April 12, 2017

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
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:

On April 10, 2017, Jonathan Spalter, Diane Holland and I met with Chairman Pai and his advisor Jay Schwarz to discuss business data services. The proposed Order, if put into place, will drive additional investment in building more fiber connections to more businesses, increasing competition, and expanding and strengthening the fiber networks that we all depend on.

We noted that the reduction in the FCC's detailed price setting role proposed in the Order is important, but relatively constrained. In the seven years between 2000 when the first petitions for pricing flexibility were granted, and 2007, the Commission returned broad pricing flexibility to markets covering roughly one-third of the country.[1] Ten years later, the current draft Order would extend that flexibility to cover an additional one-third of the country. This expansion is at a slower pace than over the 2000-2007 period, and simply reflects growth in competition and the fact that the Commission refused to act to keep its regulatory scheme up-to-date for almost ten years. And, the Commission appears to be retaining authority to ensure that prices for traditional BDS remain "just and reasonable" under the Communications Act.

1 The one-third refers to Phase II relief for channel terminations. See attachment. To the extent that petitions for pricing flexibility relief for channel terminations were granted, the grants occurred between 2000 and 2007. Few petitions were acted upon between 2007 and 2012 when the Commission announced a formal freeze on granting relief, which remains in effect today. *Special Access for Price Cap Local Exchange Carriers,* WC Dkt. No. 05-25, rel. Aug. 22, 2012, at Appendix D.

We also discussed the potential benefits of broader relief. We urged the Commission to adopt the non-dominance approach set out in filings from CenturyLink and Frontier. The Commission has acted broadly in other areas to recognize competition on a national level,[2] and should do so here.

Finally, we pointed out several areas where the Commission's competitive market test (CMT) may be too conservative, and not reflect the amount and strength of competition in today's market. Initially, the data from 2012 understates the current levels of competition, as cable companies and CLECs have continued to build and upgrade facilities and to take share in business data services. We noted that the CMT in the draft Order at paragraph 126 appears to be overly narrow because it applies the half-mile test from only locations served by CLECs rather than from competitive fiber facilities. This will understate competition because it is standard engineering practice to build splice points into intra-city fiber networks so that customers can be connected to fiber facilities.[3] In addition, the Commission's careful analysis at paragraph 135 of the draft Order of the tradeoffs between over and under regulation suggests that a competitive threshold for the CMT should be between 32% and 48%. The Commission proposes setting the threshold at the very highest end of this range, and rounding up from there. However, setting the threshold no higher than the mid-point of the range identified by the Commission -- 40% -- would better balance regulatory risks and better reflect competitive dynamics and the growth in competition and competitive facilities since 2012.

We concluded by emphasizing that the draft Order's proposal to take a measured step to better reflecting the dynamic growth that has been occurring over the last decade to upgrade networks that serve business customers will incent all competitors wanting to serve businesses to invest in more fiber to serve more locations. More fiber infrastructure will produce benefits throughout the country in both business and residential markets.

Sincerely,

Jonathan Banks
Senior Vice President, Law & Policy

Attachment

c: Chairman Pai
Jay Schwarz

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[2] *See, e.g., USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services*, GN Dkt. No. 13-5, WC Dkt. No. 13-3, rel. July 15, 2016; *Amendment to the Commission's Rules Concerning Effective Competition*, MB Dkt. No. 15-53, rel. June 3, 2015.

[3] Declaration of Gregg Ditullio, Sept. 23, 2016, attached to Letter to Marlene Dortch (FCC) from Christopher Shenk (counsel for AT&T), Re: Business Data Services, WC Dkt. Nos. 16-143, 05-25.

ATTACHMENT

**Extent of Pricing Flexibility Relief**

**# of MSAs**

**EU Channel Terminations**

| | Price Cap | Phase 1 | Phase 2 | Total |
|---|---|---|---|---|
| AT&T | 65 | 46 | 78 | 189 |
| CenturyLink | 14 | 1 | 7 | 22 |
| Other | 13 | 5 | 2 | 20 |
| Qwest | 28 | 13 | 21 | 62 |
| Verizon | 37 | 19 | 19 | 75 |
| Windstream | 3 | 2 | 0 | 5 |
| Grand Total | 160 | 86 | 127 | 373 |

**% of MSAs**

**EU Channel Terminations**

| | Price Cap | Phase 1 | Phase 2 | Total |
|---|---|---|---|---|
| AT&T | 34.4% | 24.3% | 41.3% | 100.0% |
| CenturyLink | 63.6% | 4.5% | 31.8% | 100.0% |
| Other | 65.0% | 25.0% | 10.0% | 100.0% |
| Qwest | 45.2% | 21.0% | 33.9% | 100.0% |
| Verizon | 49.3% | 25.3% | 25.3% | 100.0% |
| Windstream | 60.0% | 40.0% | 0.0% | 100.0% |
| Grand Total | 42.9% | 23.1% | 34.0% | 100.0% |

Source: USTelecom analysis of company Pricing Flexibility grants as of 2012 based the largest ILEC in each metropolitan area listed by Census.