stating that downward adjustment and X-factor reduction would be applied “beginning in July 2017”).

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between the goal of reaching a data-driven result and the goal of implementing a new BDS framework within the Commission's currently projected timeframe.

Please contact the undersigned with any questions.

Sincerely,

/s/ Russell P. Hanser

Russell P. Hanser

Brian W. Murray

WILKINSON BARKER KNAUER, LLP