



EUROPEAN UNION
DELEGATION TO THE UNITED STATES OF AMERICA

The Head of Delegation

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Subject: 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; and 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:

I am writing on behalf of the European Union on the subject of the Report and Order on Business Data Services in an Internet Protocol Environment et al. (WC Docket No. 16-143 et al.), whose draft version was circulated by the FCC on March 30, and which will be subject to an FCC vote on April 20.

I thank you for the opportunity to comment on the draft Report and Order, but regret the short deadline of 20 days between publication and vote, which did not allow us to conduct a full consultation of EU stakeholders with an interest in this matter.

After careful analysis of the draft Report and Order, we conclude that it represents a change of policy in the field of Business Data Services (BDS – also known as "special access"), which raises concerns on the part of the European Union and its industry.

It is undeniable that digital communications are a critically important input to today's economic activity, and that BDS are one of its fundamental components. BDS are crucial for creating private networks that enable the secure and reliable transfer of data across wide geographical areas. They are also used for providing dedicated access to the Internet or innovative broadband services. Many market players depend on BDS to conduct their everyday business. For example, mobile wireless providers use BDS to backhaul voice and data traffic from cell sites to their switching offices, branch banks and gas stations use BDS to connect to ATMs and credit card

readers, and many businesses in all sectors rely on BDS to create their own secure private networks.

The FCC has recently concluded an extensive data collection and analysis exercise¹, which showed that "in the vast majority of special access product and geographic markets, the incumbent LECs do not face effective competition", with 73% of all purchaser locations being served by a single incumbent local exchange carrier (ILEC), and a further 24% being served only by one ILEC and one competing carrier. In light of the collected evidence, the FCC concluded that competition in the BDS marketplace is uneven. This was fully in line with concerns previously conveyed by the EU, EU Member States, and EU operators, and created some optimism that regulatory policies might be put in place effectively to facilitate wholesale access. However, in the *draft Report and Order*, based on the same underlying evidence, the FCC now appears to arrive at the opposite conclusion that "to a large extent in the business data services market, the competition envisioned in the Telecommunications Act of 1996 (1996 Act) has been realized".

The European Union is concerned that this sudden change of course, followed by the rapid action that is foreseen in the *draft Report and Order* may be harmful for consumers and competition, and that it will further aggravate the imbalance in BDS regulatory practice that already exists between the US and the EU and other nations. This imbalance skews important markets, such as global B2B data services where both EU and US players hold significant interests, in favor of US players globally. US players benefit from no effective regulation or transparency requirements on their provision of wholesale BDS, which are key inputs for foreign B2B data services providers in the US. At the same time, they rely on regulated markets in the EU and elsewhere for the acquisition of equivalent wholesale BDS inputs abroad, which gives them a clear competitive advantage.

Furthermore, the European Union is concerned that the current situation and the course of action envisaged in the *draft Report and Order* may threaten the US' compliance with WTO regulatory norms on Telecommunications Services in Section 5² of the GATS Annex on Telecommunications and in Sections 1³ and 2⁴ of the WTO Telecommunications Services Reference Paper. WTO regulatory norms apply to BDS, both to TDM and Ethernet access

¹ In the matter of Business Data Services in an Internet Protocol Environment, WC Dkt. No. 16-143; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, WC Dkt. No. 15-27; Special Access Rates for Price Cap Local Exchange Carriers, WC Dkt. 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, Tariff Investigation Order and Further Notice of Proposed Rulemaking (May 2, 2016).

² Section 5(a) of the GATS Annex on Telecommunications requires that any service supplier be accorded "access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions" for the supply of a service included in the US' Schedule.

³ Section 1.1 of the Reference Paper requires the parties to maintain "appropriate measures ... for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices."

⁴ Section 2.2 of the Reference Paper requires interconnection with a major supplier at "cost-oriented rates that are transparent [and] reasonable."

services, which are circuit-switched and packet-switched data transmission services that are explicitly listed in the US' Schedule of Commitments, and are not covered by the enhanced services exemption that is also part of the US' Schedule.

With this in mind, I would therefore encourage the FCC to re-examine the conclusions of the draft Report and Order in light of the existing evidence and of the US' international commitments, paying particular attention to how competition is defined and to whether competition has indeed been realized in the BDS market. I would also encourage the FCC to carefully take into consideration the effects that further deregulation policy in BDS will have on all market players, especially on those who depend on wholesale special access to carry out their business. While we would not support such a policy, we hope that any change of rules is accompanied by an appropriate time allowance for operators and the market to adapt to the new rules.

Thank you for your consideration. Please do not hesitate to contact me or my staff⁵ if we can be of further assistance or if you have any questions regarding this letter.

Sincerely,

H.E. David O'Sullivan
Ambassador of the European Union to the U.S.

Cc: *Hon. Ajit Pai (Chairman), Hon. Mignon Clyburn, Hon. Michael O'Rielly (Federal Communications Commission)
Caroline Vicini, Damien Levie, Esther Nieto Hernandez, Geraldine Emberger, Andrea Glorioso, Jesse Spector, Fiona Kitson, Renate Raff, Veronica Pintilie, Marie-Claude Volay Larsen (EU Delegation to the U.S.)*

⁵ Mr Andrea Glorioso (EU Counselor for the Digital Economy) at Andrea.Glorioso@eeas.europa.eu or 202-280.4109.