

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**REPLY COMMENTS OF
USTELECOM AND ITTA**

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SUMMARY

The Eighth Circuit Court of Appeals' determination that the Federal Communications Commission (Commission) provided insufficient notice in the *BDS Order* to end ex ante pricing regulation of price cap carriers' TDM transport services was purely procedural. The Commission's decision to end ex ante regulation of transport services nationwide was backed by strong evidence and a rational policy choice. Nothing in the record of the current proceeding should alter the Commission's prior conclusion.

The Commission has already made the case that more than 92 percent of buildings served by ILEC TDM transport services are within a half-mile of competitive fiber transport facilities. The prevalence and close proximity of these other transport facilities to buildings with BDS demand served by ILECs means that there are widely deployed and available competitive facilities that non-facilities-based providers can access to serve their customers. Notably, the court upheld the Commission's determination that a half-mile is the appropriate geographic market for analyzing BDS competition, in large part because the Commission found that competitors are willing to extend their facilities to reach potential customers within that distance. Moreover, the half-mile distance is likely conservative for purposes of measuring transport competition, given the ability of competitors to interconnect with non-ILEC transport facilities in carrier hotels, splice points, and other locations outside of ILEC central offices.

INCOMPAS and Sprint suggest the Commission's analysis wrongly focuses on the distance between competitive fiber and a BDS customer's location which they claim is irrelevant to the question of whether that customer has access to competitive transport facilities. As discussed below in Section II. A., the transport competitive analysis used by the Commission actually subsumes the data INCOMPAS and Sprint suggest the Commission should rely on. It

follows from the Commission's analysis that all or most central offices can be served by competitive transport, and thus interoffice routes between those central offices can be replicated by competitive transport facilities.

Commenters suggesting that the record lacks evidence of substantial competitive TDM transport options do so to preserve onerous rules that were designed to address ILEC market power under monopoly conditions. Those rules and price regulation no longer make sense in today's highly competitive transport marketplace. The Commission should reaffirm its decision to end ex ante regulation of transport services. For similar reasons, as described in the initial joint comments filed by ITTA and USTelecom, the Commission should also provide the same deregulatory treatment for transport services provided by rate-of-return carriers that currently receive model-based or other forms of fixed high-cost universal service support and that elect to transition their business data services offerings out of rate-of-return regulation.

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**REPLY COMMENTS OF
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USTelecom – The Broadband Association (USTelecom) and ITTA – The Voice of America’s Broadband Providers (ITTA) submit these joint reply comments in further support of the Federal Communications Commission’s (FCC or Commission) proposal, and prior conclusion, to eliminate ex ante pricing regulation of TDM transport and other transport special access services offered by price cap incumbent local exchange carriers (ILECs).¹ The Commission should also provide the same deregulatory treatment of transport services provided by rate-of-return carriers that currently receive model-based or other forms of fixed high-cost universal service support and that elect to transition their business data services offerings out of rate-of-return regulation (electing rate-of-return carriers).²

¹ *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, Business Data Services in an Internet Protocol Environment, Special Access for Price Cap Local Exchange Carriers, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, FCC 18-146 (rel. Oct. 24, 2018) (Model-Based Rate of Return Order and/or Second FNPRM and/or FNPRM).*

² As with our initial joint comments in response to the *Second FNPRM and FNPRM*, we note that USTelecom member companies AT&T, Inc., CenturyLink and Verizon are taking no position on our comments addressing issues raised in the *FNPRM* related to transport services provided by rate-of-return carriers.

A majority of the comments filed in this proceeding support the Commission’s earlier finding of “strong evidence of substantial competition, as well as market conditions that suggest regulation of TDM transport and other non-end user channel termination services is not justified.”³ The two commenters that challenge this pro-competition and pro-modernization effort by the Commission do not present any new evidence to justify their continued claims, previously rejected by the Commission, of insufficient competition for transport services. Such commenters have given the Commission no reason to second-guess itself or overturn its reasoned conclusion that there is sufficient competition to justify nationwide pricing relief for TDM transport services offered by price cap providers.

I. DATA IN THE RECORD OF THIS PROCEEDING DEMONSTRATE THAT THERE IS WIDESPREAD COMPETITION FOR TDM TRANSPORT.

Most of the comments filed in the record support the Commission’s proposal to eliminate ex ante pricing regulation of TDM transport services offered by price cap carriers, based on the existing record and continued evidence of growing competition.⁴ AT&T asserts that “facilities-based competition for transport is now effectively ubiquitous,” citing to the Commission’s finding in the *BDS Order* that “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.”⁵ AT&T further notes that the actual percentage of locations with competitive transport is much

³ *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*, 32 FCC Rcd 3459, 3496 ¶79 (*BDS Order*).

⁴ See, e.g., Comments of Verizon, WC Docket Nos. 17-144, 16-143, 05-25, at 2-3 (Verizon Comments); Comments of AT&T, WC Docket Nos. 17-144, 16-143, 05-25, at 3-4, 8-9 (Feb. 8, 2019) (AT&T Comments); Comments of CenturyLink, WC Docket Nos. 17-144, 16-143, 05-25, at 8-12 (Feb. 8, 2019) (CenturyLink Comments); Comments of Alaska Communications, WC Docket Nos. 16-143, 05-25, at 2-3 (Jan. 30, 2019) (Alaska Communications Comments) (concurring that the Commission correctly decided to eliminate ex ante regulation of price cap ILECs’ TDM transport services).

⁵ AT&T Comments at 3-4, 8-9.

higher because the data omitted facilities deployed since 2013 and cable transport facilities, resulting in an understatement of the extent of actual transport competition.⁶ Similarly, CenturyLink correctly notes that “the 2015 Data Collection confirmed that price cap carriers’ TDM transport services were subject to intense competition in 2013, even without fully accounting for cable providers’ dramatic growth in enterprise services” and that such competition has only accelerated over the past five years.⁷ Moreover, record evidence indicates that the portion of BDS demand within a half-mile of competitive transport networks is even greater than the 92.1 percent of locations.⁸

The Commission also found persuasive evidence in the record that many competitors have opted to deploy their own transport services in areas served by price cap ILECS rather than purchasing from ILECs, resulting in “competitors’ transport networks today [that] are generally geographically coextensive with ILEC transport networks.”⁹ In fact, as CenturyLink notes, since adopting the *Pricing Flexibility Order* in 1999 the Commission has applied less stringent regulations to BDS transport services given lower barriers to entry than for channel termination services and the greater opportunity to recover sunk costs from multiple customers due to higher volume services between points of traffic aggregation.¹⁰ The Commission applied this logic in

⁶ *Id.* See also *BDS Order*, 32 FCC Rcd at 3496, ¶ 79 (specifically finding that the data show “that ‘the vast majority of locations with special access demand have’ competitive fiber within close proximity”).

⁷ CenturyLink Comments at 8, 10-12.

⁸ See Second Supplemental Declaration of Mark Israel, Daniel Rubinfeld and Glenn Woroch, WC Docket No. 05-25 and RM-10593 (Apr. 20, 2016) (“Supplemental Declaration”) at 10. For example, the Supplemental Declaration showed that while 84 percent of buildings where AT&T provided BDS were within 1,000 feet of competitive fiber, those buildings accounted for 95 percent of AT&T’s demand, measured in bandwidth. Similarly, while 80 percent of buildings where CenturyLink provided BDS were within 1,000 feet of competitive fiber, those buildings accounted for 94 percent of CenturyLink’s demand, measured in bandwidth. These metrics understate the actual extent of buildings and demand within 1,000 feet of competitive transport networks because they exclude facilities associated with cable operators’ networks.

⁹ AT&T Comments at 3.

¹⁰ CenturyLink Comments at 6-7 (citing *Access Charge Reform*, CC Docket Nos. 96-262, *et al.*, Fifth Report and

the *BDS Order*, finding that transport has lower barriers to entry for deployment than channel terminations as demonstrated by increases in demand, which “will provide incentives for competitive providers to deploy additional transport facilities to compete for this demand.”¹¹

Today, rapid growth in data volumes driven by continued Internet growth, mobile data, video, and cloud computing, and the attendant transition from legacy to modern networks, have driven rapid adoption of more efficient Ethernet and Internet Protocol (IP) services. Since 2013, the period reflected in the 2015 Data Collection on which the *BDS Order* relied, competitive providers and new entrants have expanded local, regional, and long haul fiber to transport traffic from their growing end-user and wholesale customer bases. Cable operators have been the fastest growing provider segment in the enterprise communications marketplace for well over a decade.¹² Cable operators have thrived by offering broadband, Ethernet, and IP services over their widely available fiber and hybrid fiber-coax (HFC) networks to small, medium and large enterprise and wholesale customers as an alternative to legacy services. Cable operators’ revenues for commercial voice and data services have more than doubled from approximately \$8 billion in 2013 to greater than \$16 billion in 2018.¹³ In the carrier Ethernet marketplace, cable

Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*)).

¹¹ *BDS Order* ¶ 82 (quoting *Pricing Flexibility Order* ¶ 102).

¹² Nick Del Deo and Craig Moffett, MoffettNathanson Research, *The Case of the Missing Revenue – Revisited* (July 16, 2018) (“MoffettNathanson Report”) at 6, Exhibit 4. The research indicates that cable commercial wireline revenue growth was 10.6 percent compared to -5.5 percent for ILECs in 2017 and that cable operators outpaced the rest of the industry – both ILECs and non-cable alternatives to ILECs – in each year from 2008 through 2017. Cable commercial wireline revenue growth was in a range of 20 percent to 25 percent from 2009 through 2013; and, while the cable growth rate has moderated in the last several years, it has nonetheless outpaced incumbent rates, which are negative, by double digits through 2017. Except for 2009, non-cable alternatives to the ILECs saw commercial wireline revenue grow at low single digit percentage rates.

¹³ Jeff Baumgartner, Light Reading, *US Cable Set to Rake in \$18B in Biz Services Revenues in 2018* (November 15, 2018), available at [https://www.lightreading.com/cable/cable-business-services/us-cable-set-to-rake-in-\\$18b-in-biz-services-revenues-in-2018/d/d-id/747602](https://www.lightreading.com/cable/cable-business-services/us-cable-set-to-rake-in-$18b-in-biz-services-revenues-in-2018/d/d-id/747602) (last visited March 6, 2019) (citing opening presentation of Light Reading cable/video practice leader, Alan Breznick, at Light Reading Future of Cable Business Services conference in New York City on November 15, 2018).

port share was 27 percent in 2018 and the number of cable ports grew 156 percent from 2013 to 2018.¹⁴ As a result, cable operators have taken an increasing share of the enterprise communications marketplace, growing from 9 percent of overall commercial wireline revenues in 2013 to 16 percent in 2017.¹⁵ Cable industry share gains continued in 2018.¹⁶

There are also compelling public interest reasons for eliminating ex ante pricing regulation of price cap TDM transport services. As AT&T notes, “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.”¹⁷ Also, Verizon points out that “[r]eversing course would upset the expectations of both suppliers and purchasers of business data services transport” because providers have already made significant changes to their transport services offerings, including to tariffing and billing systems.¹⁸

Given the widespread availability of competitive transport services, the Commission wisely recognized that identifying the relatively small number of non-competitive transport routes would be administratively burdensome, justifying pricing relief for TDM transport services across all price cap ILEC areas.¹⁹ Thus, as AT&T asserts, a competitive market test makes no sense.²⁰ Moreover, the Commission is well within its discretion in favoring “an administratively

¹⁴ Vertical Systems Group, ENS @Ethernet Research (subscription service).

¹⁵ MoffettNathanson Report at p. 5, Exhibit 2.

¹⁶ MoffettNathanson Research, *U.S. Commercial Wireline: Walking Contradiction* (November 9, 2018). In the third quarter of 2018, cable commercial wireline revenue grew 8.5 percent while ILEC commercial wireline revenue fell at a rate of -3.5 percent.

¹⁷ AT&T Comments at 6. The Commission recognized a greater harm to competitive entry with regulation than without. *See BDS Order*, 32 FCC Rcd at 3501-02, ¶¶92.

¹⁸ Verizon Comments at 5; Alaska Communications Comments at 5.

¹⁹ *See BDS Order*, 32 FCC Rcd at 3501-02, ¶¶91-92.

²⁰ AT&T Comments at 14. Alaska Communications concurs. *See Alaska Communications Comments* at 7-9. *See*

feasible approach” over “imposing undue regulatory burdens on this highly competitive segment of the market.”²¹

As Verizon concludes, reversing course and reinstating pricing and tariffing regulation for transport service would “result in a counterfactual and paradoxical regime in which transport services in some areas were more heavily regulated than channel terminations.”²² The record in this proceeding, and decades of policy leading up to the *BDS Order* finding substantially more barriers in deploying channel terminations as compared to transport services, strongly counsels in favor of reaffirming the conclusion that there is sufficient competition to justify nationwide pricing relief for TDM transport services offered by price cap providers.

also CenturyLink Comments at 13 (stating that the Commission “reasonably concluded that retaining tariff and price cap regulation of price cap carriers’ TDM transport services in any geographic area was unnecessary and would be counterproductive”).

²¹ *BDS Order*, 32 FCC Rcd at 3502, ¶¶92-93.

²² Verizon Comments at 7.

II. NOTHING IN THE COMMENTS REBUTS THE COMMISSION’S FINDING OF COMPETITION FOR TDM TRANSPORT SERVICES IN PRICE CAP AREAS.

A. The Commission’s Reliance on Strong Evidence in the Record of Competition in TDM Transport Markets was Sound.

Neither of the two commenters opposing the Commission’s proposal to deregulate ex ante pricing of TDM transport provided by price cap carriers offers compelling arguments or data for reversal of the Commission’s findings of competition in the *BDS Order*. They simply reiterate arguments raised in the earlier proceeding that the Commission weighed and rejected in favor of its more rational regulatory approach.²³

INCOMPAS, for example, claims that the Commission cites the same evidence to deregulate transport services that it used to support the competitive market test for TDM channel terminations, and asserts that this evidence does not apply in the interoffice transport service market.²⁴ This is simply wrong; the Commission specifically assessed the presence of other nearby non-ILEC transport facilities, and relied on evidence in the record showing as many as 28 transport competitors in some urban areas and more than a dozen transport competitors in second-tier MSAs.²⁵ INCOMPAS further claims that the relevant geographic market was not properly defined, stating that the relevant distance for measuring transport competition is “how far a competitive provider would need to extend its network to reach the traffic hand-off point ... not the end user’s location.”²⁶ Sprint apparently agrees with INCOMPAS, asserting that the Commission’s analysis does not support nationwide deregulation of transport, claiming that the

²³ See *BDS Order*, 32 FCC Rcd at 3495-3498, ¶¶ 77-82 and 3501-02, 90-93.

²⁴ Comments of INCOMPAS, WC Docket Nos. 16-143, 05-25, at 4 (Feb. 8, 2019) (INCOMPAS Comments).

²⁵ See *Second FNPRM and FNPRM* at ¶ 149.

²⁶ INCOMPAS Comments at 4-5.

data “do not meaningfully measure transport competition in any part of the country, let alone in the areas that the Commission seeks to deregulate.”²⁷ These arguments simply reiterate arguments asserted before that seek to keep the focus only on ILEC central offices without an acknowledgement that competitors can and do interconnect with non-ILEC transport facilities in carrier hotels, splice points, and other locations outside of incumbent central offices. The Commission heard these arguments, and found them to be unpersuasive.²⁸ In any case, the competitive analysis of transport used by the Commission actually subsumes the analysis of interoffice transport proposed by INCOMPAS and Sprint. Interoffice routes simply connect ILEC central offices, and ILEC central offices are in buildings with BDS demand. The data already show that 92 percent of buildings with BDS demand are within a half-mile of competitive transport. In addition, the Commission has already determined that competitors can connect to buildings within a half-mile of their facilities. It necessarily follows that all or most central offices can be served by competitive transport, and thus interoffice routes between those central offices can be replicated by competitive transport facilities.

B. The Availability of Nearby Competing Transport Services Allows the Commission to Make Inferences About the Competitiveness of TDM-Based Transport Markets

Sprint also seeks to discredit the request by rate-of-return carriers for similar treatment by asserting that in the *Model-Based Rate-of-Return Order*, the Commission “explicitly” declined to remove ex ante pricing regulation of TDM transport services sold by electing rate-of-return carriers due to a lack of record data about the level of competition in rate-of-return service areas.²⁹ While it is true that the Commission did not collect data specific to rate-of-return areas in

²⁷ Comments of Sprint Corporation, WC Docket Nos. 17-144, 16-143, 05-25, at 2 (Feb. 8, 2019) (Sprint Comments).

²⁸ See *BDS Order*, 32 FCC Rcd at 3497 n.273; AT&T Comments at 16-17; CenturyLink Comments at 7-8.

²⁹ Sprint Comments at 5.

making its assessment of competition in the original BDS proceeding, Sprint ignores that the Commission issued the *FNPRM* specifically to seek comment on potential regulatory relief for electing rate-of-return carriers' TDM transport services, including whether there are other proxies that "could provide a reasonable basis for Commission action," and whether there is additional data "or other information relevant to the status of competition for lower capacity TDM transport" in the study areas served by potential electing rate-of-return carriers.³⁰ In response to the *FNPRM*, USTelecom and ITTA demonstrated that there is indeed precedent for the Commission to draw reasonable inferences regarding evidence of competitive deployment in similar markets and that where warranted, the Commission's exercise of its discretion to use reasonable inferences is reasonable, permissible, and best serves the public interest.³¹

Additionally, Sprint suggests that a competitive market test for TDM transport in rate-of-return areas may be appropriate.³² However, as USTelecom and ITTA previously noted, the Commission already determined that "a competitive market test for transport would necessarily be more detailed and more burdensome since it would regulate based on the level of competition on individual routes. This significant additional complication does not appear warranted for a market that has seen considerable competitive investment"³³ Furthermore, the Commission

³⁰ *FNPRM* at ¶ 162.

³¹ See Comments of ITTA and USTelecom, WC Docket Nos. 17-144, 16-143, 05-25, at 9 (Feb. 8, 2019) (Joint Comments) (citing *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2559-60, ¶¶ 44-45 (2005) (*Triennial Review Remand Order*), *aff'd sub nom. Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006). The Commission generally assessed "similarity" in terms of the expected revenue opportunities and/or the likely presence of competitive fiber facilities in the markets at issue. See *Triennial Review Remand Order*, 20 FCC Rcd at 2558, ¶ 41 n.123.

³² See Sprint Comments at 7-8.

³³ Joint Comments at 13-14 (quoting *BDS Order*, 32 FCC Rcd at 3502, ¶ 92 n.294).

has “long recognized transport is more competitive than end user channel terminations and requires a different competitive showing for reduced pricing regulation.”³⁴ However, if the Commission deems an additional competitive market test to be necessary, such a test should be structured so that it utilizes lower thresholds for electing rate-of-return carriers to demonstrate transport competition than the competitive market test the Commission adopted for end user channel termination services, as the Commission has already determined is appropriate.³⁵

In any event, given the Commission’s consistent acknowledgement of the lower barriers to entry for competitive transport, it would be extremely difficult to fathom the presence of competitive end user channel termination services without the accompanying presence of competitive transport. Therefore, in the absence of complete relief from ex ante pricing regulation, in recognition of the lower threshold the Commission has traditionally applied for carriers to demonstrate competitiveness of TDM transport services, USTelecom and ITTA reiterate that the Commission should, without applying a competitive market test, at least provide relief from ex ante pricing regulation of TDM transport in every study area where the Commission found, based on the *Model-Based Rate-of-Return Order*’s competitive market test,

³⁴ *FNPRM* at 55, ¶ 158. See also *BDS Order*, 32 FCC Rcd at 3495-96, ¶¶ 77-78 (“Transport services . . . can more easily justify competitive investment and deployment. . . . The provision and sale of TDM-based [business data] services has reflected, and continues to reflect, the different competitive dynamics that characterize” transport and end user channel terminations. The Commission long has distinguished between these two sets of business data services “and required price cap LECs to make different levels of competitive showings to obtain pricing flexibility for each. The Commission’s pricing flexibility rules also reflect this distinction. . . . We find that this distinction remains valid in the current [business data services] marketplace . . .”). In the face of the Commission’s longstanding recognition of the comparatively low barriers to entry for provision of competitive transport services, Sprint’s grasping efforts to cast doubt on the Commission’s consistent findings in this regard, see Sprint Comments at 9, are unavailing.

³⁵ See *Second FNPRM* at 52, ¶ 148. See also *BDS Order*, 32 FCC Rcd at 3498, ¶ 82 (describing transport as the “low-hanging fruit” of the business data services circuit, making it particularly attractive to new entrants, and noting the Commission’s continued adherence to its long-held view that competitors are prone to enter the transport market before the channel termination market).

that potential electing rate-of-return carriers' end user channel termination services are competitive.³⁶

III. CONCLUSION

USTelecom applauds the Commission for continuing to pursue actions to deregulate where there is there is competition. The Commission's prior decision to end ex ante regulation of transport services nationwide was backed by strong evidence and a rational policy choice and there is nothing in the record refutes the Commission's finding of competition and therefore the current proceeding should not alter the Commission's prior conclusion. Given the record, the Commission should also extend this deregulatory treatment of transport services provided by rate-of-return carriers that currently receive model-based or other forms of fixed high-cost universal service support and that elect to transition their business data services offerings out of rate-of-return regulation (electing rate-of-return carriers).

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³⁶ See *BDS Order*, 32 FCC Rcd at 3496, ¶ 79 ("the record overall reflects a competitive landscape where customers often combine competitive transport with channel terminations supplied by incumbents").