

June 16, 2016

The Hon. Tom Wheeler  
Chairman  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re:** Business Data Services in an Internet Protocol Environment, **WC Docket No. 16-143**;

Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, **WC Docket No. 15-247**;

Special Access 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 Chairman Wheeler:

For over a decade, the Federal Communications Commission (“Commission” or “FCC”) has struggled to establish a new framework to promote and ensure competition in the business data services (“BDS”) market. As a result, competition has languished and enterprise customers and consumers have borne the cost of the market power exercised by the dominant BDS providers.

Without effective competition or regulation, businesses, non-profit organizations, community institutions, wireless providers, and government agencies have no choice but to pay supra-competitive prices for essential connectivity. The result is that businesses other entities lower their output or raise prices and government institutions provide fewer and less efficient services with valuable taxpayer dollars. Ultimately, consumers and taxpayers bear the cost of the lack of effective competition in the BDS market.

Earlier this year, Verizon and INCOMPAS proposed a permanent regulatory framework for the BDS market (“Verizon/INCOMPAS Proposal”). Under the Verizon/INCOMPAS Proposal, the Commission would make determinations on whether markets for BDS are sufficiently competitive. In markets with insufficient competition, the Commission could institute price regulation, as warranted, on a technology-neutral basis. In competitive areas, the Commission would rely on market processes to discipline BDS rates.<sup>1</sup>

In April, the Commission approved its BDS *Further Notice of Proposed Rulemaking* (“BDS FNPRM”). The Commission’s proposed BDS regulatory framework generally aligns with

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<sup>1</sup> Notice of *Ex Parte* of INCOMPAS and Verizon; WC Docket No. 05-25, RM-10593 (filed Apr. 7, 2016).

the Verizon/INCOMPAS Proposal.<sup>2</sup> The *BDS NPRM* requests comment on numerous questions regarding how to best determine whether markets for BDS are competitive, and if markets are not competitive, what actions the Commission should pursue to protect customers and consumers and promote competition.

Public Knowledge generally supports the Verizon/INCOMPAS Proposal and the Commission’s proposed framework so long as the Commission’s final rules prevent BDS providers from exerting market power and charging supra-competitive rates, and promote technology-neutral competition. The issues the Commission requests comment on are extensive, and the Commission’s policymaking should be grounded in and guided by key facts and principles. First, the BDS market is, by any measure, overwhelmingly concentrated and the market power of incumbent providers requires regulatory oversight. Second the Commission should establish a benchmark that reflects competitive market pricing. Unless the Commission understands at the outset what competition looks like, it will be ineffective at designing, implementing, and enforcing policies that promote competition and protect customers from unjust and unreasonable rates. Third, the Commission’s prior efforts to predict future competition and justify deregulation based on potential competition have been a failure. Thus, the Commission’s determinations regarding whether markets are competitive and policies to promote competition should be based on actual competition, not the specter of potential competition. Last, the Commission’s approach should be technology neutral to adequately address threats to competition from both incumbent and competitive BDS providers, as well as cable BDS providers.

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The *BDS FNPRM* correctly concludes that geographic concentration in the BDS market is “uniformly high.”<sup>3</sup> Data collected by the Commission show that the vast majority of locations are served by a monopoly BDS provider, while over ninety-five percent of locations have a monopoly provider or duopoly providers.<sup>4</sup> Recently, the Consumer Federation of America found that a result of the excessive market power held by incumbent BDS providers, overcharges and abusive pricing in the BDS market totaled approximately \$75 billion over the past five years, and have directly cost American consumers over \$150 billion since 2010.<sup>5</sup>

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<sup>2</sup> See Business Data Services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC Docket Nos. 16-143, 15-247, 05-25, RM-10593; *Tariff Investigation Order and Further Notice of Proposed Rulemaking*; FCC 16-54, 68 ¶ 159 (rel. May 2, 2016) (“*BDS FNPRM*”) (“The goals of this Further Notice are supported by the joint principles recently announced by INCOMPAS and Verizon urging the Commission to ‘adopt a permanent framework for regulating all dedicated services in a technology neutral manner.’”)

<sup>3</sup> *Id.* at 96 ¶ 216.

<sup>4</sup> *Id.* at 98 ¶ 220, Table 3.

<sup>5</sup> Mark Cooper, Consumer Federation of America, *The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits* 33-35 (2016).

To guide its analysis of whether markets are competitive and its efforts to design, implement, and enforce policies to promote BDS competition, the Commission should first establish benchmarks for pricing so that it can recognize when prices are truly competitive. A regulatory regime that marginally improves competition is not sufficient. The BDS market is overwhelmingly concentrated by any measure. A BDS regulatory regime that continues to permit unjust and unreasonable rates to flourish, albeit to a lesser degree, will nonetheless continue to allow dominant providers to harm customers and consumers.

Further, the Commission should not rely on potential competition as part of its analysis to determine whether geographic markets for BDS are competitive. Nor should the Commission rely on potential competition to determine what actions to take to address the lack of competition in markets it deems non-competitive. The Commission has long proven itself incapable of predicting future BDS competition.

As the *BDS FNPRM* acknowledges, the Commission's efforts to predict where competition will materialize and where it will not, have been unsuccessful.<sup>6</sup> Thus, it is confounding that the Commission appears ready to double down on its previous failures to predict competition by asserting that potential competition and nearby suppliers, rather than actual competitors, can constrain BDS prices.<sup>7</sup> The core of the Commission's proposal is a new Competitive Market Test and would look to potential competition as a way to bring more competition to BDS customers.<sup>8</sup> This approach is troubling and will likely be ineffective.

In 1999, the FCC adopted the *Pricing Flexibility Order*, which granted incumbent local exchange carriers pricing flexibility based on potential competition in given geographic areas.<sup>9</sup> The Commission's decision to grant pricing flexibility was premised on the assumption that competition was likely to develop, leading to lower prices and justifying regulatory relief.<sup>10</sup>

In 2006, the Government Accountability Office's ("GAO") reviewed the Commission's efforts to promote competition in the BDS market ("*GAO Report*"). The *GAO Report* was scathing in its analysis of the Commission's ability to accurately predict competition, finding that the Commission's predictions regarding likely or emerging competitors were often wrong and that competition often never materialized because potential competitors went out of business or were acquired by the incumbents. And, because the FCC never revisited or updated its data, the Commission never accounted for the failure of competitors to emerge.<sup>11</sup> GAO explained that the pricing flexibility triggers in the *Pricing Flexibility Order*, premised on potential competition, did

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<sup>6</sup> *BDS FNPRM* at 3 ¶ 1.

<sup>7</sup> *See id.* at 69 ¶ 161, 107 ¶ 235, 124 ¶ 292.

<sup>8</sup> *Id.* at 4 ¶ 5.

<sup>9</sup> *Id.* at 8 ¶ 17.

<sup>10</sup> *See* Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; CC Docket Nos. 96-262, 94-1; *Fifth Report and Order and Further Notice of Proposed Rulemaking*; 14 FCC Rcd 14221 (1999).

<sup>11</sup> United States Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services 1, 14-15 2006.

not adequately predict competition, and that dedicated access prices had actually increased in markets where the Commission had predicted new competitors would arise. In reality, competition declined in those markets.<sup>12</sup>

The Commission itself has acknowledged in forbearance proceedings that its lackluster record in making predictive judgments regarding competition makes these predictions a poor basis for granting regulatory relief.<sup>13</sup> For example, in its *Qwest Phoenix Forbearance Order*, the Commission declined to grant a request from Qwest for forbearance in the Phoenix, AZ market from several Commission rules. The Commission explained that its prior predictions regarding the development of competition were unsound and “may result in granting relief from existing obligations before competition has developed sufficiently to protect against the exercise of market power by incumbent LECs.”<sup>14</sup> The Commission further noted that where there are high barriers to entry, potential competition often poses no serious competitive restraint and that “potential entry cannot be relied upon to constrain market prices.”<sup>15</sup> Lastly, the Commission explained that if it is to consider potential competition as a competitive restraint, it should look to see if the new entrant is likely to build a new last-mile network in the near future.<sup>16</sup>

Because the Commission has been unsuccessful in its efforts to predict competition in the BDS market, it should refrain from attempting to do so in the current proceeding. Instead, the Commission’s Competitive Market Test and actions to protect customers and consumers and promote competition in non-competitive markets should focus on actual competition and existing competitors. The Commission can then reevaluate whether markets are competitive as actual competition emerges.

Last, the Commission should adopt a technology-neutral regulatory regime for BDS. As the *BDS FNPRM* explains, in the future there may be non-competitive BDS markets where time division multiplexing-based services are no longer available.<sup>17</sup> A technology neutral framework is essential to ensure that the Commission can address the lack of BDS competition during and after the ongoing technology transitions.

If the Commission follows these principles, it can successfully address the harm to customers and consumers that flows from the exercise of market power in the BDS market.

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<sup>12</sup> See *Id.* at 19-22, 27-28, 42.

<sup>13</sup> See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area, WC Docket No. 09-135, *Memorandum Opinion and Order*, 25 FCC Rcd 8622, 8633-34 ¶ 24 (2010).

<sup>14</sup> *Id.* at 8634 ¶ 24.

<sup>15</sup> *Id.* at 8660-61 ¶¶ 72-73.

<sup>16</sup> *Id.* at 8666-67 ¶¶ 84-85.

<sup>17</sup> See *BDS FNPRM* at 139 ¶ 352, 184 ¶ 507.

Respectfully submitted,

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