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

Re: Special Access, WC Docket No. 05-25

Dear Ms. Dortch:

On April 11, 2016, Jennifer McKee and Steve Morris of the National Cable & Telecommunications Association (NCTA) met with Amy Bender, Legal Advisor to Commissioner O'Rielly, and Rebekah Goodheart, Legal Advisor, and Anna Gentry, Intern, in the office of Commissioner Clyburn, to discuss the above-referenced proceeding.

NCTA expressed significant concern regarding a recent proposal by Verizon and INCOMPAS,[1] as well as statements by Chairman Wheeler supporting that proposal,[2] which raises the possibility that the rates charged by cable operators and other facilities-based competitors in the market for business data services could be subject to "ex ante rate regulation."[3] Any such proposal would reverse decades of bipartisan Commission policy and should be eliminated from the item that will be considered at the Commission's next agenda meeting. Since the *Competitive Common Carrier* decision in 1980, the Commission has followed a consistent policy of not regulating the rates charged by facilities-based competitive providers.[4] The Commission recognized in that order that facilities-based competitors have no ability to impose rates that are unreasonable under Section 201(b) of the Communications Act.[5] Accordingly, with one narrow exception, there is no context in which the Commission has found that rate regulation of facilities-based competitors is warranted.[6]

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1 Letter from Kathleen Grillo, Verizon, and Chip Pickering, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25 (Apr. 7, 2016) (Verizon/INCOMPAS Letter).

2 Remarks of Chairman Tom Wheeler at INCOMPAS Policy Summit (Apr. 11, 2016) (Wheeler Speech).

3 Verizon/INCOMPAS Letter at 2.

4 *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, CC Docket No. 79-252, First Report and Order, 85 FCC 2d 1 (1980).

5 *Id.* at ¶¶ 79, 88.

6 As NCTA explained in its reply comments, the Commission departed from this policy with respect to access charges imposed by competitive LECs because purchasers of those services had no option to deal with another

We explained that the fundamental flaw in the Verizon/INCOMPAS proposal is their suggestion that regulation of all providers is warranted if the Commission finds that there is "insufficient" competition.[7] Given that the status quo in the business data services marketplace is that price cap carriers generally are considered dominant carriers, any finding that competitive entry has been insufficient to affect the prices offered to consumers (e.g., because competitors do not offer the same range of services or their networks have limited geographic reach) necessarily means that the incumbent LEC remains dominant and should be regulated accordingly. The suggestion that the Commission should eliminate the dominant/non-dominant distinction that has applied in this context for decades makes no sense and is difficult to reconcile with the Chairman's assertion that over half the country has no competitive choice for business data services.[8]

To be clear, NCTA is not endorsing an approach where business data services offered by incumbent LECs are routinely subject to rate regulation.[9] The record in this docket makes abundantly clear that the market for these services has never been more competitive. It is undisputed that cable operators' share of the business data services market has grown substantially and it is equally clear that incumbent LECs are responding to this competition by improving services and reducing prices. Such competition generally should be sufficient to ensure that rates paid by end users are reasonable. But if the Commission finds in any particular area that the prices charged by incumbent LECs are not responding to competitive entry, then the most logical approach is to continue regulating the rates charged by the incumbent carrier, not to impose rate regulation on new entrants.

Rate regulation of competitive providers not only would be unwarranted, it would be counterproductive because it would reduce the incentive and the ability of competitors to continue investing in new facilities. Where facilities-based competition is possible, encouraging such competition is far superior to policies that encourage competitors to depend on wholesale access at regulated rates. As Chairman Wheeler explained in a recent interview, "competition is a facilities-based issue . . . You want to create environments where people are going head to head

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provider and a legal obligation to pay the tariffed rate. NCTA Reply Comments at 6 n.10. That situation is completely distinguishable from the sale of business data services, where business customers have no obligation to purchase service from a competitive provider and will do so only where the competitive provider offers the best combination of price and service.

[7] Verizon/INCOMPAS Letter at 2.

[8] Wheeler Speech at 2 ("[A]s of 2013, competitive pathways, including cable, reached less than 45 percent of locations where there is demand."). We note that it is unclear how the 45 percent figure was derived, but it almost certainly represents more than 45 percent of the businesses purchasing these services. In addition, there has been significant growth in the number of buildings served by competitors since 2013.

[9] NCTA Reply Comments at 8 ("Where an incumbent LEC's rates are constrained by the presence of a competing facilities-based provider in a particular area, there is no basis for concluding that wholesale providers are somehow entitled to even lower rates just because a third or fourth provider has not entered the market. It is inappropriate for the Commission to impose rate regulation that purports to represent the workings of a hypothetical competitive market in an area where the rates already reflect the existence of real world competitive entry that has produced substantial benefits for thousands of business customers.").

. . . how can you ever win if you have to buy your capacity from your competitor?"[10] Any departure in this proceeding from the Chairman's general "facilities-based proclivity" would be a matter of deep concern to the cable industry, which has spent billions of dollars on facilities to better serve business customers.

Along the same lines, we questioned the view that extensive regulation of business data services might be necessary to spur the deployment of 5G wireless services.[11] The theory that regulation of these services will help fill the need for 5G backhaul is completely backwards. If 5G services will need denser and more robust backhaul starting a few years from now, the Commission should be taking steps now to encourage the construction of those facilities. But what provider is going to pursue this market opportunity if the "reward" for taking the risk of building new fiber facilities is an obligation to provide access to wireless carriers at rates established by the Commission? It is particularly outrageous to suggest that Verizon somehow will be incapable of deploying 5G unless it can obtain these services at below-market regulated rates given its longstanding opposition to exactly such a regulatory regime until its self-serving flip-flop last week.

Finally, we expressed significant concern regarding the possibility that the Commission might make tentative conclusions based on an analysis from its consultant that has not been subject to any public review. The record in this proceeding includes the largest data collection ever conducted by the Commission and the public record makes clear that interpretation of that data is an exceedingly complex and controversial matter. It would be wholly inappropriate for the Commission to reach any tentative conclusions about the state of the marketplace or the appropriate course for regulation based on a non-public analysis prepared by a single entity.

Respectfully submitted,

/s/ Steven F. Morris

Steven F. Morris

cc: R. Goodheart
A. Bender
A. Gentry

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[10] Ars Technica, *Why Tom Wheeler rejected broadband price caps and last-mile unbundling* (Mar. 19, 2016), at http://arstechnica.com/business/2016/03/why-tom-wheeler-rejected-broadband-price-caps-and-last-mile-unbundling/ ("Wheeler argued that competition should be brought by companies that build their own infrastructure, not companies that have to rely on incumbents for access. 'I have a facilities-based proclivity. I think if you're going to get competition, competition is a facilities-based issue, it is not an ersatz unbundling issue,' he told Ars. The competition in the DSL Internet days 'was not sustainable,' he said. 'Look at what happened to those companies that came out in that point in time… You want to create environments where people are going head to head… Tell me, how can you ever win if you have to buy your capacity from your competitor?'").

[11] Wheeler Speech at 1-2 ("Without a healthy BDS market we put at risk the enormous opportunity for economic growth, job creation and U.S. competitiveness that 5G represents. But BDS competition remains uneven.").