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October 4, 2016

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte*** **Filing of the American Cable Association on 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 Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, RM-10593.**

Dear Ms. Dortch:

On September 30, 2016, Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association ("ACA") and Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, met with Stephanie Weiner, Legal Advisor to Chairman Wheeler, to discuss the above-referenced dockets.[1]

Consistent with its *ex parte* filed on September 22, 2016 to memorialize its meeting with Commission staff,[2] ACA representatives began the meeting by reviewing the many reasons for

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1 *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143 *et al*., Tariff Investigation and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("FNPRM"). *See* Comments of the American Cable Association, WC Docket No. 16-143 *et al*. (June 28, 2016) ("ACA Comments"); Reply Comments of the American Cable Association, WC Docket No. 16-143 *et al*. (Aug. 9, 2016) ("ACA Reply Comments").

2 Letter from Thomas Cohen, Counsel to American Cable Association, to Marlene Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. (Sept. 22, 2016).

the Commission to maintain its light touch regulatory policy on non-incumbent providers of business data services ("BDS") and not set a deadline in an order for this approach to expire or be revisited.[3] While the most recent version of the Verizon-INCOMPAS proposal moves in the correct direction by providing that new entrants should not be subject to benchmarks "at least until the FCC reassesses market competition in approximately three years,"[4] the inclusion of language setting any such expiration date or even a timeframe for examination of the light touch policy would immediately cause the cost for non-incumbents to deploy new facilities to increase, undermining the Commission's objectives to accelerate the offering of innovative services and increase competition.[5] In addition, it is not necessary because the Commission's authority to regulate non-incumbents at any time is not in dispute and, in any event, it would not bind future Commissions. Finally, such language suggests that there might be a cogent basis to regulate non-incumbents in the same manner as incumbents, and there is no evidence in the record from

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3 *See* FNRPM at ¶ 231 ("The great entry success story has been that of cable.").

While, as discussed herein, ACA has focused its advocacy so far on ensuring non-incumbents continue to be subject to light touch regulation, should the Commission not continue this policy, it should (a) follow the advice of ACA's economist, Marius Schwartz, to not regulate packet-based BDS provided over fiber facilities since the Commission should encourage investment in this critical infrastructure and since these facilities will not be deployed pursuant to any monopoly franchise with a guaranteed return, and (b) apply a "competition" test that recognizes that investment and entry are occurring and can readily occur across most of the country – and that recognizes that entry in rural areas, where incumbents dominate, is critical and more challenging and therefore should be especially encouraged.

4 *See* Letter from Kathy Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. at 2 (Aug. 9, 2016); Letter from Maggie McCready, Vice President, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. at 3 (Sept. 12, 2016).

5 Language in an order indicating that the Commission will or even may revisit whether to rate regulate non-incumbents will have an immediate impact on investment because bankers and investors will account for the potential for this event to occur and raise the cost of "money" accordingly. This may have the greatest impact in rural areas, where the payback period on investments is often longer. *See* ACA Comments, Appendix B, ACA Operator Member Activities in the Market for Business Data Services, Section 6 (June, 2016); *see also* Letter from Eric J. Branfman, Counsel for Lightower, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. at 2 (Aug. 3, 1016) ("Lightower also noted that lenders have expressed concern at the possibility of regulation of Lightower's prices, indicating that it increases the risk from the lender's point of view and therefore increases Lightower's cost of capital.").

Verizon, INCOMPAS, or any other party that would support abandoning at any time the Commission's light touch regulation of non-incumbents.

ACA recognizes that the Commission may nonetheless wish to recommend to future Commissions that they should examine the BDS market at regular intervals to review the state of competition and to determine whether its regulatory regime is working as intended. ACA does not oppose such a recommendation, so long as it does not prejudge or otherwise prejudice the outcome by stating or implying in an order that non-incumbents will – or even may – be subject to more extensive rate regulation as a result of the Commission re-examining the regulatory landscape.

Finally, ACA representatives, in discussing the common versus private carriage issue, reiterated that whether a provider offers the service on a common or private carriage basis is a factual inquiry[6] – and that the Commission in its brief on the *2015 Open Internet Order* supported this conclusion.[7] ACA further noted that in a recent filing Verizon appears to have "walked back" from its assertion that all providers of business data services are common carriers.[8] Instead, Verizon stated that "providers, including Verizon, still can and do offer other services as private carriers." Verizon also stated that providers should petition the Commission if they want clarity about the type of service being offered; however, the Commission has never required providers to file a petition to determine whether it is providing a service on a common or private carriage basis prior to initiating service. Moreover, ACA, to the best of its knowledge, believes that Verizon has never, if ever, filed such a petition prior to its offering of services on a

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6 *See e.g.* ACA Reply Comments at 12-18.

7 *See e.g*. Brief for Respondents, *United States Telecom Association, et al., Petitioners, v. Federal Communications Commission and United States of America, Respondents*, No. 15-1063, 81 (D.C. Cir. Sept. 14, 2015) ("USTelecom asserts that broadband providers 'have the right to elect whether to operate as private carriers or common carriers.' Br. 75. If a provider in the future decides not to make a standardized, mass market offering of broadband service to the public, but instead opts to offer service as private carriage on individualized terms, it would no longer be offering 'Broadband Internet Access Service' as defined in the Order and would not be subject to the legal standards adopted here.").

8 *See* Letter from Curtis Groves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*., (Sept. 27, 2016). *See also e.g.* Letter from Curtis Groves, Assistant General Counsel, Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. (Aug. 5, 2016). In this filing, Verizon claims that "cable providers sell Business Data Services the same way everyone else in the industry sells Business Data Services, and that the way they offer it is common carriage."

private carriage basis, which has occurred in thousands of instances.[9] In sum, Verizon offers insufficient support to change Commission precedent.

In closing, the heart of this proceeding has always been about whether incumbents have market power in the provision of BDS and therefore should be subject to more extensive regulation of their rates, terms, and conditions.[10] As this proceeding has developed, Verizon-INCOMPAS continue to admit in effect that they overreached in calling for regulation of non-incumbents or in seeking to classify them only as common carriers when offering BDS or business data-like services – and they keep offering new "policy crumbs" in the hope that non-incumbents will believe those are sufficient. However, the Commission's non-dominant regulatory policy has proven to be a resounding success, driving investment, facilities deployment, and competition. The proponents of regulating them offer, despite endless attempts, nothing to give the Commission sufficient basis to undermine that light touch regulatory approach. Rather, the Commission should affirm it and then focus on measures to accelerate further investment and deployment, including by addressing barriers in access to poles, conduit, and rights-of-way.[11]

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9 *See* FNPRM n. 671 ("In the time since it obtained forbearance, Verizon has entered into approximately 3,300 private carriage contracts with unaffiliated carriers for non-TDM based services, valued at more than $3.7 billion over their lifetime.").

10 ACA notes that on September 28, 2016, Sprint, a proponent of the Verizon-INCOMPAS proposal, filed a lengthy *ex parte* summarizing the record from its perspective. Nowhere in that filing did Sprint indicate that non-incumbents were charging supracompetitive or unjust and unreasonable rates or had market power. In fact, Sprint contended that incumbents were the sole providers "exploiting their market power to charge exorbitant supracompetitive rates," and that "cable providers face constraints that impede their ability to compete in the provision of BDS." In light of Sprint's contentions, ACA is puzzled by Sprint's insistence that non-incumbent should be regulated pursuant to its "leading provider" approach – an approach which lacks any economic or antitrust basis. *See* Letter from Jennifer P. Bagg *et al*., Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 16-143 *et al*. (Sept. 28, 2016).

11 *See* FNPRM at ¶¶ 225-232.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,

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