

October 28, 2016

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth 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; 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

Dear Ms. Dortch:

CenturyLink, Inc. (“CenturyLink”) addresses herein statements made in the “Fact Sheet” released on October 7, describing Chairman Wheeler’s proposal for regulating the business data services (“BDS”) marketplace and various related claims in the associated record.

**Rate Reset.** The Fact Sheet proposes a “one-time downward adjustment of 11%” for DSn BDS offerings, “phased in over 3 years.” The record evidence provides no basis whatsoever for the contemplated rate cuts. As an initial matter, the Fact Sheet significantly *understates* the actual rate cuts proposed. CenturyLink understands that, in areas in which an ILEC enjoys “Phase II” pricing flexibility and applies contract-based charges that exceed the tariffed rates, rates will first be reduced to the relevant “current” tariffed rate and *then* will be subject to the reset and annual reductions. To take a simplified example, if an ILEC sells carriage on just two circuits – one for \$100 in a price-cap jurisdiction and another for \$120 in a “Phase II” jurisdiction – then the contemplated reset (leaving aside the annual X-factor) would bring prices for both circuits to \$89. This would reflect an 11% reduction to the \$100 rate but an almost 26% reduction to the \$120 rate, amounting to a total revenue reduction of \$42, or 19%. In short, because the proposal under consideration contemplates that above-tariff contract charges would be reduced to the tariff rates *before* the 11% reduction takes effect, the total cuts will necessarily be greater than 11% – and perhaps significantly greater – with serious consequences for ILECs’ ability to recover costs and continue to invest in rural broadband

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infrastructure going forward.

These additional rate cuts in Phase II areas would result, to a significant extent, from extending to Phase II areas the X-factor reductions that the Commission imposed on price-capped special access services in the *CALLS Order*. The *CALLS* X-factor for special access was 3.0 percent in 2000, and increased to 6.5 percent for 2001, 2002, and 2003.<sup>1</sup> As the Commission has consistently recognized, the *CALLS* X-factor was part of an industry-wide settlement that “transform[ed] the X-factor from a productivity factor into a transitional mechanism that operate[d] to reduce rates at a certain pace” during the years covered by the *CALLS* plan.<sup>2</sup> It was “not linked to a specific measure of productivity.”<sup>3</sup> It therefore would be unlawful for the Commission to extend *CALLS*-mandated rate cuts to DSn services in MSAs that were not even subject to price cap regulation during the relevant time period (because the Commission had granted those areas Phase II pricing flexibility pursuant to the *Pricing Flexibility Order*). Clearly, those Phase II areas fall outside of the Commission’s ruling in the *CALLS Order*. The Commission also has not made an evidence-based finding that productivity for these services grew by 3 percent in 2000 and 6.5 percent in 2001, 2002, and 2003. Nor could it. The evidence in the record shows that actual productivity growth during this period was much less than the Commission imposed on price-capped special access services during the period governed by the *CALLS Order*.<sup>4</sup>

Even if the true reset proposed by the Fact Sheet were 11%, that result would be far outside the range permitted by the record evidence. While the Fact Sheet does not identify the evidence or methodology the Commission would use to justify the proposed reset and X-factor reductions, CenturyLink understands that the draft order would rely on the Bureau of Labor Statistics (“BLS”) KLEMS data as a starting point, and then apply an adjustment factor based on a comparison of those data to X-factors computed by the Commission during the 1990s. In the attached Second Supplemental Declaration, Drs. Mark Schankerman and Pierre Regibeau

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<sup>1</sup> *Access Charge Reform*, Sixth Report and Order, Report and Order, Eleventh Report and Order, 15 FCC Rcd. 12962, 13025 ¶ 149 (2000) (“*CALLS Order*”). Since then, the special access X-factor has been set equal to inflation.

<sup>2</sup> *Id.* at 13025 ¶ 149; see also *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4732 ¶ 19 (2016) (“FNPRM”) (“The X-factor under the *CALLS* plan, unlike these prior price cap regimes, is not a productivity factor but “a transitional mechanism ... to lower rates for a specified time period for special access.”).

<sup>3</sup> *Id.*

<sup>4</sup> Mark Schankerman and Pierre Regibeau, “Response to the FCC Further Notice: Regulation of DS1 and DS3 Services,” at 30 (attached to letter from Russell P. Hanser, Partner, Wilkinson Barker Knauer LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016)).

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explain why this adjustment is both unnecessary and indefensible.<sup>5</sup> The proposed adjustment is unnecessary because the BLS data do not understate total factor productivity (“TFP”) for DSn services, as Sprint has suggested (without any supporting evidence). In fact, there is strong evidence that the presence of broadcasting in this index tends to *overstate* the TFP growth for wired telecommunications, and particularly DS1/DS3 services, over the past decade.<sup>6</sup> Thus, there is no need for the Commission to reach back to an earlier, much different time in the telecommunications industry’s development to adjust the BLS data.

Application of an adjustment factor based on 1990s X-factors would also be unjustifiable. There is no basis in economics for an approach that uses TFP figures and input price measures *from different sources* to compute either a one-time reset or an X-factor. For example, there would be no rationale for comparing an ARMIS-based productivity measure with the BLS estimate from particular prior years back to the 1990s and then applying this factor to BLS-based TFP.<sup>7</sup> Likewise, productivity analyses that rely on arbitrary allocations of fixed accounting costs produce flawed results, especially where (as here) some of the services relying on the fixed investment are rate-regulated and others are not – an issue that is especially problematic given that there is no economic consensus on how such costs should appropriately be allocated.<sup>8</sup> Here, again, then, the use of ARMIS data (or any other accounting cost data that allocates joint costs across services) is indefensible from an economic perspective.<sup>9</sup> Even if reliance on ARMIS data were appropriate in the abstract, an approach that assumes that the relationship between ARMIS figures and BLS figures has remained constant over time is itself indefensible, given the dramatic changes that have transformed the telecommunications marketplace over time. In the 1990s, revenues for special access services were growing rapidly, as these services were much earlier in their product life-cycles. Switched access revenues were also expanding quickly and actually comprised most of ILECs’ price-cap revenues at that time. Today, all that has changed. DSn special access revenues are falling as competition grows, and the reset and X-factor proposed in the Fact Sheet would not even apply to switched access services. Thus, there is no evidence that the relationship between the BLS data and Commission’s 1990s era X-factors has any bearing on that relationship either over the past decade or going forward.

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<sup>5</sup> See Mark Schankerman and Pierre Regibeau, “Second Supplemental Declaration,” attached hereto (“Schankerman-Regibeau Second Supplemental Declaration”).

<sup>6</sup> Mark Schankerman and Pierre Regibeau, “Supplemental Declaration: Comments on the Frentrup-Sappington Report,” at 9-11 (attached to Letter from Russell P. Hanser, Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Oct. 6, 2016)).

<sup>7</sup> See *id.* at 3-4.

<sup>8</sup> See *id.* at 3-5.

<sup>9</sup> See *id.* at 5.

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Drs. Schankerman and Regibeau further show that even applying extremely conservative and unrealistic assumptions, the BLS data do not support the reductions proposed by the Fact Sheet. Changing the sample period would not result in an 11% reset, nor would exclusion of the broadcasting sector.<sup>10</sup> Sprint's repeated attempts to justify the proposed reset and X-factor reductions are equally flawed and lack any basis in the available BLS data or basic mathematics.<sup>11</sup> Its latest filing appears to be an attempt to justify use of an adjustment factor to compute the reset and X-factor. But, as Drs. Schankerman and Regibeau show, the TFP estimates for ILEC wireline services cited by Sprint could be correct only if the TFP for non-ILEC services in this sector (*e.g.*, broadcasting, cable and wireless telecommunications) had *declined* by an average annual rate of 3% to 9% during the relevant periods. This absurd and counter-factual premise demonstrates the unsustainability of Sprint's analysis and the methodology it seeks unsuccessfully to defend.

***Productivity Factor.*** The problems detailed above with respect to the proposed rate reset apply with equal force to the proposed annual X-factor reduction of 3 percent minus inflation. For example, Drs. Schankerman and Regibeau originally estimated the appropriate X-factor based on the years 2011-2014. In the attached declaration, they show how that estimate changes as the base period changes, and demonstrate that in no circumstance would the appropriate X-factor exceed 1.81%. In addition, the concerns they express regarding the reset – including reliance on mismatched inputs and use of arbitrarily allocated accounting costs – apply equally to the Fact Sheet's proposed X-factor.<sup>12</sup>

***Geographic Market Definition.*** The Fact Sheet asserts that *all* TDM services nationwide will be subject to price cap regulation, eschewing any attempt to assess competition on a more granular basis.<sup>13</sup> As CenturyLink recently explained in depth, there is expansive record evidence demonstrating that, in many geographic areas, the marketplace for these offerings is competitive, and that, in these areas, price-cap regulation is unnecessary and indeed harmful.<sup>14</sup> This core fact precludes any determination that the market for these offerings is non-competitive nationwide.

The Fact Sheet's approach contravenes long-settled principles governing the identification of geographic markets, which have been thoroughly recalled throughout this proceeding. For purposes of competitive analysis, it is well established that market definition

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<sup>10</sup> *See id.* at 10-13.

<sup>11</sup> *See id.* at 5-10.

<sup>12</sup> *See id.* at 11-12.

<sup>13</sup> Fact Sheet at 1.

<sup>14</sup> *See* Letter from Jeffrey S. Lanning, Vice President of Federal Regulatory Affairs, CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 2-3 (filed Oct. 5, 2016).

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should start with the smallest geographic market and then proceed to larger market definitions “until an area is determined within which a hypothetical monopolist would raise prices by at least a small but significant and non-transitory amount.”<sup>15</sup> The Commission has typically adhered to this approach of starting small and then considering larger geographic markets – indeed, even when it has adopted a national geographic market in other contexts, it has conducted the requisite economic analysis and cited specific record evidence to support its conclusion.<sup>16</sup> So, too, the FNPRM here signaled that the Commission’s determination of a BDS geographic market should follow DOJ guidelines: Citing antitrust law and Commission precedent, the Commission appropriately framed the proper inquiry as being whether BDS supply in one part of a geographic market would constrain the provision of BDS elsewhere in that market, finding that “a geographic market definition for lower bandwidth BDS lies somewhere above the average area of the Census block with BDS demand and below the MSA.”<sup>17</sup> The record clearly establishes the presence of strong BDS competition in all of these intermediate alternatives.

The Fact Sheet not only ignores this evidence, but declines to conduct any analysis of the BDS geographic market at all. Rather, it effectively defaults to the largest possible geographic market, adopting a nationwide finding, despite its previous dismissal of even MSAs as being too large to permit sufficiently nuanced assessment. Given the extensive record evidence showing

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<sup>15</sup> U.S. Dep’t of Justice and Fed. Trade Comm’n, *Commentary on the Horizontal Merger Guidelines*, at 5-6 (Mar. 2006), <https://www.justice.gov/atr/file/801216/download>; *see also id.* (“Definition of the relevant geographic market is undertaken in much the same way as product market definition—by identifying the narrowest possible market and then broadening it by iteratively adding the next-best substitutes.”); *see, e.g.,* Joint Comments of CenturyLink *et al.*, at 51.

<sup>16</sup> *See, e.g., Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6379-80 ¶¶ 106-07 (2016) (“*Charter/TWC Order*”) (finding a national geographic market for access to wireline broadband Internet access subscribers via interconnection).

<sup>17</sup> *See* FNPRM, 31 FCC Rcd at 4814 ¶ 209; *see also id.* 4812-18 ¶¶ 205-14 (citing precedent). In the *Special Access Pricing Flexibility Suspension Order*, the Commission concluded that its current pricing flexibility rules were not properly matching regulatory relief to areas with actual or potential competition sufficient to ensure just and reasonable rates, terms and conditions for BDS. “This suggests that competitive conditions within an MSA are also likely to vary significantly, since areas with higher demand tend to be more capable of supporting competition and are more attractive to potential entrants than low demand areas.” *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*, Report and Order, 27 FCC Rcd 10557, 10575 ¶ 37 (2012). Thus, the Commission found, “MSAs “do not have ‘reasonably similar’ competitive conditions across their geographic areas[.]” *Id.*

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competition in the provision of legacy BDS in at least some (and, in fact, many) geographic areas, the only conceivable explanation for the change of course would be a belief that anything more granular than a nationwide test would be too difficult to administer. This, however, is clearly erroneous: There are many contexts in which the Commission has relied, and continues to rely, on nuanced, geographic-market-specific analysis. For example, the Commission's test for whether cable operators are subject to "effective competition" is based on the local franchise area.<sup>18</sup> The rural service provider bidding credit is available in spectrum auctions only to entities that provide service predominantly in "rural areas," which are defined as counties with a population density of 100 or fewer persons per square mile.<sup>19</sup> And in merger proceedings, the Commission regularly conducts a separate geographic market analysis for each service at issue; in doing so, it has routinely (including quite recently) found that the geographic market for multichannel video programming services is the particular customer's location, citing "administrative convenience" as cause for aggregating customers at no higher than the local level.<sup>20</sup> The Commission is appropriately confident in its ability to manage geographic granularity in these other contexts. There is no reason for it to be any less secure in its capacity to assess DSn-level BDS competition at a sub-national level.<sup>21</sup>

The Fact Sheet's approach also appears to contravene the entire purpose of the data collection, which was designed and expected to facilitate nuanced assessment of competition for BDS offerings. When the Commission launched this rulemaking in 2005, it emphasized "our ongoing commitment to ensure that our rules, particularly those based on predictive judgments, remain consistent with the public interest as evidenced by empirical data."<sup>22</sup> To that end, it set out to develop an extensive record that it sought to update as the marketplace evolved, including through the initially voluntary submission of data.<sup>23</sup> When it initiated the mandatory data

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<sup>18</sup> 47 C.F.R. §§ 76.7, 76.905(b)(2), 76.907.

<sup>19</sup> *Id.* § 1.2110(f)(4).

<sup>20</sup> *See, e.g., Charter/TWC Order*, 31 FCC Rcd at 6355 ¶ 61 (citations omitted).

<sup>21</sup> Of course, this does not mean that it would be appropriate or feasible to evaluate competition at a building-by-building level – only that levels of aggregation below the national level are administrable, and utilized in other fields under the Commission's jurisdiction.

<sup>22</sup> *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2019 ¶ 71 (2005) (citation omitted); *see, e.g., id.* at 2035 ¶ 128 (same); *id.* at 1996 ¶ 5 ("[W]e will examine whether the available marketplace data support maintaining, modifying, or repealing" the special access rules).

<sup>23</sup> *See generally id.* at 2019-34 ¶¶ 73-127 (requesting empirical data, including econometric studies, on a variety of issues); *Parties Asked to Refresh the Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd 13352, 13352-53 (2007) (inviting parties to refresh the record in light of "the continued expansion of intermodal competition" and other marketplace developments); *Data*

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collection, the agency stated that such data would enable it to “evaluat[e] market conditions for special access services and determin[e] what regulatory changes, if any, are warranted in light of that analysis.”<sup>24</sup> The Wireline Competition Bureau subsequently reiterated that the Commission would use the data to “update its rules to ensure that they reflect the state of competition today and promote competition.”<sup>25</sup> Chairman Wheeler committed to “move forward with data collection and fact-based analysis that will help the Commission better understand competition in this marketplace, and the impact on consumers as we pursue the Commission’s statutory mandate to ensure special access services are provided at reasonable rates and on reasonable terms and conditions.”<sup>26</sup> The Fact Sheet, however, suggests an intention to ignore the data. Such an outcome, after years and monumental effort expended developing the “most comprehensive collection of information ever assembled for a Commission rulemaking proceeding”<sup>27</sup> to establish a mechanism for collecting and analyzing competition, would be arbitrary and capricious.

**Product Market Definition.** The Fact Sheet also fails to account properly for product markets, in two ways. *First*, it fails to differentiate between (1) last-mile “channel termination” offerings (*i.e.*, last-mile connections or local loops to end user locations) and (2) inter-office “transport” offerings. Proponents of expansive regulation in this docket have focused their arguments on channel terminations, as evidenced by their proposals to evaluate competition on a “building-by-building” or “location-by-location” (rather than “route-by-route”) basis.<sup>28</sup> This is for good reason: Given the immense amount of data on the record showing the very high

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*Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd 15146 (2010); *Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd 14000 (2011).

<sup>24</sup> *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16340 ¶ 53 (2012); *id.* at 16345 ¶ 66.

<sup>25</sup> *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*, Report and Order, 28 FCC Rcd 13189, 13223 App. A (2013).

<sup>26</sup> News Release, *Statement from FCC Chairman Tom Wheeler on OMB Approval of Special Access Data Collection* (rel. Aug. 18, 2014). The introduction to the news release described the data collection as “a plan to collect data from providers and purchasers of special access service for the purpose of conducting a comprehensive evaluation of competition in the marketplace.” *Id.*

<sup>27</sup> *See* FNPRM, 31 FCC Rcd at 4743 ¶ 20; *see also id.* at 4833 ¶ 245 (the data collection “provides an unprecedented amount of information and gives the Commission its most comprehensive insight”).

<sup>28</sup> *See, e.g.*, Reply Comments of INCOMPAS, WC Docket No. 05-25, RM-10593, at 8-14 (filed Feb. 19, 2016) (section entitled “The Relevant Geographic Market Is the End-User Location or Cell Tower”); Reply Comments of Sprint Corporation, WC Docket Nos. 16-143 *et al.*, at iv (filed Aug. 9, 2016) (“[T]he relevant geographic market for BDS remains the customer location.”).

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incidence of competitive fiber rings,<sup>29</sup> there is no basis for the Commission to apply its new regulatory framework to DSn transport. Thus, even assuming *arguendo* that the FCC *could* adopt a defensible rate reset and productivity factor for legacy offerings, that framework should be applied only to DSn channel terminations, not to inter-office transport.

*Second*, while the Fact Sheet appears to recognize (at least implicitly) that Ethernet services are competitive and therefore do not warrant price cap regulation, it fails to recognize substantial record evidence that competitive Ethernet offerings also discipline prices and practices with regards to legacy DSn offerings.<sup>30</sup> As a result, the Commission appears to be drawing an arbitrary distinction in its competitive analysis between technology platforms – *i.e.*, circuit-switched TDM and packet-switched Ethernet services – even when the availability of one disciplines pricing and business practices with regard to the other. This would not only be an unjustified departure from the Commission’s earlier (and correct) conclusion that TDM- and packet-based business data services are in the same product market<sup>31</sup> – as even CLECs have agreed, in this proceeding<sup>32</sup> – it would also violate core tenets of competition analysis and ignore Commission precedent.

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<sup>29</sup> See, e.g., Comments of the Fiber to the Home Council Americas on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143 *et al.*, at 13 (filed June 28, 2016) (“[A]vailable data shows that ILECs, CLECs, and cable providers have taken steps to add a total of more than 100,000 miles of metro fiber between 2013 and 2015”); Dr. Hal Singer, *Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Analysis*, Economists Inc., at 2, <http://innovatewithus.org/wp-content/uploads/2016/04/Hal-Singer-Report-FCC-Regulation-of-Business-Broadband.pdf> (last visited Oct. 28, 2016) (finding that nearly 30 competitive broadband providers have laid over 650,000 route miles of fiber in Charlotte, North Carolina, which is representative of a typical American city); Presentation on BDS Regulation from the Perspective of Competitive Fiber Providers – Lightower, Lumos, and Unite Private Networks, at 2 (attached to Letter from Eric J. Branfman & Joshua M. Bobeck, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Sept. 13, 2016) (stating that competitive fiber providers face competition from other competitive fiber providers in “almost all cases”).

<sup>30</sup> See, e.g., Joint Reply Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 9-13, 39-41 (filed Aug. 9, 2016) (“Mid-Size ILEC Reply Comments”); Declaration of Julie Brown and David Williams, at ¶¶ 9-15 (attached as Exhibit 1 to the Reply Comments of CenturyLink, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016)) (“Brown/Williams Declaration”).

<sup>31</sup> See FNPRM, 31 FCC Rcd at 4809 ¶ 197.

<sup>32</sup> See, e.g., Comments of Sprint Corporation, WC Docket Nos. 16-143 *et al.*, at 15 (filed June 28, 2016) (“[T]he use of TDM or Ethernet as the underlying technology for delivering BDS does not matter for purposes of market definition”); Comments of Comcast Corporation, WC Docket Nos. 16-143 *et al.*, at 12 (filed June 28, 2016) (stating that Comcast’s Ethernet Network Service “is typically a replacement for legacy TDM-based Wide Area Network” service); *cf.* Comments of Windstream Services, LLC, WC

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As CenturyLink has explained in this proceeding, bedrock principles of competitive analysis call for including in the product market all reasonably close actual and potential substitutes for the offering under consideration.<sup>33</sup> Indeed, for more than five decades the Commission has based its definition of “product markets” on the substitutability of the goods or services at issue, without regard to the products’ underlying technology.<sup>34</sup> The overwhelming body of Commission precedent also demonstrates that interchangeability (as evaluated from the perspective of *consumers*) is critical to the determination of the appropriate product market.<sup>35</sup>

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Docket Nos. 16-143 *et al.*, at 44 (filed June 28, 2016) (noting the “cost savings” to be realized “from transitioning away from TDM networks and services”) (internal quotations omitted); Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.*, at 11 (Oct. 17, 2016) (stating that “functionally DS1 special access service is comparable to the highest class of service for Ethernet offerings”).

<sup>33</sup> See Joint Comments of CenturyLink, Inc. *et al.*, WC Docket Nos. 16-143 *et al.*, at 36-38 (filed June 28, 2016).

<sup>34</sup> See *Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules*, Report and Order, 34 F.C.C. 829, 863-64 ¶ 31 (1963) (holding that “the appropriate line of commerce or product market” is comprised of those products that “are reasonably interchangeable with, and compete against” the product in question (internal quotations omitted) (citing *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 191-92 (S.D.N.Y. 1960)); *Charter/TWC Order*, 31 FCC Rcd at 6350 ¶ 53 (“[A] relevant market includes all products that consumers consider reasonably interchangeable for the same purposes. When one product is considered by consumers to be a reasonable substitute for another product, it is included in the relevant market.” (internal citations and quotations omitted)).

<sup>35</sup> *Application of EchoStar Corporation et al.*, Hearing Designation Order, 17 FCC Rcd 20559, 20606 ¶ 106 (2002) (“[W]hen one product is a reasonable substitute for the other in the eyes of the consumers, it is to be included in the relevant product market even though the products themselves are not identical. Thus, the relevant product market includes all products reasonably interchangeable by consumers for the same purposes.” (internal citations and quotations omitted)); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4287 ¶ 119 (2011) (acknowledging the centrality of substitution as a constraint in the product market test, stating that “the loss of a substitute product by itself can harm competition by reducing a competitive constraint”); *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.*, 22 FCC Rcd 16440, 16452 ¶ 22 n. 73 (2007) (“While some commenters express concern about the inclusion of . . . [certain products] because they might not act as a competitive constraint, *consistent with our precedent*, we include such services in our product markets . . . to the extent that they are, in fact, a substitute” (emphasis added)); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 F.C.C.2d 554, 563 ¶ 14 (1995) (the “relevant product market” is “the set of services which check the ability of a carrier to restrict its output of a service and thereby raise its price”); *Application of General Electric Company, GE Subsidiary, Inc. 21, and MCI Communications Corporation for Authority to transfer control of RCA Global Communications, Inc.*,

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In light of this precedent, there would be no basis for any determination that competitive Ethernet offerings are irrelevant to the analysis of the legacy DSn product market. The fact that purchasers of DSn offerings could rely on Ethernet substitutes (and, in the case of lower-throughput services, vice versa) exerts significant discipline on the DSn BDS marketplace.<sup>36</sup> The Commission's determinations must reflect this fact – and must account for competitive Ethernet offerings in evaluating the DSn marketplace.<sup>37</sup>

The principles in play here are well illustrated by the product market analysis the Commission applied when facilities-based Voice over Internet Protocol (“VoIP”) services began to supplant traditional local exchange services. When the Commission approved the SBC/AT&T merger, for example, it concluded that facilities-based VoIP services and traditional local

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Memorandum Opinion and Order, 4 FCC Rcd 8207, 8208 ¶ 11 (1989) (“the key determinant in defining the relevant product market is interchangeability of use, i.e., the cross-elasticity of demand between a telecommunications service and substitutes for that service”).

<sup>36</sup> Schankerman-Regibeau Second Supplemental Declaration at 14.

<sup>37</sup> This is true *even if* the Commission determines that substitution between DSn and Ethernet services is occurring on an asymmetric basis. Under these circumstances, guidance issued by the Body of European Regulators for Electronic Communications (“BEREC”) is instructive. BEREC has advised regulatory agencies to first “define the focal product of the market analysis,” which BEREC defines as “the product where competition problems are believed to exist.” *BEREC Report on Impact of Fixed-Mobile Substitution in Market Definition*, at 12 (2012), available at [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/reports/363-berec-report-impact-of-fixed-mobile-substitution-fms-in-market-definition](http://berec.europa.eu/eng/document_register/subject_matter/berec/reports/363-berec-report-impact-of-fixed-mobile-substitution-fms-in-market-definition). After identifying the focal product, BEREC advises regulators to verify “that there is substitution from the focal product to the alternative product(s) but that there is not substitution from the alternative product(s) to the focal product. *In this case the alternative product(s) are included in the same market as the focal product.*” *Id.* (emphasis added). By way of example, BEREC cites a review of retail and wholesale leased lines markets published by the Portuguese regulator, ANACOM, in 2009. According to BEREC:

Asymmetrical substitution was identified in this case because the [small but significant and non-transitory increase in the price] test revealed that operators would change from “traditional” leased lines to Ethernet leased lines but not the other way around. Considering that traditional leased lines (i) was the only product considered in the previous market analysis; (ii) was the product in which obligations were imposed and (iii) was the product with the higher volume of leased lines installed, ANACOM defined this product as the focal product. In consequence, verifying that traditional leased lines were substituted by Ethernet leased lines, ANACOM concluded that both products should be included in the same market.

*Id.* at 13.

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exchange services were in the same product market because (1) the services shared a number of similar characteristics; (2) mass-market customers were subscribing to cable-based VoIP offerings as cable operators deployed these services throughout their footprints; and (3) SBC viewed cable-based VoIP as its primary competitive threat in the mass market and considered the prospect of customer substitution when devising its own service offerings.<sup>38</sup> Furthermore, the Commission found that facilities-based VoIP and traditional local exchange offerings were in the same product market even though facilities-based VoIP services were not widely available in SBC's service territory.<sup>39</sup> The Commission applied similar product market analyses in the Verizon/MCI and AT&T/BellSouth mergers.<sup>40</sup>

The VoIP experience is illustrative here, where DS<sub>n</sub> customers are increasingly migrating toward Ethernet services. As the Commission observed in the Further Notice of Proposed Rulemaking, TDM and Ethernet services share similar characteristics because "TDM BDS offers point-to-point connectivity in essentially the same way that packet BDS does."<sup>41</sup> Although the Commission has correctly recognized that there are differences between the services (*i.e.*, "Ethernet is more easily scaled"<sup>42</sup>), this was also true of the enhancements offered over facilities-based VoIP. Like facilities-based VoIP offerings in 2005, Ethernet BDS is today expanding due to rollouts by cable companies, which CenturyLink views as its primary competitive threat.<sup>43</sup> And CenturyLink has responded to these competitive alternatives and potential customer substitution by adjusting its DS<sub>n</sub> service offerings, just as ILECs did with respect to local exchange service a decade ago.<sup>44</sup> Just last year, the Commission adopted an interim requirement that an ILEC seeking to discontinue a DS<sub>n</sub> offering (or commercial wholesale platform service) demonstrate that it offers a "reasonably comparable" packet-based alternative, typically in the form of Ethernet, in the area in question.<sup>45</sup> The Commission concluded that this condition was

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<sup>38</sup> See *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18338-39 ¶ 87 (2005).

<sup>39</sup> *Id.*

<sup>40</sup> See *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5712-13 ¶¶ 92-93 (2007); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18479-80 ¶¶ 87-88 (2005).

<sup>41</sup> FNPRM, 31 FCC Rcd at 4809 ¶ 197.

<sup>42</sup> *Id.*

<sup>43</sup> See Brown/Williams Declaration ¶ 7 ("CenturyLink views cable providers to be its primary special access competitors, given their expansive networks and rapid growth in business markets").

<sup>44</sup> *Id.* ¶ 9 (describing CenturyLink's launch of its Revenue Discount Simplification Plan, which provides special access customers additional discounts on DS<sub>n</sub> services).

<sup>45</sup> See *Technology Transitions et al.*, 30 FCC Rcd 9372, 9443 ¶ 131 (2015) ("*Emerging Wireline Order*").

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warranted because it was “not yet clear whether (or where) competitive alternatives exists that are sufficient to constrain a discontinuing incumbent LEC’s rates, terms, and conditions for replacement services.”<sup>46</sup> Now that the Commission has recognized evidence of “emerging competition and falling prices” for the packet-based services to which former DSn customers are flocking,<sup>47</sup> it cannot ignore these services in assessing the competitiveness of DSn services.<sup>48</sup> The Commission, in short, must consider Ethernet offerings when assessing the competitiveness of the legacy BDS marketplace, just as it has considered successor technologies in these other contexts.

**Complaint Process.** Finally, while the Fact Sheet promises a “robust” complaint process,<sup>49</sup> the brief outline provided raises several concerns. Fundamentally, the process is explicitly (and unabashedly) tilted against ILECs, who will presumptively face greater scrutiny than other providers – namely, “new entrants and parties with smaller market shares,” a group that the Fact Sheet makes clear includes all cable companies (among other non-ILECs) and whose rates, the Fact Sheet asserts, “are unlikely to be questioned.”<sup>50</sup> As a result, ILECs will have no opportunity for relief in their capacity as *purchasers* of BDS – and the record shows that ILECs frequently are on the “buy side” of these transactions<sup>51</sup> – while their competitors will enjoy the unfettered ability to seek Commission intervention (or threaten to do so) in order to drive down the rates they pay to ILECs. ILECs’ unique and constant vulnerability to enforcement actions effectively would constrain their business practices in pervasive ways. As just one example, it appears that ILECs may be unable to price their services on a building-by-building basis in order to be more competitive, as rates and practices with respect to each individual location could be subject to new litigation and the attendant costs, even if a complaint would be meritless. The only way ILECs could hope to avoid scrutiny of their rates in numerous concurrent cases would be to charge below-cost rates over as large a geographic area as possible. In contrast, non-ILECs – free from the BDS-specific complaint process – would be free to charge

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<sup>46</sup> *Id.* at 9451 ¶ 142.

<sup>47</sup> *See* Fact Sheet at 2.

<sup>48</sup> For the same reason, the Commission should also reject requests to reverse the Commission’s finding in the *Emerging Wireline Order* that this interim condition should remain in place only until the Commission adopts a set of rules to ensure that the rates, terms, and conditions for special access services are just and reasonable and those rules have become effective. *See Emerging Wireline Order*, 30 FCC Rcd at 9443 ¶ 132.

<sup>49</sup> Fact Sheet at 2.

<sup>50</sup> *Id.*; *see also id.* (“New entrants include cable companies[.]”).

<sup>51</sup> *See, e.g.,* Mid-Size ILEC Reply Comments at 30-31 (referencing and summarizing evidence regarding CenturyLink purchase of HFC-based Ethernet services from cable operators).

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what they want, where they want, without consequence. This is a far cry from the “targeted” regulation that the Fact Sheet promises.<sup>52</sup>

The unique harms threatening ILECs could be compounded by whatever specific procedural mechanisms the Commission ultimately adopts. The Fact Sheet’s limited discussion already hints at significant litigation burdens on ILECs. For instance, it makes clear that providers subject to a complaint will be “required to furnish specific rate information during adjudication”<sup>53</sup> – which, if existing complaint procedures are any indication, presumably will include a combination of mandatory disclosures to, and discovery by, the complainant and/or the Commission itself. The scope of the required rate information could well be quite vast, and producing it on the “expedited” timeframe to which the Fact Sheet alludes could be extremely burdensome.<sup>54</sup> The contemplated breadth of discovery also presents potential competitive concerns, given that a complainant is likely to be a key competitor to the ILEC. Further, while staff-supervised mediation apparently will be a prerequisite to a complaint, the Fact Sheet’s conspicuous silence on eligibility criteria suggests that there will be none, opening the floodgates to non-meritorious and even frivolous complaints that will consume substantial ILEC and Commission resources. Such an asymmetric regime contradicts the Fact Sheet’s commitment to “level the playing field” among BDS providers.<sup>55</sup> The Commission should put in a place a more balanced enforcement system and ensure that its procedures are adequate and fair for all participants in the BDS marketplace.

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In evaluating competition, the Commission does not, of course, write on a blank slate. Rather, it has long adhered to broadly accepted precepts, shared by economists and regulators alike, concerning market definition, the appropriate use of econometric analysis, and a host of other matters. The Commission should not repudiate these settled principles here, particularly not for the purpose of setting its thumb on the scale and picking market winners and losers. Rather, it should embrace long-settled tenets of competitive analysis, and amend the Fact Sheet’s conclusions in the ways detailed above.

Please contact the undersigned with any questions.

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<sup>52</sup> Fact Sheet at 1.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.*

<sup>55</sup> Fact Sheet at 3.

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Sincerely,

*/s/ Russell P. Hanser*

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Brian W. Murray

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Enclosure