Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	)	WC Docket No. 17-144
	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	

COMMENTS OF AT&T

James P. Young
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8689

Keith Krom
Gary L. Phillips
David L. Lawson
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 463-6148

Attorneys for AT&T Services Inc.

February 8, 2019

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	)	WC Docket No. 17-144
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25

COMMENTS OF AT&T

AT&T respectfully submits these comments in response to the Second Further Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking released on October 24, 2018 in the above-captioned matters.[1]

INTRODUCTION AND SUMMARY

In 2017, the Commission completed an extraordinarily thorough and data-driven examination of competition in the marketplace for business data services ("BDS"). It found that, even as of 2013, multiple facilities-based competitors had deployed alternative transport facilities in almost every geographic area with BDS demand. Moreover, the Commission found that this dataset dramatically understated the full extent of competitive transport, because it did not include all relevant cable facilities deployed as of 2013, nor the substantial competitive transport deployed

[1] Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access Rates for Price Cap Local Exchange Carriers,* WC Docket Nos. 17-144, 16-143, 05-25 (Oct. 24, 2018) ("*Notice*").

by all providers after 2013. On this record, the Commission correctly determined that *ex ante* price cap regulation was no longer needed to protect consumers or competition, and that continued application of such regulation would be affirmatively harmful because it would discourage investment in next-generation facilities. Thus, in the *BDS Order*,[2] the Commission updated the regulatory regime for transport by eliminating *ex ante* price cap regulation in the relatively few remaining geographic areas where it still existed, and relied instead on competition to protect consumers, with *ex post* regulation as an additional regulatory backstop.[3]

Opponents of this regulatory update sought judicial review of the *BDS Order* in the Eighth Circuit. The court found no fault with the Commission's substantive analysis.[4] Rather, the court merely called a procedural foul: it held that the Commission had not provided adequate notice under the Administrative Procedure Act that it was considering nationwide elimination of *ex ante* regulation for transport.[5] The *Notice* fully addresses this technicality by explicitly seeking comment on the Commission's proposal to re-adopt the *BDS Order*'s approach to transport. As demonstrated below, the Commission's substantive analysis in the *BDS Order* was correct and should be readopted—indeed, its analysis is even more clearly correct now.

Competitors have been building their own fiber transport networks for more than three decades. They have built those fiber networks in a variety of configurations. In some cases,

---

[2] Report and Order, *Business Data Services in an Internet Protocol Environment; Technology Transitions; 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, 05-25, GN Docket No. 13-5, RM-10593, 32 FCC Rcd. 3459 (2017) ("*BDS Order*")

[3] The Commission also permissively detariffed transport services, and required carriers to implement mandatory detariffing by August 1, 2020. *See id.*

[4] *Citizens Telecomms, Co. of Minn.* v. *FCC*, 901 F.3d 991 (8th Cir. 2018).

[5] *Id.* at 1004-06.

competitors connect fiber transport facilities to collocations in ILEC central offices, where they can access ILEC loops. In other cases, they bypass ILEC central offices altogether, establishing their own connections to end user locations from splice points on their fiber transport networks. Competitors can also readily access each other's transport networks via ever-increasing use of neutral, third-party carrier hotels and data centers. Notably, cable companies, which entered the BDS marketplace relatively recently, have achieved rapid growth relying on their own fiber-coaxial transport networks that bypass ILEC central offices.

After three decades and billions of dollars of deployments, facilities-based competition for transport is now effectively ubiquitous. As the Commission found, the data show that competitors have built their transport networks to within a half-mile of 92.1 percent of all locations with BDS demand in price cap areas. Moreover, the Commission found this statistic to be extremely conservative for at least two reasons: (1) it is based on data from *2013* and thus leaves out the significant amount of CLEC and cable facilities that have been deployed since then, and (2) even the 2013 data omitted significant portions of cable company transport.[6] The real percentage today, six years later and accounting for the explosive growth of cable services, is much higher.[7] The data also show that large cities typically have more than twenty independent transport competitors, and smaller cities typically have a dozen or more.[8] In short, the data show that competitors' transport networks today are generally geographically coextensive with ILEC transport networks.[9]

---

[6] *BDS Order* ¶ 91.

[7] *See, e.g., id.* ¶ 79.

[8] *Id.*

[9] The references in this pleading to the state of competition for BDS—both transport and channel terminations—refer to competition in areas historically governed by price cap regulation. AT&T takes no position on the state of competition for BDS in areas historically regulated by rate-of-return regulation.

Based on this overwhelming record, the Commission correctly found that the public interest would be best served by eliminating price cap regulation of transport on a nationwide basis. The Commission recognized that once facilities-based competition exists, the potential benefits of *ex ante* rate regulation cease to exist, leaving only the substantial harms.[10] Now that facilities-based competition is almost ubiquitous, the Commission properly concluded that competition is "sufficiently pervasive at the local level to justify relief from pricing regulation nationwide."[11]

To be sure, the Commission acknowledged that nationwide relief could leave a very small percentage of census blocks, which contain "an even smaller percentage of overall demand," deregulated but "without the immediate prospect of competitive transport options."[12] The Commission correctly found, however, that "greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach."[13] Such regulation would also be

[10] *See id. See also, e.g.,* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Second White Paper, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, RM-10593, at 39-40 (Jun. 28, 2016) ("IRW Second White Paper") ("As a matter of economics, price cap regulation is unnecessary and is, in fact, counterproductive in areas where rivals have deployed competing facilities-based networks."); *WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market" (internal quotations omitted)); *Pricing Flexibility Order* ¶ 80 (once a *facilities-based* competitor has "entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary"); *USTA* v. *FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004).

[11] *BDS Order* ¶ 91.

[12] *Id.* ¶ 92.

[13] *Id.*

an administrative nightmare for the Commission and regulated entities. The Commission's goal is not "absolute mathematical precision but an administratively feasible approach that avoids imposing undue regulatory burdens on this highly competitive segment of the market," and in the context of transport, nationwide relief "achieves the proper balance between precision and administrability."[14] Those judgments remain sound and should be reaffirmed.

The CLECs that have opposed the *BDS Order* have offered two meritless arguments against the Commission's approach to transport. Their lead argument is that the Commission incorrectly measured the scope of competitive transport, supposedly because the Commission should have measured how far competitive transport is from ILEC central offices rather than from locations with BDS demand. But this argument ignores that a large portion of competitive transport, including virtually all cable transport, bypasses ILEC central offices today, thus making distance of competitive transport to ILEC central offices largely beside the point. Moreover, even if the ability to connect to central offices were critical to the analysis, the data show that competitive transport is deployed nearby all or most central offices. Central offices are in buildings spread throughout service areas, and the data show that more than 92 percent of buildings are within a half mile of transport. Since the Commission has already found that competitors can connect buildings within a half mile of their fiber facilities, it follows that they can connect to all or most central offices (to the extent they have not done so already).

Opponents' other argument is that removing price caps from transport will permit ILECs to evade price caps on channel terminations. In fact, TDM transport is offered and billed separately from TDM channel terminations. Therefore, if an ILEC raised transport prices to evade caps on

[14] *Id.* ¶ 93; s*ee also Citizens*, 901 F.3d at 1010-11 (upholding a similar analysis for channel terminations).

channel terminations, customers would simply switch to competitors' transport services while continuing to rely on ILECs for price-capped channel terminations.

ARGUMENT

I. THE COMMISSION SHOULD READOPT ITS RULES ELIMINATING *EX ANTE* PRICE CAP REGULATION FOR TDM TRANSPORT NATIONWIDE.

The Commission should reaffirm its decision to remove all *ex ante* price cap regulation from TDM transport nationwide. The Commission's decision in the *BDS Order* was based on a two-step analysis: (1) competitors have deployed alternative transport facilities capable of serving almost all BDS demand, and (2) there is no public interest basis for trying to identify and regulate the very small portion of remaining price cap LEC transport. As demonstrated below, both propositions remain true (indeed, they are even more true today), and continue to compel the elimination of *ex ante* price cap regulation for transport.

A. Facilities-Based Competition For Transport Is Effectively Ubiquitous.

There is unanimous agreement among courts, the Commission, and economists that price cap regulation is no longer justified once competitors have deployed their own facilities, because such facilities ensure that prices will remain at just and reasonable levels and continued regulation causes more harm than good.[15] All of this is confirmed by a decade and a half of real-world

[15] *See, e.g., WorldCom, Inc.* v. *FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) ("the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market" (internal quotations omitted)); Fifth Report & Order & Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd. 14221, ¶ 80 (1999) ("*Pricing Flexibility Order*") (once a *facilities-based* competitor has "entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary"), *aff'd WorldCom, Inc.*, 238 F.3d at 458-59; *see also* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Competitive Analysis of the FCC's Special Access Data Collection, *Special Access Rates for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, at 14 (Jan. 26, 2016) ("IRW First White Paper"); Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied

experience under the Commission's previous *Pricing Flexibility Order*, under which carriers had received Phase II relief (*i.e.*, the elimination of price caps) for a majority of transport services. As the Commission correctly concluded in the *BDS Order*, competition for transport services remained "robust" even though "a substantial majority of transport revenue [had not been subject to price caps] since the early 2000s."[16]

Here, the record and the Commission's findings in the *BDS Order* confirm that facilities-based competition for transport services is essentially ubiquitous, necessitating the removal of harmful *ex ante* pricing regulation to unleash the full benefits of competition for transport services. The data show that numerous competitors have deployed competing transport facilities and that these competing facilities are within reach of nearly all BDS demand. Major cities typically have more than twenty independent competitive transport providers, and smaller cities typically have at least a dozen.[17] Commission staff calculated that, as of 2013, 92.1 percent of buildings with special access demand in price cap territories were within a half mile of competitive fiber transport facilities.[18] Commission staff also showed that those CLEC transport networks are geographically

---

Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Second White Paper, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, RM-10593, at 39-40 (Jun. 28, 2016) ("IRW Second White Paper") ("As a matter of economics, price cap regulation is unnecessary and is, in fact, counterproductive in areas where rivals have deployed competing facilities-based networks."); Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Third White Paper, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143. 15-247, 05-25, RM-10593, at 2 (Aug. 9, 2016) ("IRW Third White Paper").

[16] *BDS Order* ¶ 79. Indeed, this is also the theory under which the Commission eliminated *ex ante* price cap regulation for channel terminations in many areas in the *BDS Order*, and the Eighth Circuit upheld that decision based on evidence of facilities-based competition as well. *Citizens*, 901 F.3d at 1008-11.

[17] *BDS Order* ¶ 79.

[18] *Id.* ¶ 91.

dispersed: 89.6 percent of all price cap census blocks with BDS demand had at least one building within a half mile of competitive transport fiber.[19]

These metrics, however, dramatically understate the actual extent of facilities-based competition for transport. To begin with, the 2013 data "include[d] only a subset of all hybrid fiber coax facilities deployed by cable providers"—specifically, "only Metro-Ethernet headend-connected fiber feeder plant."[20] Moreover, all competitors have continued to deploy transport since 2013, and thus the 2013 metrics "necessarily understate the level of actual competition for transport services by not including competitive facilities that have since been deployed."[21] Indeed, the *BDS Order* documented the substantial expansion of cable companies' and CLEC providers' transport networks between 2013 and 2015.[22] And that growth has continued into 2017 and 2018.[23] Indeed, Comcast reports that in 2017 and 2018 it continued to make billions of dollars in capital expenditures "to increase network capacity" and reports that its "vast and growing footprint" now has "over 141,000 national route miles of fiber," which "spans 29 regional networks in 39 states," and is "the largest facilities-based last mile alternative to the phone

[19] *Id.*; *see also Notice* ¶ 149.

[20] *BDS Order* ¶ 91.

[21] *Id.* ¶ 91.

[22] *BDS Order* ¶¶ 55-65. For example, the record shows that if all cable BDS services are included (including cable best efforts services) as of 2015, competitive providers had deployed competing transport networks in more than 95 percent of census blocks with special access demand, and according to Dun & Bradstreet data, about 99 percent of all business establishments are in those MSAs. *BDS Order* ¶ 79 (citing Mark Israel, Daniel Rubinfeld & Glenn Woroch, Competitive Analysis of the FCC's Special Access Data Collection, *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at 20 (filed Jan. 27, 2016) ("IRW 1/27/16 White Paper")).

[23] *See, e.g., Notice* ¶ 152 & n.389 ("there are indications that cable providers' market share of lower speed business data services continues to grow significantly" since the *BDS Order* was issued).

company."[24] Charter Spectrum reports that in 2018 it spent "more than one billion dollars (U.S.) in new fiber infrastructure to increase the density of its national fiber network," which will be the "second consecutive year in which Charter has invested in excess of $1 billion exclusively in Spectrum Enterprise."[25] Cox is supplementing the "$15 billion in infrastructure upgrades over the past decade" by "pump[ing] at least $10 billion more into its network over the next five years."[26] Altice now has more than 375,000 business customers across 21 states, and has nearly doubled the number of buildings connected to its fiber network since 2015.[27] With respect to CLECs, the *BDS Order* highlighted the growth of Zayo between 2013 and 2015.[28] That growth has also continued. Zayo reports a 38% increase in fiber route miles from December 2015 (95,000 miles) to November 2018 (131,100 miles).[29]

These data confirm that the Commission's decision in the *BDS Order* that all or virtually all transport is subject to competition, thus eliminating the need for continued use of harmful *ex ante* price cap regulation, was clearly correct. Moreover, that decision is on firmer legal ground today, because the Eighth Circuit, in affirming the Commission's decision to eliminate *ex ante*

---

[24] Comcast Business, The Comcast Network (2018), *available at* https://business.comcast.com/about-us/our-network (last visited Jan. 27, 2019).

[25] Press Release, *Spectrum Enterprise to Invest $1 Billion to Increase the Density of its National Fiber Network and Transform its Approach to the Client Experience* (May 14, 2018), *available at* https://newsroom.charter.com/press-releases/spectrum-enterprise-to-invest-1-billion-to-increase-the-density-of-its-national-fiber-network-and-transform-its-approach-to-the-client-experience/.

[26] Alan Bresnick, *Cox Hits Gas on Gigabit Rollout*, LightReading (Jan. 10, 2018), *available at* https://www.lightreading.com/cable/docsis/cox-hits-gas-on-gigabit-rollout/d/d-id/739577.

[27] *Compare BDS Order* para. 60 (reporting 7,700 connected buildings for Altice) *to* Altice 2018 Website (reporting more than 14,000 fiber-lit locations), *available at* https://alticebusiness.com/about-us (last visited Jan. 27, 2019).

[28] *BDS Order* ¶ 63.

[29] *See* Zayo November 2018 10Q and February 2017 10Q, *available* at https://investors.zayo.com/financials-and-results/sec-filings/default.aspx (last visited Jan. 27, 2019).

pricing regulation for channel terminations, upheld two of the key premises underlying the Commission's analysis of transport.

First, a key finding underlying the Commission's analysis of both transport and channel terminations in the *BDS Order* is that a CLEC can profitably build a lateral connecting an end user location to an interoffice transport facility as long as the end user location is within a half mile.[30] The CLEC Petitioners in the *Citizens* case challenged this finding as it related to channel terminations, but the Eighth Circuit upheld the Commission's use of a half-mile, and explained in detail that the agency's analysis of the record on this point was "not arbitrary and capricious."[31] Accordingly, the Commission can conclude even more confidently today that calculating the percentage of locations with BDS demand that are within a half-mile of competitive transport is the correct focus. In essence, the Eighth Circuit's holding confirms that 92 percent of locations with BDS demand are close enough to competitive transport that the end user could access that competitive transport via the economically feasible deployment of a lateral (*e.g.*, a channel termination).

Second, the Commission's transport analysis was based in part on the conclusion that "the presence or reasonable proximity of a *single* competitor's facilities represents competition given the high sunk cost nature of the business data services market."[32] The CLEC Petitioners also challenged this finding as it related to channel terminations.[33] The Eighth Circuit again rejected the CLEC Petitioners' arguments and upheld the Commission's use of a single competitor to assess

[30] *BDS Order* ¶¶ 41-43.

[31] *Citizens*, 901 F.3d at 1008-09.

[32] *BDS Order* ¶ 91 (emphasis added).

[33] *Citizens*, 901 F.3d at 1010.

competition in the BDS market.[34] Thus, the Commission is on even firmer ground today in concluding that ample competition exists for transport serving almost all available demand, especially given the record evidence that, in most cases, there are many providers of competitive transport services, not just one.

B. Nationwide Relief Is Appropriate.

In the *BDS Order*, the Commission acknowledged that nationwide elimination of price cap regulation could "leave a relatively small percentage of census blocks (with an even smaller percentage of overall demand) price deregulated and without the immediate prospect of competitive transport options."[35] The Commission nonetheless concluded that complete elimination of price caps would better serve the public interest, because retaining price cap regulation (1) would unduly discourage competitive entry and (2) would be administratively unworkable.[36] After two additional years of competitive expansion by CLECs and cable companies, both of the Commission's reasons continue to strongly support nationwide relief.

First, the public interest would be better served by encouraging facilities-based entry and investment on those remaining routes, rather than trying to retain intrusive price cap regulation. The Commission correctly recognized that "greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach."[37] As the Commission noted, the complete elimination of *ex ante* price regulation is more appropriate for transport services than

---

[34] *Id.* (Commission "cited sufficient evidence to justify removing *ex ante* regulation in a market with two competitors").

[35] *BDS Order* ¶ 92.

[36] *Id.* ¶¶ 92-93.

[37] *Id.* ¶ 92.

channel terminations, because transport is generally more conducive to facilities-based entry. Carriers do not literally deploy "DS1 transport" facilities; they deploy high-capacity fiber connections that can be *channelized* to provide DS1 or DS3 transport and which, in contrast to channel terminations, can potentially be used to serve many end user customers.[38] For these reasons, transport remains the "low hanging fruit" in the BDS marketplace,[39] and "[t]o the extent that there are points of aggregation that are not served by competitors, the relatively high demand at these points makes it likely that a competitor could justify investing in competitive transport facilities to serve that demand."[40] The Commission correctly recognized in the *BDS Order* that transport both has "lower entry barriers" for deployment than channel terminations and is experiencing "increasing demand," and it remains true that those two factors "will provide incentives for competitive providers to deploy additional transport facilities to compete for this demand."[41]

[38] *See, e.g., Pricing Flexibility Order* ¶ 102 ("[e]ntrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport all involve carrying traffic from one point of traffic concentration to another," which meant that "entering the market for these services requires less investment per unit of traffic than is required, for example, for channel terminations between an end office and a customer premises," which also meant that competitors would be likely to enter the market for transport services "before they enter the market for channel terminations."); Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, ¶ 72 (2005) ("transport facilities are not dedicated to a single customer . . . but rather carry numerous customers' traffic. A competitive LEC therefore does not lose the sunk costs it has incurred to deploy transport when it loses a single customer, as it may in the case of a loop, if it does not acquire a new customer requesting similar services in the same location. With transport facilities, competitive LECs have some flexibility to replace a decrease in traffic. Thus, while there are significant sunk costs associated with transport deployment, there are greater opportunities for recovering sunk costs with transport than with loop facilities").

[39] *BDS Order* ¶ 82 (quoting *Pricing Flexibility Order* ¶ 102).

[40] *Id.* ¶ 92.

[41] *Id.*

The fact that competitors can credibly threaten entry is sufficient to discipline transport prices on the handful of routes not already served by a facilities-based competitor. As the record shows, competitors do not have to be able to accept *all* transport traffic in an area to provide competitive discipline. Price cap LECs generally do not price their transport services on a route-by-route basis, and therefore in counties in which competitors can accept the overwhelming majority of transport traffic on all or almost all routes, price cap LECs have no choice but to provide competitive mileage prices and terms to compete for that traffic, thereby ensuring competitive outcomes.[42] Thus, as the Commission found, although "competition may not be universal, it is sufficiently widespread for us to have confidence that a combination of these factors will broadly protect against the risk of supracompetitive rates being charged by price cap LECs over the short- to medium-term."[43] In addition, as the Commission noted, "the section 208 complaint process represents a continuing safeguard against unjust and unreasonable rates."[44]

Second, the Commission correctly concluded that trying to identify and regulate "non-competitive" transport routes would be administratively infeasible. In this regard, it is important to underscore here just how little transport is not already subject to facilities-based competition. As discussed above, the Commission found that the *2013* data, even excluding a lot of relevant cable competition, showed that competitors had already built their transport networks within a

[42] Even in an outlying area where CLECs may not have built transport all the way to the ILEC central office closest to a customer, CLECs nonetheless have transport facilities and networks that duplicate *most* of that ILEC's interoffice transport routes, and thus could still win most if not all of that transport business by accepting that traffic from a different hand-off point. Indeed, with the proliferation of extensive carrier-neutral facilities (such as carrier hotels and data centers), many competitive carriers use those locations today for network interconnection in which they accept transport traffic instead of maintaining collocation facilities in ILEC serving wire centers.

[43] *BDS Order* ¶ 92; *see also Citizens*, 901 F.3d at 1008 (expressly upholding Commission's focus on *medium*-term competitive entry).

[44] *BDS Order* ¶ 93.

channel termination's reach of more than 92 percent of all locations with BDS demand.[45] After *six years* of further competitive investment and rapid expansion of cable offerings, the percentage of locations with BDS demand today that are not within reach of a facilities-based transport competitor must be exceedingly small. Equally important, the data show that these locations are scattered all over the country in isolated pockets in odd corners of larger geographic units such as counties.

Accordingly, a "competitive market test" for transport would make no sense.[46] Any *reasonably administrable* geographic area for regulation (such as a county) would be grossly over-inclusive, in the sense that it would unjustifiably impose price cap regulation mostly on price cap LEC transport services that are subject to robust, facilities-based competition (often from a dozen or more competitors). The Commission has stated a clear preference for erring on the side of encouraging competitive entry and investment, and the Eighth Circuit has expressly upheld that preference in this specific context.[47] A competitive market test for transport, if applied at a county or similar geographic level, would impose massive error costs that would unduly discourage competitors from making feasible investments in next-generation transport facilities.[48] As the Commission put it in the *BDS Order*, the "significant additional complication [from having to target transport price caps to smaller geographic areas] does not appear warranted for a market that

[45] *Id.* ¶ 91.

[46] *See Notice* ¶ 155.

[47] *Citizens*, 901 F.3d at 1010-11 ("the problem with the CLEC Petitioners' argument is that it presumes that only price caps produce affordable rates, while the FCC found that competition would drive prices to competitive levels").

[48] *See BDS Order* ¶ 92 (the "greater harm" would be to discourage facilities-based competitive entry).

has seen considerable competitive investment and has largely been deregulated for much of the past 15 years under our current pricing flexibility rules."[49]

Under these circumstances, the Commission correctly eliminated all *ex ante* price cap regulation of transport. As the Commission appropriately noted, its "goal is not absolute mathematical precision but an administratively feasible approach that avoids imposing undue regulatory burdens on this highly competitive segment of the market."[50] With that goal in mind, it is even truer today that "[r]efraining from pricing regulation for transport services nationally achieves the proper balance between precision and administrability."[51]

II. THE CLECS' ARGUMENTS AGAINST NATIONWIDE ELIMINATION OF *EX ANTE* PRICE CAP REGULATOIN FOR TRANSPORT HAVE NO MERIT.

CLECs thus far have mounted two baseless challenges to the *substance* of the Commission's approach to transport: (1) the Commission improperly based nationwide regulation on data showing the distance between competitive fiber and customer locations, rather than between competitive fiber and ILEC central offices, and (2) nationwide deregulation would permit ILECs to evade price caps on channel terminations.

The CLECs' first argument, before both the Commission and the Eighth Circuit, has been that the Commission did not properly measure the scope of facilities-based transport competition. These arguments focused on just one of the Commission's conclusions—namely, the Commission's finding that competitors as of 2013 had deployed facilities within a half-mile of

[49] *Id.* ¶ 91 n.294 (citing AT&T 4/13/17 *Ex Parte* at 2-8).

[50] *Id.* ¶ 93.

[51] *Id.* ¶ 93; *see also id.* ("the alternative would be to impose significant regulatory burdens on all participants in the market with an additional layer of regulatory complexity that would undermine predictability and ultimately hinder investment, including in entry, and growth"); *see also id.* (eliminating price cap regulation "also avoids unnecessary disruption of existing special access transport arrangements").

92.1 percent of the locations with BDS demand in price cap areas.[52] The CLECs have argued that, because ILEC interoffice transport facilities connect ILEC central offices, the Commission should have measured distances between CLEC fiber and ILEC central offices, rather than customer locations.[53]

The CLECs' criticism fails for multiple reasons. Foremost, it rests on a view of transport that is too ILEC-centric. As noted, CLECs do not need to collocate in ILEC central offices, or to replicate ILEC transport paths, in order to provide a competitive alternative that disciplines ILEC rates. For example, as noted, the record shows that cable companies generally deploy their own transport facilities that essentially duplicate ILEC paths. Moreover, CLECs and other competitors often rely on carrier hotels as a substitute for ILEC central offices. And, CLECs can and do build channel terminations that connect directly to "competitive fiber at a 'splice point'" on their networks rather than at ILEC central offices, as the CLECs themselves have repeatedly acknowledged.[54] Indeed, the Commission has correctly recognized that CLECs and cable companies "commonly" bypass ILEC central offices.[55] Properly understood, therefore, the Commission's finding confirms that competitors have indeed built transport networks that are

[52] *See BDS Order* ¶ 91.

[53] *See* CLEC Petitioners Brief at 31-32 ("because 'interoffice transport' connects incumbent end offices to the nearest point of interconnection with a competitor's network, the only distance arguably relevant to transport competition is between an ILEC end office and the nearest point of interconnection").

[54] *See* CLEC Petitioners Brief at 32 (acknowledging that a competitive channel termination could be "deployed economically by connecting the customer location to the competitive fiber at a 'splice point'").

[55] *See* Order Denying Stay ¶ 26 ("the relevant transport market is not exclusively relegated to the carriage of traffic between end offices," and "competitive transport providers now commonly take the opportunity to bypass incumbent LEC facilities for network interconnection"); *BDS Order* ¶ 81 n.273.

essentially coextensive with incumbent LEC interoffice transport networks, and that are within a channel termination's reach of almost all available BDS demand.

Notably, the D.C. Circuit has already recognized this fundamental fact about the transport marketplace. In its 1999 *Pricing Flexibility Order*, the Commission recognized that the "best evidence of irreversible investment" was merely having competitive transport facilities within a wire center.[56] Since the Commission did not have that type of evidence in 1999 (and chose not to collect it because it would be "neither simple to administer nor easily verifiable"[57]), the Commission used facilities-based collocations instead as a *proxy* for the broader existence of competitive fiber.[58] The D.C. Circuit upheld the Commission's use of collocations as such a proxy, expressly acknowledging the likelihood that "collocation underestimates competition in relevant markets as 'it fails to account for the presence of competitors that have wholly bypassed the incumbent LEC facilities.'"[59] It would make even less sense for the Commission to rigidly tie its analysis of the transport marketplace to ILEC central offices today. Competitors rely much less on ILEC collocations, due to the increasing use of third-party carrier hotels and data centers and to the explosive growth of cable services, which bypass ILEC networks altogether.[60] Nor does the Commission need a proxy: it has much more extensive and granular data than it did when it adopted the *Pricing Flexibility Order*.

---

[56] *Pricing Flexibility Order* ¶ 94 (the mere "presence of competitive facilities within a wire center may well be the best evidence of irreversible investment").

[57] *Id.*

[58] *Id.* ¶¶ 148-149.

[59] *WorldCom*, 238 F.3d at 462 (quoting *Pricing Flexibility Order* ¶ 95).

[60] *See also Notice* ¶ 152.

In all events, the CLECs' criticism fails by its own terms. The Commission's analysis shows that "92.1 percent of *buildings* served were within a half mile of competitive fiber transport facilities."[61] As noted, these buildings *include* buildings where ILEC central offices are located. In other words, contrary to the CLECs' unsupported assertions to the contrary, the data show that competitive providers have built transport networks within a half mile of almost all ILEC central offices.[62] Thus, if an ILEC tried to charge supracompetitive rates on such routes, competitors with nearby fiber could profitably extend those facilities to those ILEC offices and undersell the ILEC, and the credible threat of such entry in turn disciplines the prices ILECs can charge.[63]

The CLECs' second argument has been that eliminating price caps for transport would allow price cap LECs to evade the price caps that remain applicable to channel terminations.[64] That is not true. Because TDM transport is offered and billed separately from TDM channel terminations, an ILEC could not raise transport prices to evade caps on channel terminations without facing an immediate competitive response: customers would switch to competitors for transport services while continuing to rely on ILECs for price-capped—and tariffed—channel terminations.[65]

---

[61] *BDS Order* ¶ 91 (emphasis added).

[62] There is no reason to believe that ILEC central offices are located disproportionately in the areas that are more than a half-mile from competitive transport.

[63] *See id.* ¶ 92 ("[t]o the extent that there are points of aggregation that are not served by competitors, the relatively high demand at these points makes it likely that a competitor could justify investing in competitive transport facilities to serve that demand"). These data also answer the CLECs' argument that transport links are typically longer than channel terminations. *See* CLEC Petitioners Brief at 32-33.

[64] *See* CLEC Petitioners Brief at 34-35.

[65] *See BDS Order* ¶¶ 91-93.

III. THE COMMISSION SHOULD REAFFIRM ITS DECISION TO DETARIFF TRANSPORT.

Finally, the Commission should also reaffirm its prior decision to detariff transport services.[66] The Commission proposes to make detariffing permissive for a transition period, and it proposes to keep August 1, 2020, as the deadline for mandatory detariffing. The Commission notes that this is the "same date that the transition period mandated by the *BDS Order* for price cap carriers' other BDS services is scheduled end," and thus would "align these transition periods and simplify their administration."[67]

These proposals are sensible and the Commission should adopt them. The Commission's decision to detariff BDS services has not been controversial: the Commission fully explained the basis for its decision in the *BDS Order* (at ¶¶ 153-77), and no party challenged the substance of that aspect of the order in the Eighth Circuit. Moreover, significant detariffing has already occurred. As the Commission is aware, the Eighth Circuit denied a stay of the *BDS Order* pending judicial review, thus permitting the *BDS Order* to take effect in 2017. While the case was pending, certain carriers, including AT&T, detariffed some or all of their transport services. Since the issuance of the *Notice*, the Eighth Circuit has granted a stay of its mandate, thus preserving the status quo under the *BDS Order* and allowing the detariffing that has occurred to continue. Accordingly, as the Commission itself explained to the Eighth Circuit, any decision to *re*-tariff transport now would not only be unnecessary to serve any public interest purpose, it would be

[66] *See Notice* ¶¶ 152-53.

[67] *Id.* ¶ 152.

extremely disruptive and burdensome.[68] For all of these reasons, the Commission should readopt its decision to detariff transport.[69]

CONCLUSION

For the foregoing reasons, the Commission should readopt the *BDS Order* rules that eliminate *ex ante* price cap regulation from TDM transport services and grant forbearance from tariffing requirements.

Respectfully submitted,

/s/ Keith Krom

James P. Young
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Keith Krom
Gary L. Phillips
David L. Lawson
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 463-4148

Attorneys for AT&T Services Inc.

February 8, 2019

[68] *Citizens Telecomms. Co. of Minn.* v. *FCC*, Nos. 17-2296, 17-2342, & 17-2342, Reply of Federal Communications Commission in Support of Motion to Stay the Mandate (8th Cir., filed Oct. 29, 2018).

[69] The Commission also asks whether it should readopt the companion rule requiring carriers to "freeze the tariffed rates for their TDM transport services" for six months, "as long as those services remain tariffed." *Notice* ¶ 152. Such a rule, by its terms, would not apply to carriers that have *already* detariffed their transport services under the original *BDS Order* as adopted in 2017, and thus have no "tariffed rates," and the Commission should make that clear if it does readopt this rule.