



November 9, 2016

**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 November 7, 2016, Jonathan Banks and the undersigned of USTelecom met separately with Claude Aiken, Legal Advisor to Commissioner Clyburn, and Travis Litman, Senior Legal Advisor to Commissioner Rosenworcel. We discussed certain aspects of Chairman Wheeler's recent proposals for regulating the business data services (BDS) marketplace.

With regard to Ethernet services, we reiterated that multiple regressions and other data in the record provide no evidence of market power on which the Commission could lawfully regulate prices for Ethernet at any speed, and further stated our agreement with the decision not to impose ex ante pricing regulation on Ethernet services either directly or indirectly through conditions or other mandates that limit providers' ability to charge market-based rates.

With regard to TDM-based legacy services, we and others were caught off guard by the absence of a competitive test in the Chairman's proposals to determine where to impose price cap regulation. We explained that the Commission cannot justify imposing new pricing rules everywhere indiscriminately, given ample evidence of BDS competition in the record, and the Commission's previous determinations (e.g., in the UNE and pricing flexibility proceedings) that BDS is competitive in some areas of the country. We described the two-competitor test put forth by USTelecom and others,<sup>1</sup> and suggested that it could be used to direct regulation only to areas that lack competition on an interim basis until the Commission can seek additional data in a Further Notice to establish a competitive test.

We also questioned the Commission's basis for regulating transport prices as part of its price cap reform. As an initial matter, claims that channel terminations to end users and transport services (which connect circuits and other points of presence) cannot be separated for purposes of price cap regulation are

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<sup>1</sup> See, e.g., Ex Parte Letter to Marlene H. Dortch, Secretary, FCC from USTelecom, WC Docket Nos. 16-143, 05-25, RM-10593 (Sep. 9, 2016).

simply untrue; the Commission has for years regulated them as separate BDS components, imposing different pricing flexibility rules on each accordingly.<sup>2</sup> Moreover, the record lacks sufficient data to regulate transport prices, which likely explains why the Commission's own consultant did not conduct a separate analysis of the transport market:

My approach of aggregating to the level of the circuit rules out separate analysis of the transport market. In this paper, I focus only on the market for circuits provided to customers (sometimes called the channel termination market)....<sup>3</sup>

The Commission should not force companies to take an unanticipated initial and deep price cut on transport services where, as here, there is no evidence in the record that these services are not competitively provided.

We also briefly explained why the Commission should reject demands by certain competitors that rely heavily on resale to force a mandatory "wholesale" discount structure on the BDS marketplace.

Backward-looking regulations that encourage resale by making it cheaper will only serve to transfer wealth from small incumbents to often large (and growing) "competitors," which hardly seems like an appropriate regulatory goal in today's diverse and competitive BDS marketplace.

Please do not hesitate to contact the undersigned if you have questions or concerns.

Sincerely,



Diane Griffin Holland  
Vice President, Law & Policy

cc: Claude Aiken  
Travis Litman

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<sup>2</sup> See, e.g., 47 C.F.R. §§ 69.711, 69.713 (describing pricing flexibility rules for the two separate components of BDS: channel terminations, and common line, traffic-sensitive and tandem-switched transport services, respectively).

<sup>3</sup> *Business Data Services in an Internet Protocol Environment, Tariff Investigation Order and Further Notice of Proposed Rulemaking*, 31 FCC Rcd 4723, App. B at 204 (2016).