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REDACTED – FOR PUBLIC INSPECTION

March 11, 2019

By Hand Delivery

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

Re: 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)

Dear Ms. Dortch:

AT&T hereby submits the enclosed redacted version of its reply comments in the above-referenced proceedings, pursuant to the protective orders adopted in those proceedings.[1] The portions of the enclosed reply comments that are designated as "Highly Confidential Information" qualify for that designation because they contain specific information about AT&T's "Revenues from the sale of Dedicated Services."[2] In addition, this information "is not otherwise available from publicly available sources," [is] kept . . . strictly confidential," "is

[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 (rel. Oct. 24, 2018) ("*Notice*").

[2] Order and Data Collection Protective Order, *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 No. 05-25, RM-10593; Appendix B, ¶ 7 (October 1, 2014) ("October 2014 Protective Order"). *See also* Second Protective Order, *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 No. 05-25, RM-10593 (December 27, 2010).

subject to protection under FOIA and the Commission's implementing rules," and "constitutes some of [AT&T's] most sensitive business data which, if released to competitors or those with whom [AT&T] does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations."[3] For these same reasons, this information is also protected from public disclosure by 5 U.S.C. § 552(b)(4) and 47 C.F.R. § 0.457.

Respectfully submitted,

Christopher T. Shenk

Christopher T. Shenk
Partner

Enclosure

[3] October 2014 Protective Order, Appendix B, ¶ 1 (definition of "Highly Confidential Information").

REDACTED – FOR PUBLIC INSPECTION

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
	)	

REPLY COMMENTS OF AT&T

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March 11, 2019

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	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	

REPLY COMMENTS OF AT&T

AT&T Services Inc. ("AT&T") respectfully submits these reply 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

No commenter disputes the long-standing principle that, where facilities-based competition has developed for business data services ("BDS"), continued application of *ex ante* price cap regulation is counter-productive and thus should be eliminated.[2] Nor does any commenter dispute

[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 (rel. Oct. 24, 2018) ("*Notice*").

[2] *See, e.g.*, Fifth Report & Order & Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd. 14221, ¶ 19 (1999) ("*Pricing Flexibility Order*") ("As the market becomes more competitive, such constraints become counter-productive"); Report and Order, *Business Data Services in an Internet Protocol*

the key facts underlying the Commission's prior conclusion that competition for BDS transport services is essentially ubiquitous throughout price cap ILEC regions. These data show that as of 2013: (1) more than 92 percent of all buildings with BDS demand were within a half mile of competitive BDS transport;[3] (2) there are more than 20 facilities-based competitors in typical large metropolitan statistical areas ("MSAs") and more than 12 facilities-based competitors in smaller MSAs;[4] and (3) these metrics substantially understate the extent of competition, because they omitted significant cable company facilities that were deployed in 2013, nor do they include the substantial additional investments made by competitors since then.[5] On this record, the majority

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, ¶ 129 (2017) ("*BDS Order*") (regulation in markets where competition can develop "is generally considered to be counterproductive"); *id.* ¶ 79 ("competition for such [transport] services has been robust since a large proportion of TDM transport services were deregulated"). *See also* 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.").

[3] *Notice* ¶ 149; *BDS Order* ¶ 91. Those competitive facilities are also geographically 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 in 2013. *Notice* ¶ 149; *BDS Order* ¶ 91.

[4] *Notice* ¶ 149; *BDS Order* ¶ 79.

[5] *Notice* ¶ 149; *BDS Order* ¶ 91; Comments of Alaska Communications, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, at 6-7 (January 30, 2018) ("Alaska Comments"); Comments of AT&T, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, at 8-9 (Feb. 8, 2018) ("AT&T Comments"); Comments of CenturyLink, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, at 8-12 (Feb. 8, 2018) ("CenturyLink Comments").

of commenters agree with the Commission's proposal to re-adopt the rules in the *BDS Order* that eliminated *ex ante* price cap regulation for BDS transport nationwide.[6]

Only two commenters—INCOMPAS and Sprint—oppose the Commission's proposal. But they cannot and do not dispute any of the dispositive facts. Instead, they argue that the Commission should ignore them and start over. They are wrong.

First, they argue that the Commission should start over by examining competition on every ILEC interoffice route because, they say, only facilities on those precise routes can be used to serve end users. In fact, the record shows that cable companies and other competitors often by-pass ILEC interoffice routes. The Commission, therefore correctly adopted a more granular and comprehensive approach by examining *each building* with BDS demand to determine whether it could be served by existing or nearby competitive transport, whether connected to an ILEC central office or not. In addition to being more granular and comprehensive, this approach effectively subsumes the analysis proposed by INCOMPAS and Sprint. Interoffice transport routes are merely connections between ILEC central offices, and ILEC central offices are often in buildings with BDS demand in the Commission's dataset. Given that 92 percent of buildings are within a half mile of competitive transport and that the Commission has already determined that competitors can connect to buildings within a half mile of their facilities, it follows that all or most central offices—and hence interoffice routes—can be served by competitive transport.

[6] Alaska Comments at 13; AT&T Comments at 20; CenturyLink Comments at 14; Comments of Verizon, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, at 8 (Feb. 8, 2018) ("Verizon Comments"). Price cap regulation applies only to price cap LECs and thus "nationwide" elimination of price cap regulation means elimination of price caps in areas served by price cap LECs. AT&T does not take a position as to whether competitive BDS transport is similarly competitive in areas governed by rate-of-return regulation.

Second, INCOMPAS and Sprint argue that nationwide relief is inappropriate because the data do not establish that competitive facilities can serve 100 percent of locations with BDS demand. But the data show that competition exists for 92 percent of all buildings with special access demand—and that percentage is undoubtedly higher six years later—and the small number of remaining locations are scattered in across the country and are thus not amenable to an administratively feasible price cap system. Under these circumstances, the Commission correctly concluded 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."[7] INCOMPAS and Sprint offer no alternative proposal or new analysis that addresses any of these concerns.

Third, INCOMPAS and Sprint erroneously argue that other evidence in the record indicates that ILECs continue to exercise widespread market power for BDS transport. For example, they cite to Dr. Rysman's analyses, but he explicitly stated that his analysis did not separately analyze ILEC transport pricing, "although the transport market may also be interesting to study."[8] They also point to comparisons of ILEC prices in price cap and non-price cap areas and argue that prices are higher in non-price cap areas. But the Commission correctly rejected this argument, finding those comparisons to be unreliable because, for example, they do "not take into account the differing costs of service in each area, whether price caps were initially higher in Phase II areas, and whether competitor transport facilities are in the areas being compared."[9] The reality is that

[7] *See, e.g.*, *BDS Order* ¶ 92.

[8] Dr. Marc Rysman, *Empirics of Business Data Services*, White Paper, at 6 (April 2016, Revised June 2016) ("Rysman Rev. White Paper"), https://docs.fcc.gov/public/attachments/DOC-340040A7.pdf.

[9] *BDS Order* ¶ 80, n.270.

price cap LECs are subject to intense competition for the DS1 and DS3 transport services at issue in this proceeding. Indeed, AT&T's revenues for DS1 and D3 transport have continued to decline substantially since 2015 due to the availability of competitive alternatives.[10]

I. THE COMMISSION CORRECTLY CONCLUDED THAT NATIONWIDE ELIMINATION OF *EX ANTE* PRICE CAP REGULATION IS SUPPORTED BY THE EVIDENCE OF ESSENTIALLY UBIQUITOUS DEPLOYMENT OF COMPETITIVE TRANSPORT BY NUMEROUS COMPETITORS.

No commenter disputes that maintaining *ex ante* price cap regulation for BDS transport where competition has developed harms consumers and competition by, among other things, substantially reducing incentives for investment and innovation, and delaying the transition to next-generation services. The only question therefore is where this competition has developed. On this score, the data are undisputed. As of 2013, more than 92 percent of buildings with BDS demand are within a half mile of competitive transport.[11] These facilities covered more than 89 percent of census blocks with BDS demand.[12] The typical MSAs had more than a dozen transport competitors. And all of these figures understate competition *today*, because the 2013 data omitted significant cable facilities, and do not include the billions of dollars in BDS transport investments

[10] AT&T estimates that, since 2015, its DS3 transport revenues have declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** XXXXXXXX **[END HIGHLY CONFIDENTIAL]** and that its DS1 transport revenues have declined by more than **[BEGIN HIGHLY CONFIDENTIAL]** XXXXXXXX **[END HIGHLY CONFIDENTIAL]**.

[11] *Notice* ¶ 149; *BDS Order* ¶ 91. The portion of *demand*, measured in bandwidth, that is within a half mile of competitive facilities is even higher than 92 percent. The record shows, for example, that, even as of 2013, 95 percent of the BDS bandwidth served by AT&T is within just 1,000 feet (less than a quarter mile) of competitive facilities. *See* Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld and Glenn Woroch, ¶ 14, attached to Letter from Christopher T. Shenk to Marlene H. Dortch, WC Docket No. 05-25; RM-10593 (April 20, 2016).

[12] *Notice* ¶ 149; *BDS Order* ¶ 91.

since 2013.[13] On this record, the majority of commenters support the elimination of *ex ante* price cap regulation in its entirety.[14]

Only INCOMPAS and Sprint oppose this result. But they do not—indeed cannot—dispute any of the data demonstrating that BDS transport is essentially ubiquitous. Instead, they argue that the Commission should start over with a new analysis. According to them, the only "relevant" competitive BDS transport facilities are those that connect each pair of ILEC central offices, and thus, they argue, the Commission should conduct a new analysis that examines competition on ILEC interoffice routes.[15] The Commission, however, has already correctly rejected this argument,[16] and for good reasons.

The fatal flaw in INCOMPAS's and Sprint's argument is that it erroneously assumes that competitive transport cannot reach end user customers unless it connects through ILEC central offices. The record evidence, however, refutes that false assumption. It shows that cable companies almost always bypass ILEC networks entirely, and that CLECs likewise often bypass ILECs via carrier hotels and laterals that connect directly to their fiber transport networks.[17]

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[13] *Notice* ¶ 149; *BDS Order* ¶ 79. *See also* Alaska Comments, at 6-7; AT&T Comments at 8-9; CenturyLink Comments at 8-12.

[14] Alaska Comments at 13; AT&T Comments at 20; CenturyLink Comments at 14; Verizon Comments at 8.

[15] Comments of INCOMPAS, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, 2-3, 8 (Feb. 8, 2018) ("INCOMPAS Comments"); Comments of Sprint Corporation, *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144, 16-143, 05-25, 3-4 (Feb. 8, 2018) ("Sprint Comments").

[16] *BDS Order* ¶ 81, n.273 ("[W]e are not persuaded by Windstream's and Sprint's argument that transport cannot be competitive unless a competitive provider has collocated in the incumbent LEC's end office where the particular channel termination is located.").

[17] Indeed, both the Commission and the D.C. Circuit acknowledged that CLEC bypass was common even in 1999 when the Commission adopted the original *Pricing Flexibility Order*. *See* Fifth Report & Order & Further Notice of Proposed Rulemaking, *Access Charge Reform; Price*

Therefore, the better measure of whether a competitor's transport facilities can serve a building with BDS demand is how close the building is to that competitor's transport facilities. Indeed, it makes no sense to ignore competitive transport that is not directly connected to an ILEC central office. Doing so would require the Commission to implausibly assume that competitors have made substantial investments to deploy competitive transport near buildings with BDS demand but cannot or will not use those facilities to actually provide transport services to those nearby buildings.

The approach adopted by the Commission in the *BDS Order*, and proposed in the *Notice*, does not have this fatal flaw, and is actually both more granular and more comprehensive than the approach advocated by INCOMPAS and Sprint. It is more granular because it focuses on whether competitive transport alternatives are available to serve each individual *building* with BDS demand and it is more accurate because it accounts for *all* competitive transport facilities, including both competitive transport facilities that duplicates ILEC interoffice facilities and competitive transport used to bypass those ILEC facilities, such as cable facilities, carrier hotels, and CLEC facilities that can be accessed directly from splice points.[18] And it is this far more accurate approach that confirms that competitive transport is essentially ubiquitous in areas served by price cap LECs.

Equally important, INCOMPAS and Sprint fail to account for the fact that the Commission's analysis effectively subsumes their proposed measure of competition. ILEC central offices, after all, are located in buildings included in the Commission's dataset, and the central offices used to serve buildings with BDS demand are typically located near those buildings to

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Cap Performance Review for Local Exchange Carriers, 14 FCC Rcd. 14221, ¶ 95 (1999) ("*Pricing Flexibility Order*"); *WorldCom v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001).

[18] *See, e.g.*, *Notice* ¶ 154 & 155 n.390; *BDS Order* ¶¶ 40, 54, 81, n.73; AT&T Comments at 2-5, 16-17; CenturyLink at 7-8.

avoid unnecessarily long channel terminations. The Commission in the *BDS Order* found that competitors can extend connections to buildings within a half mile of their facilities, and the Eighth Circuit specifically upheld that finding.[19] Because 92 percent of all buildings with BDS demand are within a half mile of competitive facilities, it follows that all or almost all ILEC central offices used to serve that demand are also within a half mile of competitive facilities. That is, competitors are either already connected to or can connect to all or almost all ILEC central offices. Accordingly, even if INCOMPAS and Sprint had a valid point—and they do not—their approach would also support the Commission's bottom line conclusion that nationwide elimination of price caps is warranted.

There is likewise no merit to INCOMPAS' and Sprint's attack on the Commission's reliance on the fact that more than twenty competitors have deployed transport in large MSAs and more than a dozen competitors have deployed transport in small MSAs. They argue that MSAs "are too large and varied to be a reliable geographic unit for which to assess competition."[20] This argument misses the point. The Commission does not have to guess at the *distribution* of competitors within MSAs. The dataset already provides vastly more granular data confirming that competitive facilities are within range of 92 percent of *buildings* with BDS demand and that such facilities are spread across more than 89 percent of the census blocks with demand. The significance of this information is not that it is an MSA-level measurement, but that it confirms that many transport providers have overbuilt ILEC networks and, as a result, customers often have a number of transport options. It is yet another data point confirming that the marketplace for BDS transport is highly competitive.

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[19] *BDS Order* ¶¶ 39-47; *Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991, 1008-09 (8th Cir. 2018).

[20] INCOMPAS Comments at 9. *See also* Sprint Comments at 2-5.

Lastly, INCOMPAS and Sprint attack the well-documented and long-established proposition that it is easier to justify deployment of transport than channel terminations because transport tends to carry more traffic. They argue that the transport at issue here is DS1 and DS3 transport which they say are, by definition, lower-capacity facilities. But that is highly misleading. The record shows that DS1 and DS3 transport is often provided over much larger-capacity fiber facilities, which are "channelized" to provide DS1 and DS3 services. And the Commission and courts have repeatedly rejected such claims.[21] Moreover, as noted, AT&T revenues for DS1 and DS3 services have declined dramatically since 2015, further confirming that these services are subject to intense competition.

[21] *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"). Nor is there any merit to claims that competitors are forced to buy most of their transport from ILECs due to purchase commitments and early termination fees. INCOMPAS at 11-12. These arguments were refuted by ILECs in response to the Commission's *Tariff Designation Order*. *See, e.g.*, Brief of AT&T Inc. In Support of Its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (Jan. 8, 2016). The reality is that many competitors (*e.g.*, cable companies) do not purchase much transport from ILECs at all, and those that do are not constrained by any minimum purchase commitments or early termination fees to which they voluntarily agreed because they typically have very substantial headroom under those agreements. *See, e.g., id.* at 14-15.

II. THE COMMISSION CORRECTLY CONCLUDED THAT NATIONWIDE ELIMINATION OF *EX ANTE* PRICE CAP REGULATION WAS JUSTIFIED BY ADMINISTRATIVE FEASIBILITY AND OTHER FACTORS.

INCOMPAS and Sprint argue that nationwide elimination of price caps is inappropriate because some areas may still lack competition. According to them, the 92 percent figure is supposedly misleading because it "mash[es] together nationwide data, such that the largest and densest central business districts . . . mask the lack of competition everywhere else."[22] But the *92 percent* figure shows that competition is essentially ubiquitous, leaving no room for arguments that this metric is somehow hiding any significant areas without competition. Further, the true percentage today is significantly higher, because the 92 percent figure did not include certain forms of cable competition, nor does it include six years of additional competitive investment since 2013. Moreover, the fact that even these 2013 competitive facilities are spread across more than 89 percent of census blocks with BDS demand,[23] refutes any assertion that competitive facilities are disproportionately concentrated in relatively small areas.

In any case, the Commission has already addressed these arguments and, quite correctly, rejected them. The Commission explained that 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."[24] Indeed, attempting to ferret out the tiny number of routes that lack competitive transport, and then crafting and imposing a new set of price cap regulations for those routes, is not administratively feasible, for either the Commission or providers.

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[22] INCOMPAS Comments at 10; Sprint Comments at 5-6.

[23] *Notice* ¶ 149; *BDS Order* ¶ 91.

[24] *BDS Order* ¶ 93.

To begin with, there is no feasible geographic subdivision that could serve as the basis for regulation that could reasonably target the small number of buildings with BDS demand that do not currently have access to competitive alternatives. Those locations are not neatly concentrated in any clearly defined geographic areas, such as census blocks, counties, or any other administratively feasible geographic basis for regulation. Thus, any attempt to design a new system of price cap regulation that focused on such geographic areas would be grossly over-inclusive and would regulate more competitive transport facilities than non-competitive facilities.

Nor would it be feasible to target such buildings directly, because any attempt to regulate on a route-by-route or some other ultra-granular geographic basis would be an administrative nightmare. It is not even clear that the datasets in the record would allow the Commission to make such ultra-granular determinations. Even if they did, such regulation would require an enormous amount of work for the Commission to identify those routes, and to develop a non-arbitrary *ex ante* price cap regime that could be applied on a route-by-route basis.

Such regulation would also "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."[25] To give just a few examples, it would require ILECs to make expensive alterations to their ordering and billing systems that enable those systems to apply different rates, terms and conditions for routes that continue to be subject to *ex ante* price cap regulation. It would also "disrupt[] . . . existing special access transport sales arrangements" and would otherwise dramatically increase the complexity of contracting because ILECs and their customers would have to develop separate terms and conditions on a

[25] *Id.*

route-by-route basis.[26] Moreover, at this stage, ILECs, relying on the *BDS Order* and the Eighth Circuit's stays, have already detariffed transport and in many cases have replaced those tariffs with numerous commercial arrangements with their customers, and the sky has not fallen as INCOMPAS and Sprint would have one believe.[27] As Verizon correctly points out, returning to some sort of price cap regulation now would require the industry to reverse the deregulation that has already occurred, resulting in enormous disruption and unnecessary costs.[28] None of these costs are justified, especially given the small and diminishing use of UNEs.

The Commission was thus entirely correct when it found 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."[29] At most it could theoretically benefit less than eight percent of all buildings with BDS demand, but the reality is that it would result in no incremental benefit. As the Commission has explained, for example, price cap LECs generally do not price transport services on a building or route basis, and therefore the fact that competitive transport exists on most routes disciplines the rates that ILECs can charge on the small number of routes where competition has not yet developed.[30] Moreover, as the Commission further pointed out, as entry barriers to deploying transport fall and demand for transport continues to increase, the already tiny number of non-competitive routes will continue to

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[26] *Id.*

[27] For example, as Alaska, AT&T, and CenturyLink, have demonstrated, cable companies and CLECs have continued to invest billions of dollars in competing BDS facilities since the *BDS Order* was adopted. *See* Alaska Comments, at 6-7; AT&T Comments at 8-9; CenturyLink Comments at 8-12.

[28] Verizon Comments at 1-8.

[29] *BDS Order* ¶ 92.

[30] *See id.*; AT&T Comments at 13 & n.42.

diminish.[31] The Commission thus correctly found that 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."[32] And, in any case, the Commission's section 208 complaint process represents a continuing safeguard against unjust, unreasonable, or discriminatory rates on those few routes.[33]

Courts have repeatedly endorsed this type of balancing of administrative feasibility against precision in this exact context. Most recently, the Eighth Circuit upheld this type of balancing in the context of channel terminations.[34] In the *BDS Order*, the Commission eliminated *ex ante* price cap regulation for all channel terminations in a county if at least 50% of buildings in the county could be served by competitors.[35] The Eight Circuit upheld this approach—based on the Commission's predictive judgments and cost-benefit analysis—even though such an approach could theoretically leave a significant percentage of buildings in a county with no competition and no regulation.[36] If anything, the Commission's approach to transport would result in far fewer buildings without transport alternatives because, as noted, the data show that even as of 2013 more than 92 percent of buildings are served by, or could be served by, competitive BDS transport.

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[31] *BDS Order* ¶ 92.

[32] *Id.* ¶ 93.

[33] *Id.*

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

[35] *BDS Order* ¶ 86.

[36] *Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991, 1007-12 (8th Cir. 2018).

In all events, it is not enough just to criticize the approaches proposed by the Commission and others.[37] If INCOMPAS and Sprint believe there is a better approach that addresses the need for administrability and that maintains incentives for investment and innovation, the burden is on them to identify that better approach. The D.C. Circuit rejected precisely this type of "criticize-only" approach when reviewed challenges to the *Pricing Flexibility Order* nearly two decades ago.[38] There too opponents of eliminating *ex ante* price cap regulation complained about the approach adopted by the Commission, but offered no alternative except a full, traditional market power analysis. The D.C. Circuit upheld the Commission's decision, explaining that the Commission is entitled to "make ease of administration and enforceability a consideration in setting its standard for regulatory relief" and crediting the Commission's determination that the approach it had adopted "superior to the various alternatives" in the record.[39]

III. THERE IS NO MERIT TO OPPONENTS' ASSERTIONS THAT THE RECORD SUPPORTS MAINTAINING *EX ANTE* PRICE CAP REGULATION.

INCOMPAS and Sprint purport to identify analysis and data in the record that supports maintaining *ex ante* price cap regulation for transport. None of these assertions has merit.

First, INCOMPAS and Sprint incorrectly assert that "analysis performed by Dr. Marc Rysman, the Commission's independent expert economist in the proceeding, included revenue data on both channel terminations and interoffice transport and found that ILECs exercise market power for DS1 and DS3 services."[40] In fact, Dr. Rysman's analysis was based on end-to-end

[37] INCOMPAS, for example, frankly concedes it has no alternative to the approach proposed by the Commission, stating instead that the Commission should "further develop the record" and devise some sort of new competitive "indicators" for transport within some sort of "appropriate geographic unit[s]." INCOMPAS Comments at 14-16.

[38] *See WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[39] *Id.* at 456.

[40] INCOMPAS Comments at 6-8; *see also* Sprint Comments at 6-7.

circuits, and thus did not separately examine transport: "In this paper, I focus only on the market for circuits provided to customers (sometimes called the channel termination market), although the transport market may also be interesting to study."[41] Indeed, Dr. Rysman removed from his analysis all standalone transport facilities.[42]

In all events, there was uniform agreement among the peers who reviewed Dr. Rysman's analysis, the other economists who submitted testimony in the record, and the Commission that Dr. Rysman's analyses was not sufficiently robust to draw any conclusions about market power for BDS services. As explained by the Commission, "as recognized by Dr. Rysman, and noted by peer reviewers and other commenters in the record, data and modeling limitations did not allow for a definitive conclusion that incumbent LECs were not pricing competitively."[43] Indeed, the results of Dr. Rysman's analyses "often became statistically insignificant after implementing changes to the analysis in response to peer reviewers, suggesting that the data are too noisy to draw any firm conclusions."[44]

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[41] Rysman Rev. White Paper at 6.

[42] *See id.* at 37 ("Connections that are strictly for transport between wire centers were also removed. . . . These connections were removed from the analysis because the cost structure behind providing transport is likely to be substantially different from providing service to end-user premises and therefore would make comparisons of prices less meaningful.").

[43] *BDS Order* ¶ 75.

[44] *Id.* ¶ 74. The Commission found that Dr. Rysman's analysis could not be relied upon to draw causal inferences between the number of competitors and prices for additional reasons as well. *See, e.g., id.* ¶ 75 ("a causal relationship could not be ascribed to his [Dr. Rysman's] estimates due to the possibility that some factor not observed in the data (*e.g.*, lower costs of serving a given customer) could be simultaneously producing both a greater number of facilities-based competitors and lower prices."); *see also Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991, 1008 (8th Cir. 2018) (The Rysman analysis "did not survive peer review"); *see also id.* ("The problem with the CLEC Petitioners' argument, as well as with drawing definitive conclusions from the expert report, is that the FCC recognized different fixed costs in serving different customers may be causing the increased prices in certain areas. The FCC's expert report was unable to completely account for this potential alternate cause for high prices and thus a causal connection could not be established.")

Second, INCOMPAS and Sprint repeat their argument that ILEC prices have historically been higher in areas where *ex ante* price cap regulation has been removed, *i.e.*, in areas where Phase II pricing flexibility was granted. The Commission previously has rejected this argument for multiple good reasons. To begin, these assertions were "disputed" and "other evidence was presented of dramatic increases in competitive entry, rapid price declines, and service growth."[45] In addition, after reviewing this supposed evidence, the Commission found that "[w]ithout more supporting detail . . . it is difficult to rely on this evidence because it does not take into account the differing costs of service in each area, whether price caps were initially higher in Phase II areas, and whether competitor transport facilities are in the areas being compared in the attachment."[46] The Commission also found the supposed evidence to be flawed because it "centers on tariffed rates, not actual rates paid, which can be significantly less."[47]

Third, Opponents argue that there are barriers to entry that prevent competitors from deploying alternatives to ILEC transport facilities, and that the Commission has failed to account for those supposed barriers.[48] In fact, the Commission devoted an entire section of the *BDS Order* to examining entry barriers and concluded, correctly, that "while there can be high barriers to

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[45] *BDS Order* ¶ 75.

[46] *Id.* ¶ 80, n.270.

[47] *Id.* Sprint also argues that an unnamed ILEC, after receiving nationwide relief from *ex ante* price cap regulation, substantially increased the prices that Sprint must pay for BDS transport. It does not appear that Sprint is referring to AT&T. However, AT&T notes that Sprint does not disclose whether those price increases occurred in areas that had previously been subject to Phase II pricing flexibility or whether they were limited to price cap areas. If they were in areas with pre-existing Phase II pricing flexibility, then it is clear that any rate changes were market-based and not caused by elimination of *ex ante* price caps. Even if the alleged price increase occurred in price cap areas, price increases are to be expected to the extent price caps were set below market levels. Moreover, if Sprint believes the rate changes are unjust and unreasonable, it can challenge those rates via a Section 208 complaint. To the extent it has not done so, that further undermines its claims that the alleged new rates exceed competitive levels.

[48] INCOMPAS Comments at 12-13; Sprint Comments at 6-7.

business data services entry, evidence shows that firms frequently choose to enter this market with significant investments, particularly in areas of significant demand, indicating sufficient competitive conditions that do not warrant direct regulatory intervention."[49] The fact that numerous competitors have deployed transport to within a half mile of most buildings with BDS demand in price cap areas overwhelmingly confirms that entry barriers do not impede competition in price cap areas.

Fourth, Sprint cites to prior statements made by AT&T out of context. It states that AT&T has previously stated that entities that engage in traffic stimulation schemes "establish facilities in areas where there are no realistic transport alternatives and where it would be prohibitively expensive to deploy them."[50] These traffic stimulation schemes are almost always implemented outside price cap areas, and the quote above is specifically addressing an equal access provider that all other providers of telecommunications services are generally required to use. In short, this quote has nothing to do with the issues in this proceeding.

[49] *BDS Order* ¶ 48.

[50] Sprint Comments at 7.

CONCLUSION

For the foregoing reasons and for the reasons set forth in AT&T's initial comments, the Commission should readopt the *BDS Order* rules that eliminate *ex ante* price cap regulation from BDS transport services and grant forbearance from tariffing requirements.

Respectfully submitted,

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