



November 4, 2016

Via Electronic Submission

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

Re: *Business Data Services in an Internet Protocol Environment (WC Docket No. 16-143);
Special Access Rates 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 Services (RM-10593)*

Dear Ms. Dortch:

The Commission should reject demands to force a mandatory “wholesale” discount structure on the business data services (“BDS”) marketplace.¹ Under the volume and term-based discount structure that has evolved under Commission supervision, competing carriers already had 51% of the market in 2013.² Grafting a new “wholesale” discount on to the current structure does not reflect how BDS is sold and provisioned and would be counter to the Commission’s longstanding goals of facilities-based competition. As Chairman Wheeler recently noted, “if you’re going to get competition, competition is a facilities-based issue, it is not an ersatz unbundling issue.”³ Similarly, the May Further Notice in this proceeding concludes “we do not consider competition over resold lines as a material competitive

¹ See, e.g., Ex Parte Letter to Marlene H. Dortch, Secretary, FCC from John T. Nakahata, Counsel to Windstream Services, LLC, WC Docket No. 16-143 (Oct. 17, 2016) (“Windstream 10/17 Ex Parte”); Ex Parte Letter to Marlene H. Dortch, Secretary, FCC from Tamar E. Finn, Counsel to TDS Telecommunications Corp., WC Docket No. 16-143 (Oct. 20, 2016); Ex Parte Letter to Marlene H. Dortch, Secretary, FCC from John T. Nakahata, Counsel to Windstream Services, LLC, WC Docket No. 16-143 (Oct. 21, 2016) (“Windstream 10/21 Ex Parte”).

² Business Data Services in an Internet Protocol Environment, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, App. B at 216, Table 1 (2016) (Rysman Paper) (finding that competing providers have a 51% market share in terms of business data services revenues and serve approximately one-half of all buildings with fiber).

³ Ars Technica, “Why Tom Wheeler rejected broadband price caps and last-mile unbundling” (Mar. 16, 2016), available at <http://arstechnica.com/business/2016/03/why-tom-wheeler-rejected-broadband-price-caps-and-last-mile-unbundling/>.

restraint.”⁴ At the end of the day, making resale artificially more attractive by mandating a special discount (“ersatz unbundling”) for a favored class of resellers will result in more resale and less investment in the real facilities-based competition that matters.⁵

Market Realities Do Not Support The Creation Of A “Wholesale” Discount

In pressing for a “wholesale” discount, proponents theorize that competing carriers purchasing business data services “pay for retail costs to serve their customers twice” – once in connection with their own retail operations and “again to the ILEC,” which, so the theory goes, “charges for these costs even though it is not the carrier actually incurring them.”⁶ However, this “pay-twice” theory simply assumes away how BDS is sold and the costs of providing service to resellers.

First, this theory ignores that, according to the Commission’s data, “[t]he vast majority of BDS sales are to other telecom providers, about 90%.”⁷ Under the circumstances, there is no reason to believe that current BDS rates reflect “significant” costs associated with the sale, marketing, and support of “retail” business data services that are somehow magically avoided when that capacity is sold at “wholesale.”⁸ After all, BDS is a service for sophisticated business customers, not a consumer type product sold through small stores where a manufacturer-seller would benefit from a wholesaler-reseller buying in large bulk and supplying local storage, delivery in small lots, and other services.

Second, the “pay-twice” theory ignores the significant costs that an incumbent carrier incurs in selling and provisioning services to a competing carrier for resale. Indeed, in order to meet their obligations under section 271 of the Telecommunications Act, the Bell Companies are required to devote considerable resources to selling to resellers, which include special “sales, marketing, and customer support” functions, special “help desks” and “team[s] of wholesale support personnel.”⁹ Regardless of the identity of the buyer,

⁴ Business Data Services in an Internet Protocol Environment, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 at para. 230 (2016).

⁵ USTelecom also agrees that any rule mandating that carriers provide a “wholesale” discount on business data services purchased by other carriers would be unlawful. See, e.g., Ex Parte Letter to Marlene H. Dortch, Secretary, FCC from Curtis L. Groves, Counsel to Verizon, WC Docket No. 16-143 (Oct. 14, 2016); Reply Comments of AT&T Inc., WC Docket No. 16-143, at 55-67 (filed Aug. 9, 2016).

⁶ Windstream 10/17 Ex Parte, at 2.

⁷ See *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, at 226 (2016).

⁸ Windstream 10/17 Ex Parte, at 2.

⁹ See, e.g., *Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 18 FCC Rcd 19024, ¶ 66 (2003) (finding that “Michigan Bell provides nondiscriminatory access to its ordering systems and processes” and noting “team of wholesale sales support personnel” assembled to address performance issues); *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, Memorandum Opinion and

the incumbent must provision a circuit to a particular location, log and track the circuit, maintain and repair the circuit, and bill for the circuit. Resellers, for example, do not maintain or repair the circuits they order. Incumbents must market to get business from resellers just as they must market to other customers. Competitive carriers do not take on the functions and costs associated with these activities. Simply because a competing carrier might layer on its own costs in reselling service to its own customers does not mean that the facilities-based company avoids those costs.

The competitive absurdity of the “wholesale” discount is underscored by the claim that CMRS providers are “wholesalers” entitled to a discount on their BDS purchases because they happen to use BDS in making available their service offerings. Under this approach, every purchaser of BDS would qualify for a “wholesale” discount. For example, a large hospital incorporates to some degree the business data services it acquires in serving its patients, and the same is true for a large bank in providing services to its customers. That proponents of the “wholesale” discount seek to extend its benefits to CMRS providers only makes plain the absence of any economic analysis or justification.

Commission Precedent Recognizes that Volume and Term Commitments Create Savings and That “Wholesale” Discounts May Be Anticompetitive

There is no generally recognized “wholesale” discount in the business data services market. Indeed, such a discount is completely foreign to the Commission’s special access regime that has been in place for more than 30 years. Under Commission supervision, the industry has developed an approach to discounts for business data services predicated on volume and term commitments. The Commission repeatedly has endorsed the use of volume and term discounts because they encourage the efficiencies gained with increased traffic and the certainty associated with long-term business relationships.¹⁰

The discounts are commonplace in the business data services market and are available regardless of the identity of the buyer or the seller. That is, nearly all business data service providers make available

Order, 17 FCC Rcd 25650, ¶ 100 (2002) (noting “technical assistance and help desk support” provided to competing carriers).

¹⁰ See, e.g., *Access Charge Reform*, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, ¶ 187 (1996) (“[Volume and term] discounts should be permitted ... because they encourage efficiency and full competition”) (subsequent history omitted); *Transport Rate Structure and Pricing*, Fourth Order and Order on Reconsideration, 10 FCC Rcd 12979, ¶ 13 (1995) (addressing the propriety of volume and growth discounts under sections 201(b) and 202(a)); *Expanded Interconnection with Local Telephone Company Facilities, Amendment of the Part 69 Allocation of General Support Facility Costs*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, ¶ 199 (1992); *Price Cap Local Exchange Carrier Performance Review*, First Report and Order, 10 FCC Rcd 8961, ¶ 417 (1995); *Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 3030, ¶¶ 105, 114 (1994) (noting that acceptable volume discounts grant “reduced per-unit prices for a particular number of units of service”) (subsequent history omitted); *Private Line Rate Structure and Volume Discount Practices*, Report and Order, 97 F.C.C. 2d 923, ¶¶ 38, 40 (1984) (“[g]reater pricing flexibility in volume discounts may benefit large as well as small users, not injure competition, and not be discriminatory”).

volume and term discounts to customers, and the discounts are triggered as long as the customer meets the specified volume levels or term lengths, whether that customer is an incumbent carrier, a traditional competitive LEC, a cable company, a dark fiber provider, or an enterprise customer.

Furthermore, a “wholesale” discount that would only be available to some customers (*i.e.*, certain carriers) but not others (*i.e.*, enterprise customers) would constitute a customer or use restriction that the Commission has long found tend to be “anticompetitive and anti-consumer” and therefore unlawful.¹¹ To the extent that the “wholesale” discount would, as proposed, give a very small reseller a discount off the best price an incumbent charges, for example to a very large enterprise customer, the discount elevates labels over economic substance.¹² Further, any such discount mandate is more likely to reduce discounting to businesses and to harm competition by handicapping the ability of incumbents to compete through offering targeted discounts than it is to help. The argument that the proposed “wholesale” discount would not be unlawful because it does not restrict “anyone’s use of the services” is misguided.¹³ The Commission has long interpreted the prohibition against customer or use restrictions expansively to avoid anti-consumer outcomes.¹⁴

Perhaps most importantly, the mandated special discount for resellers rewards resale over investing in building facilities. As the FCC and Chairman Wheeler have recognized, facilities-based competition creates real competitive pressure that benefits consumers, produces jobs and leads to innovation. For the foregoing reasons, the Commission should reject requests to impose a special “wholesale” discount on the BDS industry.

Sincerely,



Jonathan Banks
Senior Vice President, Law & Policy

¹¹ See, *e.g.*, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 3 FCC Rcd 1135, ¶ 77 (1988) (“This Commission has repeatedly found that use and customer restrictions in tariffs tend to have an anticompetitive, anti-consumer impact”); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, ¶ 111 (1987) (finding “a strong federal policy against customer or use restrictions in tariffs,” which “have often been used by carriers as a means of engaging in certain practices ... that generally tend to impair competition and reduce consumer welfare”).

¹² Windstream 10/17 Ex Parte, Proposed Rule (c).

¹³ Windstream 10/17 Ex Parte at 5.

¹⁴ See, *e.g.*, *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I and Phase II, Part I, FCC 84-524, Memorandum Opinion and Order, ¶ 45 (1984) (finding that a channel charge “rate element” that distinguished “between an end user and [a carrier] ... imposes use restrictions on Special Access”).