April 13, 2017

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 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 Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, **RM-10593**

Dear Ms. Dortch:

Despite a nearly-five-year data collection that produced ample evidence of the lack of competition in the Business Data Services ("BDS") market, the Federal Communications Commission ("Commission" or "FCC") has circulated proposed rules ("*Order on Circulation*") premised on "intense" competition. Public Knowledge, Consumer Federation of America, National Digital Inclusion Alliance, Common Cause, Next Century Cities, New America's Open Technology Institute, Institute for Local Self-Reliance, and Engine respectfully request that the Commission seek additional comments to refresh the record. Failing that, we request that the FCC reexamine its conclusions based on the existing record, before it passes rules that will cause serious harm to small businesses, non-profits, schools, libraries, universities, government agencies, and ultimately consumers.

Background

The Commission opened its BDS proceeding well over a decade ago.[1] The FCC's stated goal has been to analyze how competition "whether actual or potential, affects prices, controlling for all other factors that affect prices" and to "determine what barriers inhibit investment and delay competition, including regulatory barriers."[2] In May 2016, the Commission approved a Notice of Proposed Rulemaking that proposed replacing the existing BDS regulatory structure with a new framework, one without "the traditional use of tariffs for BDS services" that would discard "the traditional classification of 'dominant' and 'nondominant' carriers," and would apply a "Competitive Market Test" to determine markets in which competition is benefitting

[1] *See Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005), http://bit.ly/2pybI69.

[2] *Special Access for Price Cap Local Exchange Carriers et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 ¶ 68 (2012).

consumers.[3] The Commission sought comprehensive comments on the proposed new framework.[4] Dozens of entities submitted hundreds of filings in response to the FCC's requests.

The BDS Market Lacks Workable Competition

The data produced in response to the FCC's requests "showed that the vast majority of consumers (over three quarters) have only a monopoly business broadband supplier."[5] Indeed, analysis of the market by Dr. Stanley M. Besen and Dr. Bridger M. Mitchell, in conjunction with the Brattle Group and SMG Consulting, demonstrated that 73 percent of BDS purchaser locations are served by "a single ILEC with no other facilities-based supplier reported present." The Besen and Mitchell analysis further found that "almost all purchaser locations, 97 percent, are served by only one or two suppliers."[6] Besen and Mitchell also found that the Herfindahl-Hirschman Index ("HHI") exceeds 5,000 in approximately 99 percent of census blocks.[7] The U.S. Department of Justice and Federal Trade Commission have said a market with an HHI above 2,500 is "highly concentrated."

In the *Order on Circulation*, the FCC finds that the presence of a nearby competitor – or potential competitor – "tempers prices in the short term and results in reasonable competitive outcomes over three to five years."[8] The FCC thus concludes that the presence of two competitors in a market, or one BDS provider and "providers with their own fiber nodes within a half-mile" (a potential competitor), is sufficient to provide competitive pressure that will "adequately discipline prices."[9] Much of the FCC's analysis, however, relies on the assumption that new competitors are poised to enter the marketplace.

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[3] *Business Data Services in an Internet Protocol Environment, et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 ¶¶ 4-5 (2016) ("*BDS NPRM*").

[4] *See generally id.*

[5] Letter from CFA and PK (March 30, 2017), http://bit.ly/2oGaiKA.

[6] *See BDS NPRM* ¶ 181.

[7] Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Docket. No. 05-25, at 20-21 (originally filed Jan. 27, 2016, revised consistent with protective orders Apr. 11, 2016).

[8] *Business Data Services in an Internet Protocol Environment, et al.*, Report and Order ¶ 13 (circulated for tentative consideration), http://bit.ly/2oeLiZK ("*Order on Circulation*"). We note, for comparison, that the FCC has repeatedly refused to make a finding of effective competition in the mobile wireless market, in which nearly all customers have a choice of two or more carriers in addition to their current carrier. *See, e.g., Implementation of Section 6002(b) of the Omnibus Budget Reconcilitation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report 31 FCC Rcd 10534 (2016), http://bit.ly/2hnh4kB.

[9] *Order on Circulation* ¶ 15.

The FCC does not have a strong track record of deregulation based on the mere expectation that competition will emerge. In 1999, the FCC deregulated the pricing for BDS in areas where it believed a critical mass of investment in facilities by nearby competitors had occurred, and robust competition and downward pressure on prices were imminent.[10] According to a follow-up study by the Government Accountability Office ("GAO") in 2006, however, "in areas where FCC granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues" tended to be higher seven years later than the prices or revenues in areas still under price regulation.[11] The GAO concluded that some of the areas with the *lowest* levels of deployment by competitors were those areas for which the FCC granted pricing flexibility.[12] The title of the GAO's report said it all, "FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services."[13] The FCC ultimately agreed. In 2012, the FCC held that the potential-competition collocation triggers it adopted in 1999 were a "poor proxy for the presence of competition sufficient to constrain special access prices or deter anticompetitive practices."[14] The FCC's *Order on Circulation* seems poised to use much the same analysis to make much the same mistake nearly two decades earlier.

The Consumer Federation of America ("CFA") has made a compelling case that a BDS market is not "workably competitive" unless it has four actual competitors *and* four potential competitors.[15] Fewer than 2 percent of census blocks have four or more providers of BDS services.[16] Moreover, the evidence on the record demonstrates that the presence of the "robust" competition the FCC found has nonetheless failed to bring competitive prices for BDS, to the detriment of consumers.

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[10] *See Access Charge Reform, et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999), http://bit.ly/2opQCrm.

[11] *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GOVERNMENT ACCOUNTABILITY OFFICE 1 (Nov. 2006), http://bit.ly/2opNSu6.

[12] *Id*. at 13; *see also* Comments of Time Warner Telecom Inc., GN Docket No. 07-45 (May 16, 2007), http://bit.ly/2o84Lro.

[13] *Id*.

[14] *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 27 FCC Rcd 10557 ¶ 5 (2012).

[15] Letter from CFA and PK (March 30, 2017), http://bit.ly/2oGaiKA; *see also* Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, WC Docket No. 16-143 (filed July 14, 2016), http://bit.ly/2otHiEm ("*Baker Declaration*") ("the presence of four or more in-building and four or more in-block high-bandwidth rivals lowers the prices of high-bandwidth connections by 43% according to one estimate and by 25% according to another").

[16] *BDS NPRM* ¶ 182.

Lack of Competition Results in Overcharging for Consumers

CFA has estimated that "abusive pricing" has resulted in overcharges in the BDS market totaling $20 billion annually each of the last five years. Without legitimate competitors in the marketplace, businesses have no choices when they purchase essential BDS connectivity.[17] According to CFA, half of the $40 billion charged annually for BDS services are overcharges as a result of incumbent LEC market power.[18] Comprehensive economic analysis in the record demonstrates that if the BDS market *were* competitive, the prices for the service would be lower. Analyses of the market submitted by Professor Jonathan Baker and Dr. Marc Rysman concluded that ILEC "prices for business data services exceed competitive levels, reflecting the exercise of market power."[19] And economists Chris Frentrup and Prof. David E.M. Sappington recommended that the Commission implement price caps for BDS that reduce rates by at least 17%.[20] The current overcharges for BDS harm small businesses, universities, schools, libraries, and other customers for whom connectivity is essential. These overcharges also result in indirect costs to American consumers totaling more than $150 billion.[21]

Lack of Competition Will Harm Wireless Customers and 5G Deployment

The lack of competition in the BDS market also results in unjust and unreasonable prices for mobile wireless backhaul customers. Wireless carriers pass on the high cost of backhaul to consumers through increased retail prices, which negatively impacts efforts to close the digital divide. Wireless service price increases hinder access to wireless broadband for low-income consumers, more of whom depend on wireless service for broadband connectivity than do consumers with higher incomes.[22] Unreasonable prices for BDS will also stymie the development of 5G, which will rely on competitive pricing for wireless backhaul. A report from

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[17] Letter from Mark Cooper, Director of Research, Consumer Federation of America and Phillip Berenbroick, Senior Policy Counsel, Public Knowledge to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143, WC Docket No. 05-25, RM-10593 (March 30, 2017), http://bit.ly/2oGaiKA.

[18] Letter from Phillip Berenbroick, Senior Policy Counsel, Public Knowledge to Marlene H. Dortch, Secretary, FCC (Nov. 11, 2016), http://bit.ly/2oOYmTu.

[19] *See Baker Declaration*; *see also* White Paper, *Empirics of Business Data Services*, Dr. Marc Rysman (April 2016), http://bit.ly/2nFSAXg.

[20] Declaration of Chris Frentrup and David E.M. Sappington, at 1-2 (filed as an attachment to the Letter from Jennifer Bagg, Counsel, Sprint Corporation to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, WC Docket No. 15-247, WC Docket No. 16-143 (filed Aug. 31, 2016)), http://bit.ly/2nFTsLy.

[21] Mark Cooper, Consumer Federation of America, *The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits* 1, 33-35 (2016), available at http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-SpecialAccess.pdf.

[22] Monica Anderson and John B. Horrigan, *Smartphones help those without broadband get online, but don't necessarily bridge the digital divide*, PEW RESEARCH CENTER (Oct. 3, 2016), http://pewrsr.ch/2dtfZ6J.

Raul Katz at Telecom Advisory Services, LLC found that as much as 30 percent of operating expenses for mobile providers is devoted to backhaul and that "BDS customers are frequently required to purchase BDS from the ILEC at supra-competitive prices as a result of ILEC market dominance."[23] According to the report, wireless carriers have seen ILEC prices drop by 50% in markets with at least two BDS competitors.[24] These price decreases allow wireless carriers to invest more money in their networks, which results in "improved service quality, better coverage, and lower churn."[25]

The FCC Should Refresh the Record

Even if the data showed a competitive marketplace for BDS, the market has condensed significantly since the FCC received the responses on which it is relying. Just the last few months have seen the completion of major mergers between six BDS providers – Verizon and XO Communications,[26] Windstream and Earthlink,[27] and CenturyLink and Level 3.[28] This wave of consolidation eliminates competitors from the market and reinforces the market power of those BDS providers that remain. The FCC's data fails to fully consider the effect of these market changes and should be refreshed. A robust analysis of the BDS process requires analysis of the current, post-merger market to determine the number of choices consumers truly have and the true effect on prices for BDS.

Chairman Pai recently called for the Commission to "restore the place of economic analysis at the FCC," including "drawing on the best practices in data management and analytics" to ensure that the FCC's policy-making is "informed by sound economic principles and solid data."[29] U.S. courts of appeals have reiterated the principle that the FCC, as an expert agency, must make "rational and informed decisions on the record before it to achieve the principles set by Congress," and may not make policy without adequate empirical support.[30] This proceeding presents an opportunity to put these principles to work. Any Commission action to

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[23] Raul Katz, *Assessment of the Impact of the Business Data Services Market Dynamics on Innovation and Competition in the Wireless Market*, Telecom Advisory Services, LLC 4-5 (July 2016), http://bit.ly/2py7snc.

[24] *Id*. at 6.

[25] *Id*. at 7.

[26] Press Release, Verizon, Verizon Completes Purchase of XO Communications' Fiber Business (Feb. 1, 2017), http://prn.to/2kVS7L2.

[27] Press Release, Windstream, Windstream completes merger with Earthlink (Feb. 27, 2017), http://bit.ly/2lUwLke.

[28] Tamara Chuang, Level 3 and CenturyLink shareholders approve merger, The Denver Post (March 16, 2017), http://dpo.st/2mD9wJC.

[29] Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC" (April 5, 2017), http://bit.ly/2oAIDts.

[30] *Qwest Corp. v. FCC*, 258 F.3d 1191 (10th.Cir.2001).

regulate or deregulate the BDS market should rely on recent, accurate data on the record that takes account of current market conditions. This is not the case in the present *Order on Circulation*.

Recent Comments from ILECs are Both Unsupported and Contradictory

After years of telling the Commission to go slow on reforming the BDS market, incumbent operators have lately been clambering for the FCC to push forward with deregulation as quickly as possible. CenturyLink and Frontier, for example, cite to the presence of competitor facilities and cable BDS offerings as sufficient grounds for an expansive finding of competition in the BDS market.[31] And AT&T recently claimed the Commission "has before it a record that would support eliminating rate regulation for these services altogether."[32] But the mere existence of competitor facilities in some areas is, as explained above, a poor surrogate for downward pricing pressure at any remove from the site of that competitive facility and, given the well documented barriers to entry in other properties or buildings, has little meaningful effect on the competitiveness of the market as a whole.

The BDS suppliers' call for immediate Commission action also contradicts years of calls from the same parties for an unhurried, deliberative review process. CenturyLink and Frontier in their recent comments praised the "thousands of pages" of record evidence received by the FCC on these issues since May of 2016.[33] But as recently as August 2016, the same BDS providers had warned the FCC against acting in the BDS market without collecting additional data, conducting further study and providing ample opportunity to analyze the effects of any Commission action on the market. A research paper submitted in August by Invest in Broadband for America Coalition, which includes CenturyLink and Frontier, said that the "FCC is rushing to push through new regulation without giving adequate time to study the likely effects" and advocated for pausing "long enough to consider the consequences of the proposed regulation."[34] Now that the FCC proposes deregulation, however, these same providers claim the record is miraculously complete. The BDS providers' head-spinning change risks encouraging the Commission to adopt poorly conceived, insufficiently supported, arbitrary rules that will not withstand appeal.

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[31] Letter from Bryan Tramont, Partner, Wilkinson Barker Knauer, LLP to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593 (April 6, 2017), http://bit.ly/2ou6DOw ("*CenturyLink/Frontier Comments*").

[32] *Ex Parte* Notice from Caroline Van Wie, AT&T to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16, 143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593 (March 13, 2017), http://bit.ly/2ou2Kcs.

[33] *CenturyLink/Frontier Comments.*

[34] Gary Arlen, *FCC's BDS Price Rules Would Cripple Competition, Commenters Say*, MULTICHANNEL NEWS (Aug. 10, 2016), http://bit.ly/2opS5he.

The undersigned respectfully request that the Commission refresh the record on competition in the BDS market prior to adopting rules deregulating the BDS market, fully identify on a market-by-market basis the areas in which sufficient competition is alleged to exist at sufficient levels to permit deregulation and allow the public to have an opportunity to analyze and account for the effects of the Commission's proposal.

Respectfully submitted,

Public Knowledge
Consumer Federation of America
National Digital Inclusion Alliance
Common Cause
Next Century Cities
New America's Open Technology Institute
Institute for Local Self-Reliance
Engine

cc: Chairman Ajit Pai
Commissioner Mignon Clyburn
Commissioner Michael O'Rielly