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Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

The marketplace for special access and high-capacity broadband services, including Ethernet, has grown even more competitive in the nine years since the Commission first forbore from regulating these services. And that trend has accelerated since 2013—the only year for which the Commission collected data in its mandatory data collection. Faced with those facts, the Commission should reject recent calls to roll back forbearance and regulate these services.

First, the Commission cannot simply “reverse” a forbearance grant, despite what some parties say.¹ The Commission could re-regulate enterprise broadband services only by first satisfying the rulemaking requirements of the Communications Act and the Administrative Procedure Act. That requires a record based on current marketplace facts. And current marketplace facts—including developments since 2013—show that competition for enterprise broadband services is robust and growing more so.

Second, the Commission has no basis to penalize arbitrarily one set of competitors—the ILECs—by singling them out for regulation of their enterprise broadband services after years of forbearance. Regulating only ILEC Ethernet services—but not cable and other providers’ services competing for the same business customers—would give those other providers an unfair advantage and would deter competition and constrain investment incentives to the detriment of

¹ See, e.g., Letter from Thomas Jones, Willkie Farr & Gallagher LLP, Counsel for Birch Communications, Inc. *et al.* to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593, GN Docket Nos. 13-5 & 12-353 (Aug. 28, 2015); Letter from John T. Nakahata, Harris, Wiltshire & Grannis LLP, Counsel to Windstream Services, LLC, to Marlene H. Dortch, FCC, WC Docket Nos. 15-1 & 05-25, GN Docket Nos. 13-5 & 12-353, RM-10593 (July 27, 2015); Letter from Jennie B. Chandra, Windstream Corp., to Marlene H. Dortch, FCC, WC Docket Nos. 15-1 & 05-25, GN Docket Nos. 13-5 & 12-353, RM-10593 (July 31, 2015); Letter from Thomas Jones, Willkie Farr & Gallagher LLP, Counsel for TDS Telecommunications Corp., WC Docket No. 05-25, RM-10593, GN Docket Nos. 13-5 & 12-353 (June 22, 2015).

customers who benefit from the many high-capacity broadband services cable and others offer, services that have thrived free from unnecessary rate regulation.

A. Competition for Enterprise Broadband Services Is Robust and Continues To Grow Since the Commission’s Mandatory Data Collection

Although the Commission collected only 2013 data, the Commission must consider 2014 and 2015 marketplace developments to conduct a “comprehensive” competitive analysis.² An appendix attached to this letter contains profiles of enterprise broadband providers based on recently available information for these companies, including where available their 2014 and 2015 expansion plans. These companies’ public statements reconfirm that competition for special access and high-capacity services is robust and increasing. Of course, these competitive profiles are only examples. Competition is likely even greater than what these public sources reveal.

Cable operators continue to enter new markets and aggressively introduce alternatives to ILEC services. The enterprise-focused units of the nation’s largest cable operators—Time Warner Cable, Comcast, and Cox—are now the fifth, sixth, and eighth largest providers of Ethernet services in the United States, respectively.³

- *Comcast*—which describes its network as the “largest facilities-based last mile alternative to the phone company,” over which it provides a wide range of Ethernet and other enterprise broadband services to “businesses of any size”⁴— just announced it has formed a new business unit to provide enterprise broadband services to Fortune 1000 enterprise customers.⁵ Its most recent 10-K reported “continued growth in the number of customers receiving [its] Ethernet network and cellular backhaul services.”⁶ In the first quarter of 2015 alone, Comcast’s Business Services revenue “grew 21.4% to over \$1.1 billion,” which not only “accelerate[d] sequentially” but represented the “[h]ighest absolute dollar growth in the business’

² *Technology Transitions*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking ¶¶ 6, 8 & n.28, 132 & n.448, GN Docket No. 13-5, *et al.*, FCC 15-97 (FCC rel. Aug. 7, 2015); *see also Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, ¶ 13 (2012) (requiring parties to submit information to allow a comprehensive analysis of competition in the special access market).

³ Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015). Hyperlinks to this and all sources regarding the competitors profiled here can be found in the attached competitive profiles.

⁴ Comcast Website, *Comcast Business – The Comcast Network*.

⁵ Comcast Business Press Release, *Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises* (Sept. 16, 2015).

⁶ Comcast Corp., Form 10-K, at 59 (SEC filed Feb. 27, 2015).

history.”⁷ Comcast has stated it “continue[s] to expand the network” and “will continue investing in Business Services expansion.”⁸ In just the first eight months of 2015, Comcast has added new fiber in Vermont; eastern Connecticut; Portland, OR; Denver; northern California; and Salt Lake City.⁹

- *Time Warner Cable* recently reported “somewhere just north of 30% growth in [its] wholesale transport business,” and in the first half of 2015 reported increased capital expenditures to “expand its network to additional . . . commercial buildings and cell towers, including: . . . nearly 32,000 commercial buildings added to TWC’s network.”¹⁰
- *Cox* states “[c]arrier services is a big push for [Cox Business],” and that it has experienced ““double-digit growth again in the wireline last mile.””¹¹
- *Spectrum Business*—the recently renamed business unit of Charter Communications—states “[e]very day [it is] adding to . . . lit buildings,” and in the

⁷ Thomson Reuters StreetEvents, *Edited Transcript: CMCSA – Q1 2015 Comcast Corp Earnings Call*, at 6 (May 4, 2015) (statement by Comcast Corporation Vice Chairman and CFO Michael Angelakis); Comcast, *1st Quarter 2015 Results*, at 5 (May 4, 2015).

⁸ Thomson Reuters StreetEvents, *CMCSA – Q4 2014 Comcast Corp Earnings Call*, at 16 (Feb. 24, 2015) (statement by Comcast Corp. EVP and Comcast Cable President & CEO Neil Smit).

⁹ Comcast Business Press Release, *Comcast Business Extends Fiber Network To Bring Multi-Gigabit Ethernet Services to Three Communities in Sullivan County, New Hampshire, and Windsor County, Vermont* (Mar. 2, 2015); Comcast Business Press Release, *Comcast Business Launches 10 Gigabit-per-Second Ethernet Services Across Six Towns and Cities in New London County, Connecticut* (Mar. 30, 2015); Comcast Business Press Release, *Comcast Business Expands Fiber Network to Businesses Moving into Portland’s Central Eastside* (May 12, 2015); Comcast Business Press Release, *Comcast Expands Fiber Network Throughout the Denver Metro Area* (Apr. 7, 2015); Comcast Business Press Release, *Comcast Business To Expand Multi-Gigabit Ethernet in East Bay with \$2 Million Fiber Extension* (Apr. 6, 2015); Comcast Business Press Release, *New DataVaulting Service Based Inside Granite Mountain Combines Virtual with Physical Security* (July 22, 2015); Comcast Business Press Release, *Comcast Supports Local Business Innovation and Productivity with New High Speed Connections for Salinas Municipal Airport Business District* (July 28, 2015).

¹⁰ *Q1 2014 Time Warner Cable Inc. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 042414a5338998.798 (Apr. 24, 2014); Time Warner Cable, *Second-Quarter 2015 Earnings Summary*, at 10 (July 30, 2015).

¹¹ Carol Wilson, *Cox Biz Looks Beyond SMBs*, LightReading (Dec. 4, 2014) (quoting Cox Business SVP Steve Rowley).

last three years has invested more than \$800 million in capital expenditures for commercial services.¹²

- *Charter*, according to its FCC filings related to its proposed merger with Time Warner Cable and Bright House, states “[w]ithin 4 years of close, New Charter will invest at least \$2.5 billion in the build-out of networks into commercial areas within [its] footprint, beyond where [it] currently operate[s].”¹³
- *Cablevision* says its Lightpath unit “continues to be a nice growth area for [Cablevision],” with its “Ethernet business . . . growing much more rapidly than [Lightpath’s 6% revenue growth] number would indicate.”¹⁴

CLECs likewise continue to expand their networks since the Commission’s 2013 data collection. These providers offer a wide range of Ethernet and other enterprise broadband services using their own fiber-optic networks and other technologies like fixed wireless. Many of these companies also offer dark fiber as an alternative to managed Ethernet services, which allows customers to supply their own electronics. Some suppliers, such as Unite Private Networks, focus heavily on dark fiber, and these companies also have expanded their offerings in recent months.

- *Windstream*, following a string of acquisitions reflecting its bullishness on the competitive marketplace, now says it has “a presence in virtually every city”¹⁵ and claims to be “the provider of choice for four out of five Fortune 500 companies for data, voice, network and cloud solutions.”¹⁶ In August 2015, Windstream announced new “milestones in its network expansion plans,” including “12 new 100G markets” and “3,900 additional fiber route miles featuring Infinera’s 500G super-channel

¹² Spectrum Business Website, *Carrier Solutions – Access Services*; Charter Communications, Form 10-K, at 56 (SEC filed Feb. 24, 2015) (\$242 million in 2014, \$300 million in 2013, and \$269 million in 2012).

¹³ Public Interest Statement at 18, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149 (FCC filed June 25, 2015).

¹⁴ *Cablevision Systems Corp. at Bank of America Merrill Lynch Media, Communications and Entertainment Conference – Final*, FD (Fair Disclosure) Wire, Transcript 091614a5486218.718 (Sept. 16, 2014) (statement by Cablevision Systems Corp. Vice Chairman and CFO Gregg Seibert); *CVC – Cablevision Systems Corp at Deutsche Bank Media, Internet and Telecom Conference*, FD (Fair Disclosure) Wire, Transcript 030915a5637615.715 (Mar. 9, 2015) (statement by Cablevision Systems Corporation Vice Chairman Gregg Seibert).

¹⁵ *Windstream Communications at Citi Internet Media & Telecommunications Conference – Final*, FD (Fair Disclosure) Wire, Transcript 010714a5261028.728 (Jan. 7, 2014) (statement by Windstream CEO Jeff Gardner).

¹⁶ Windstream Communications Website, *Why Windstream?*.

technology.”¹⁷ By the end of 2015 Windstream plans to be able to provide carrier customers 100G service in 44 markets.¹⁸ Windstream is also expanding through alternative technologies such as fixed wireless. The company now offers “carrier-grade Ethernet and Internet-over-Ethernet connectivity delivered by digital microwave technology” in Chicago, New York City, northern New Jersey, Milwaukee, Boston, and Philadelphia.¹⁹ By launching its fixed wireless solution, Windstream said it is “able to provide enterprise businesses with a cost-effective alternative to fiber optic or traditional copper/coax networks, along with quick service installation, network diversity, and the high speed and security they need.”²⁰

- *Level 3*—which now ranks as the second largest U.S. provider of Ethernet services ahead of Verizon²¹—reported it experienced 10 percent growth in 2014 for its Core Network Services to enterprises.²²
- *XO*—the seventh largest Ethernet provider²³—in 2014 launched a project to invest more than \$500 million to grow its nationwide network, and its CEO explained that it is seeing more businesses sign up for its service as it constructs facilities into new buildings, “target[ing] buildings with factors like nearness of fiber, type of building, number of tenants, estimated telecom spend, and competitive providers already in the space.”²⁴ *XO* states that it has deployed “[o]ne of the largest Ethernet access networks reaching more than 2 million business locations” and that its customers include “more than 50 percent of the Fortune 500 as well as the largest cable operators, mobile wireless companies and Internet-based content providers.”²⁵ *XO* serves “4 of the top 5 U.S. wireless providers,” “9 of the world’s 20 largest

¹⁷ Windstream News Release, *Windstream and Infinera Partnership Drives Windstream Carrier Solutions’ Leadership in the Wave Transport Market* (Aug. 12, 2015).

¹⁸ *Id.*

¹⁹ Windstream News Release, *Windstream’s Fixed Wireless Solution Now Available in Philadelphia* (Aug. 19, 2015).

²⁰ *Id.* (statement by Windstream enterprise executive vice president and chief marketing officer Joseph Harding).

²¹ Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015).

²² Level 3 Communications, Inc., Form 10-K, at 72 (SEC filed Feb. 27, 2015).

²³ Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015).

²⁴ Sean Buckley, *XO Takes Success-Based Approach to On-Net Fiber Buildouts*, FierceTelecom (Sept. 3, 2015) (quoting *XO* CEO Chris Ancell).

²⁵ *XO* Communications Website, *Wholesale Business; id., Careers*.

telecommunications companies,” the “[t]op 5 social business networks,” “7 of the top 20 U.S. banks,” and “8 of the 20 largest U.S. retail companies.”²⁶

- *The Zayo Group*, which was formed from acquisitions of more than 34 companies worth about \$3.9 billion, now operates fiber networks covering “over 300 metro markets” in “46 states, plus Washington D.C.”²⁷ As of March 31, 2015, the company reported “\$5.8 billion in revenue under contract with a weighted average remaining contract term of approximately 45 months.”²⁸ Zayo states it is “actively constructing fiber to an additional 1,200” cell towers beyond the 4,500 it already reaches with its network.²⁹

Smaller CLECs also are thriving and growing. The attached appendix contains profiles for 29 fiber-based CLECs, many of which focus on particular regions, ranging from a metropolitan area to several states. Like their larger counterparts, smaller CLECs provide a full suite of Ethernet and other enterprise broadband services and continue to expand their networks. For example, Lumos Networks—which focuses on Virginia, West Virginia, and portions of Maryland, Pennsylvania, Ohio and Kentucky—has recently deployed a 270-mile dense metro fiber network in Virginia that is scheduled for completion by the end of 2015.³⁰ Alpheus Communications—which focuses its operations on Texas—announced in August 2015 it completed “its fourth major fiber network expansion in the past 12 months,” adding “just over 1,000 new near-net buildings for a total of approximately 7,000 near-net buildings in Texas.”³¹ Hudson Fiber Network, which is based in Manhattan, recently completed the installation of bulk cable throughout Manhattan, “bringing fiber optic services to leading commercial buildings and data centers throughout New York City.”³²

Providers that focus on fixed wireless technology also continue to grow. Towerstream has reported “nearly doubling the number of contracts signed in the second quarter [of 2014],” that the number of “signed contracts grew by 44%” the following quarter,³³ and that the

²⁶ XO Communications Website, *Corporate Overview* (emphasis omitted).

²⁷ Zayo Group Website, *About Zayo*.

²⁸ Zayo Group Holdings, Inc., Form 10-Q, at 29 (SEC filed May 13, 2015).

²⁹ Zayo Group Holdings, Inc., Form 424(B)(4) Prospectus, at 95 (SEC filed Mar. 13, 2015).

³⁰ Lumos Networks News Release, *Lumos Networks Officially Launches Hampton Roads/Norfolk Metro as Its 24th and Largest Enterprise Market* (Aug. 6, 2015).

³¹ Alpheus Communications News Release, *Alpheus Communications’ Latest Network Expansion Gives New Fiber Last-Mile Option to Thousands of Buildings and Businesses in Texas* (Aug. 13, 2015).

³² Hudson Fiber Network News Release, *HFN Expands NYC’s Network Infrastructure* (July 7, 2015).

³³ *Q3 2014 Towerstream Corp Earnings Call – Final*, FD (Fair Disclosure) Wire, Transcript 111014a5512649.749 (Nov. 10, 2014) (statement by Towerstream President and CEO Jeff Thompson).

“[n]umber of On Net customers added in the first half of 2015 is more than 70% higher than all of 2014.”³⁴ The company continues to add more lit buildings and believes “30 buildings per quarter is a number that [Towerstream] should be able to get to in a couple quarters.”³⁵ In 2014, Conterra entered into an agreement with Court Square Capital Partners to receive an equity investment that “will bolster Conterra’s expansion of its broadband network operations on a national basis.”³⁶

B. There Is No Basis To Single Out ILECs and Re-Regulate Only Their Ethernet and Other Enterprise Broadband Services

The Commission cannot re-regulate ILEC enterprise broadband services based on the existing record. As a threshold matter, the Commission cannot simply reverse the forbearance relief it granted as far back as nine years ago. Those grants—which the D.C. Circuit upheld in several decisions on appeal—are final and unreviewable.³⁷ The Commission cannot reconsider them. Under section 10, the Commission has only one year plus 90 days to deny a forbearance petition.³⁸ And even assuming reconsideration of a forbearance grant after that statutory deadline were ever appropriate, the time for reconsidering those grants has long passed.³⁹

A carrier that obtained forbearance under section 10(c) does not have to prove continually that it is still entitled to forbearance. Instead, under the Administrative Procedure Act, parties asking the Commission to adopt new regulations must support those regulations with actual current marketplace facts.⁴⁰ They must show that additional enterprise broadband regulation is necessary to further the Communications Act’s goals based on a new record reflecting the current state of competition for these services. They bear the burden of proving that at least one of section 10(c)’s forbearance criteria is no longer met: that regulation is necessary to ensure just and reasonable rates or to protect consumers, or is otherwise in the public interest. They must show that there is a market failure such that market forces will not keep prices down—precisely the showing required when the Commission promulgates new regulations, whether in response to a petition or on its own motion. And they have not and cannot make those showings.

³⁴ Towerstream Press Release, *Towerstream Reports Second Quarter 2015 Results and Business Update* (Aug. 10, 2015).

³⁵ *Q3 2014 Towerstream Corp Earnings Call – Final*, FD (Fair Disclosure) Wire, Transcript 111014a5512649.749 (Nov. 10, 2014) (statement by Towerstream President and CEO Jeff Thompson).

³⁶ Conterra Broadband Services News Release, *Court Square Capital Leads Major Equity Investment in Conterra Broadband* (Mar. 19, 2014).

³⁷ *See Ad Hoc Telecom. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

³⁸ 47 U.S.C. § 160(c).

³⁹ *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

⁴⁰ *See* 5 U.S.C § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); *Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 366 (D.C. Cir. 1989).

The facts and record—including both the data the Commission already collected and developments in the marketplace since 2013—cannot support a finding that any of these forbearance criteria no longer are met. Here, the facts show the marketplace is thriving, not failing. Current data—including Comcast’s announcement this month that it has formed a new business unit to compete for nationwide enterprise customers⁴¹—demonstrate that the marketplace for enterprise broadband services is competitive and that it has grown only more competitive since incumbent LECs received forbearance.

Nor can the record support regulating ILEC enterprise broadband services more stringently than others. Like the cable companies, Verizon and other ILECs aggressively invested in advanced networks. Competition thrived, and customers benefitted. There is accordingly no basis to reverse course and confer a benefit on cable and other competitors in this marketplace while disadvantaging ILECs through new rate and other regulations on their enterprise broadband services. Unnecessary and uneven regulation deters competition and constrains incentives to invest in facilities.⁴²

Finally, Verizon and other ILECs relied on forbearance grants and continued to invest heavily after the Commission decided not to subject those investments to restrictive rate and other regulations. Reversing course now would erode confidence in the regulatory process and create an unnecessary cloud of uncertainty.

Sincerely,



⁴¹ See n.5, *supra*.

⁴² See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901, ¶ 56 (2007) (describing the “Act’s overarching goal of fostering competition by providing a level playing field in the market and removing unnecessary regulatory impediments.”); *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶ 49 (2007); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, ¶ 45 (2005).