



March 22, 2017

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

***Re: Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; 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, 15-247 & 05-25, RM-10593***

Dear Ms. Dortch:

Pursuant to the Commission’s June 24, 2016 *Order* (“*June 24 Order*”), which “extends the procedures for submitting and accessing Confidential Information adopted in the business data services protective orders in WC Docket No. 05-25 to Confidential Information filed in the record in WC Docket No. 16-143,”<sup>1</sup> Sprint Corporation (“Sprint”) hereby submits a redacted version of the attached letter, which contains redacted highly confidential information protected under the following protective orders adopted by the Commission:

- *Modified Protective Order*<sup>2</sup> in WC Docket No. 05-25, RM-10593
- *Second Protective Order*<sup>3</sup> in WC Docket No. 05-25, RM-10593
- *Data Collection Protective Order*<sup>4</sup> in WC Docket No. 05-25, RM-10593

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<sup>1</sup> *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; 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, 15-247, and 05-25, RM-10593, Order, DA 16-722 (rel. June 24, 2016).

<sup>2</sup> See *Special Access Rates for Price Cap Local Exchange Carriers*, Modified Protective Order, DA 10-2075, 25 FCC Rcd. 15,168 (Wireline Comp. Bur. 2010).

<sup>3</sup> See *Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Comp. Bur. 2010) (“*Second Protective Order*”).

<sup>4</sup> See *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*, Order and Data Collection Protective Order, DA 14-1424, 29 FCC

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- *Business Data Services Data Collection Protective Order*<sup>5</sup> in WC Docket Nos. 15-247 & 05-25, RM-10593
- *Tariff Investigation Protective Order*<sup>6</sup> in WC Docket Nos. 15-247 & 05-25, RM-10593

Highly confidential treatment of the respectively marked portions of the attached document is required to protect information subject to the above-mentioned protective orders, including information regarding:

- The “extent to which companies rely on incumbent local exchange carrier . . . and non-incumbent LEC last-mile facilities and local transport facilities” and “the nature of those inputs”;<sup>7</sup>
- Factors that companies “take into account when deciding what types of channel termination and local transport facilities to lease”;<sup>8</sup>
- The “types of customers companies serve and the types of special access-type services demanded by those customers”;<sup>9</sup>
- The factors companies consider “when deciding whether to self-deploy channel termination and local transport facilities or lease such facilities from a third party”;<sup>10</sup>
- The “nature or type of structure where . . . cell sites are placed” and “the type or capacity of the connections provided to companies’ cell sites”;<sup>11</sup>
- The “terms and conditions of or strategy related to . . . most sensitive business negotiations or contracts”;<sup>12</sup>
- “[D]etailed or granular information about specific network facilities, including types, equivalents, and capacities, whether TDM- or IP-based services”;<sup>13</sup>

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Rcd. 11,657 (Wireline Comp. Bur. 2014) (“*Data Collection Protective Order*”). See also *Public Statements Derived from Highly Confidential Data Filed in Response to the Business Data Services (Special Access) Data Collection*, Public Notice, DA 16-368, 31 FCC Rcd. 3420 (2016) (clarifying the confidential treatment of data derived from the data collection).

<sup>5</sup> See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; 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*, Order and Protective Orders, DA 15-1387, 30 FCC Rcd. 13,680, App. A (Wireline Comp. Bur. 2015).

<sup>6</sup> See *id.* App. B (“*Tariff Investigation Protective Order*”).

<sup>7</sup> *Second Protective Order* ¶ 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*; *Data Collection Protective Order* at App. B.

<sup>11</sup> *Second Protective Order* ¶ 6.

<sup>12</sup> *Tariff Investigation Protective Order* at 13,704.

<sup>13</sup> *Id.*

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- “[C]urrent or future plans regarding the transition from TDM- to IP-based services or to compete for a customer or specific groups or types of customers (e.g., retail business or wholesale customers), including specific pricing or (tariffed or non-tariffed) contract proposals, pricing strategies, product strategies, advertising or marketing strategies, future business plans, procurement strategies, technology implementation or deployment plans and strategies (e.g., engineering capacity planning documents)”;<sup>14</sup>
- The “nature or contents of private non-tariffed commercial agreements”;<sup>15</sup>
- The analyses performed about “competitors, including data, sources and methods used in those analyses”;<sup>16</sup>
- “Descriptions of CLEC or out-of-region ILEC sales, pricing structures and discounts” and “expenditures” under “certain rate structures and discount plans”;<sup>17</sup>
- “Pricing, to the extent such information is not publicly available, for . . . all [packet-switched data services]”;<sup>18</sup>
- “[R]ates or charges associated with channel terminations or transport facilities, and information from which, whether alone or in combination with other confidential or non-confidential information, such rates or charges . . . ”;<sup>19</sup> and
- “Information about Requests for Proposals (‘RFPs’), including descriptions of RFPs for which a party was selected as the winning bidder, descriptions of RFPs for which a party submitted unsuccessful competitive bids, and the business rules companies take into consideration to determine whether to submit a bid in response to an RFP”.<sup>20</sup>

The marked information is not available from public sources, and, “if released to competitors, would allow those competitors to gain a significant advantage in the marketplace.”<sup>21</sup>

In accordance with the protective orders in WC Docket No. 05-25, extended to WC Docket No. 16-143 by the *June 24 Order*, Sprint, in addition to filing this redacted version electronically via ECFS, will submit one original and two hardcopies without redaction to the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, DA 12-199, 27 FCC Rcd. 1545, 1548 (Feb. 13, 2012) (supplementing the *Second Protective Order*) (“*Second Supplement to Second Protective Order*”).

<sup>18</sup> *Id.*

<sup>19</sup> Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Paul Margie, Esq., Wiltshire & Grannis LLP, DA 11-805, 26 FCC Rcd. 6571, 6572 (May 2, 2011) (supplementing the *Second Protective Order*) (“*First Supplement to Second Protective Order*”).

<sup>20</sup> *Data Collection Protective Order* at App. B.

<sup>21</sup> *Second Protective Order* ¶ 3; *First Supplement to Second Protective Order* at 6571; *Second Supplement to Second Protective Order* at 1546; *Data Collection Protective Order* ¶ 5.

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Secretary's Office. Sprint will also submit one copy without redaction to Christopher Koves, Pricing Policy Division, Wireline Competition Bureau.

Please contact me if you have any questions or require any additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "A.P. Margie".

Paul Margie  
*Counsel to Sprint Corporation*



March 22, 2017

**Ex Parte**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> 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 Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593.*

Dear Ms. Dortch,

The Commission has recognized that thousands of large and small businesses across the country are paying far too much for broadband because of inadequate competition in the multi-billion-dollar Business Data Services (“BDS”) marketplace. BDS connections power our information economy, generate high-paying jobs, and are critical to expanding our nation’s telecommunications infrastructure. But a small handful of companies are overcharging the very investors and employers that are critical to our economic growth—and are using anticompetitive tactics to ensure that these businesses never have access to competitive alternatives. In response, investors and job creators from all corners of the industry, including a coalition of the country’s largest companies, leading incumbent local exchange carriers (“ILECs”), competitive local exchange carriers (“CLECs”), and wireless providers like Sprint, have recognized the need to address inflated prices and the lack of competition.<sup>1</sup>

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<sup>1</sup> See, e.g., Letter from Margaret McCready, Executive Director of Public Policy, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 *et al.* (filed Nov. 8, 2016) (explaining that “Verizon supports the Commission’s move towards adopting a framework for business data services that applies the same set of rules to all competing providers and services”); Letter from Chip Pickering, INCOMPAS, *et al.*, to Chairman Wheeler, FCC, WC Docket No. 16-143 (Oct. 27, 2016) (expressing broad support for the proposed framework from INCOMPAS, Level 3, BT Americas, the Computer & Communications Industry Association, Public Knowledge, the Open Technology Institute, Engine, Sprint, US Cellular, and other competitive wireless carriers); Letter from Kathleen Q. Abernathy, Frontier, Charles W. McKee, Sprint, and Eric N. Einhorn, Windstream, to Marlene H. Dortch, FCC, WC Docket No. 16-143 *et al.* (filed Oct. 3, 2016) (“Frontier agrees that the Commission

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Understanding the importance of BDS to the economy, the full Commission adopted a series of specific findings regarding the state of competition, relevant product markets and substitutability, relevant geographic areas, barriers to entry for potential competitors, and anticompetitive terms and conditions, all based on the record, and proposed a comprehensive framework to repair the broken BDS marketplace.<sup>2</sup>

But in a March 13 *ex parte* letter, AT&T argued that the Commission should abandon the full Commission's findings, ignore the collected record and the report filed by the FCC's own independent economic consultant, and instead declare that the marketplace is almost uniformly competitive across all BDS services and in all, or nearly all, geographic markets. AT&T further asked the Commission to conduct an 11<sup>th</sup>-hour about-face and, instead of adopting a regulatory framework consistent with the record and the *Order and FNPRM*, remove the very protections that the Commission already determined are in need of reinforcement. One week later, CenturyLink and Frontier filed a letter even more disconnected from the record and the Commission's recent findings, and asked the Commission to eliminate all BDS protections based on the sweeping and incorrect conclusion that ILECs "no longer exercise market power in the provision of BDS" at any capacity and in any part of the country.<sup>3</sup> Startlingly, AT&T, CenturyLink, and Frontier appear to believe that the Commission should do all of this without even issuing a new Notice of Proposed Rulemaking and seeking public comment on a new proposal.

The reversal that these ILECs seek would be disastrous for our nation's broadband future, and the small and medium-size businesses, economic growth, and job creation that depend so critically on access to affordable connectivity. As explained in more detail below, adopting their proposal would also be unlawful. In addition to undermining the Chairman's efforts to improve transparency,<sup>4</sup> the Commission's abrupt change in course, without additional procedural steps

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should move forward with reform of TDM BDS" as proposed by Verizon-INCOMPAS, with smaller reductions in price caps for smaller ILECs).

<sup>2</sup> *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143 *et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("*Order and FNPRM*").

<sup>3</sup> Letter from Russell P. Hanser, Counsel, CenturyLink and Frontier, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Mar. 20, 2017) ("CenturyLink and Frontier Ex Parte").

<sup>4</sup> See Press Release, FCC, Statement of FCC Chairman Ajit Pai: Announces Pilot Program to Release Commission Documents to the Public (Feb. 2, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0202/DOC-343303A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0202/DOC-343303A1.pdf); see also Ajit Pai, *Springing Forward for the Public Interest: The FCC's March Agenda*, FCC

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and new record evidence, would violate even the minimum standards of openness by which all agencies must operate under the Administrative Procedure Act. It would also force the Commission into a Hobson's choice that inevitably would lead to reversal on appeal: either overturn recent decisions on the relevant geographic market, substitutable services, and barriers to entry in order to reach a conclusion that even the low-bandwidth BDS marketplace is competitive—all in direct contradiction to the record—or conclude that deregulation is justified notwithstanding the scarcity of competition, a new policy on which there is no meaningful record at all.

At a minimum, if the Commission were to explore rolling back protections for American businesses that rely on dedicated broadband connections as AT&T, CenturyLink, and Frontier expect, it must do so in an open and transparent manner, by describing specific proposals in a further notice, and releasing a new competition analysis that justifies the wide range of sudden policy changes sought by the ILECs.

**I. The Record Does Not Support Action That Would Eliminate Existing TDM Pricing Constraints and Foreclose Action on Packet-Based BDS Services.**

The wholesale elimination of competition protections that AT&T, CenturyLink, and Frontier propose would be arbitrary and capricious given recent Commission findings and the state of the record in this proceeding. As explained below, the record precludes the Commission from both reversing course to adopt the new findings that AT&T, CenturyLink, and Frontier proffer, and adopting the regulatory changes that the ILECs claim these findings support. The record unambiguously demonstrates that the country lacks the BDS channel termination competition that the ILECs claim is ubiquitous. The Commission cannot reasonably ignore this evidence to eliminate protections for purchasers of TDM services, or foreclose regulation of packet-based services. Furthermore, there is no record at all supporting the argument that the Commission should eliminate regulation of BDS transport services. Even the ILECs admit that the *Order and FNPRM* “barely discusses dedicated transport.”<sup>5</sup> A record that lacks even a basic analysis of the impact on ILEC prices of nearby competitive transport services cannot justify action that would eliminate existing regulation. Indeed, to the extent a record exists on this subject, it shows that ILECs are able to unilaterally raise rates for transport services by staggering amounts in the absence of pricing regulation, and regularly do so in the marketplace.

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BLOG (Mar. 2, 2017), <https://www.fcc.gov/news-events/blog/2017/03/02/springing-forward-public-interest-fcc%E2%80%99s-march-agenda> (expanding the pilot program).

<sup>5</sup> Letter from James P. Young, et al., Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC at 9, WC Docket Nos. 16-143 *et al.* (filed Mar 13, 2017) (“AT&T Ex Parte”); *see also* CenturyLink and Frontier Ex Parte at 17 (“neither the original NPRM nor the analysis by the Commission’s expert, Dr. Marc Rysman, contains any meaningful discussion of transport[.]”).

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**A. The Commission Has Determined that MSAs Are Too Large a Geographic Area for a BDS Competition Test.**

AT&T's flawed recommendations depend on the Commission administering the Competitive Market Test ("CMT") across huge MSAs, and CenturyLink and Frontier's demands for complete deregulation depend on the Commission determining that BDS is competitive nationwide.<sup>6</sup> But the full Commission has explicitly rejected the claim that BDS is uniformly competitive within an MSA, let alone in all parts of the country. On that basis, the full Commission also rejected the use of MSAs for determining whether the presence of competition merits targeted deregulation, pointing to clear record evidence that MSAs are too large and diverse to accurately measure or predict competitive entry.<sup>7</sup> In response to and in reliance on this decision in the *Order and FNPRM*, commenters filed comments in the FCC's proceeding that analyzed competition in smaller geographic areas that comported with the Commission's record findings. If the Commission wishes to revisit its MSA decision or the fundamental need for a CMT, it must demonstrate how record evidence supports overturning its recent conclusions, and must issue a new NPRM inviting comment and analysis to test this substantial change.

In the *Suspension Order*,<sup>8</sup> the Commission rejected using MSAs as the geographic area across which to administer a competition trigger, concluding that BDS "demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA's and some areas with little or no demand."<sup>9</sup> In the subsequent *Order and FNPRM*, the Commission determined that

Our record reinforces that view. The Commission stated that competitive entry is considerably less likely to occur in areas of low demand, regardless of whether other areas within the MSA contain sufficient demand to warrant competitive entry. The Commission also observed that competitors have a strong tendency to enter into concentrated areas of high business demand, and have not expanded beyond

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<sup>6</sup> See AT&T Ex Parte at 13-14; see generally CenturyLink and Frontier Ex Parte.

<sup>7</sup> *Order and FNPRM* ¶ 213 (concluding that "MSA-wide conclusions would substantially overpredict the presence of actual deployment, as well as the potential ability to deploy") (internal quotation marks omitted).

<sup>8</sup> *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, Report and Order, 27 FCC Rcd 10557 (2012) ("*Suspension Order*").

<sup>9</sup> *Order and FNPRM* ¶ 210 (quoting *Suspension Order*, 27 FCC Rcd. at 10574 ¶ 36).



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those areas despite the passage of more than a decade since the grant of Phase II relief.<sup>10</sup>

Based on its careful review of the record, the Commission concluded that it would be “unlikely that BDS supply in one part of an MSA would constrain the provision of BDS where it is demanded everywhere in the MSA,” and therefore proposed a CMT to target regulation on a more granular basis.<sup>11</sup>

Likely recognizing that the record does not support their position that the FCC can use MSAs to accurately predict competition, AT&T falls back on the claim that the use of a smaller geographic area would be too difficult to administer,<sup>12</sup> even if this means that the FCC would deem many *non-competitive* areas to be *competitive*. But this position is also inconsistent with the record. Tellingly, Verizon, one of the largest incumbent BDS providers in the country, plainly states that a census block approach, as opposed to the use of MSAs, is “administratively feasible.”<sup>13</sup> AT&T has not explained why this approach would be feasible for Verizon, but not for them. More importantly, AT&T itself [BEGIN HIGHLY CONFIDENTIAL] ██████████

██████████ [END HIGHLY CONFIDENTIAL]<sup>14</sup> It would be plainly arbitrary for the Commission to conclude that a census block-based framework would be less administrable than [BEGIN HIGHLY CONFIDENTIAL] ██████████ [END HIGHLY CONFIDENTIAL]

Further, other BDS providers and purchasers report that administering the CMT by census block is administratively reasonable. Sprint itself is a large BDS purchaser whose systems will also have to accommodate the varying levels of BDS regulation across census

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<sup>10</sup> *Order and FNPRM* ¶ 210 (footnotes and internal quotation marks omitted).

<sup>11</sup> *Id.* ¶¶ 209, 270.

<sup>12</sup> AT&T Ex Parte at 17.

<sup>13</sup> Comments of Verizon at 10, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016).

<sup>14</sup> *See, e.g.*, [BEGIN HIGHLY CONFIDENTIAL] ██████████  
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blocks, and has already voiced its support for the census block approach.<sup>15</sup> Multiple CLECs that both buy and sell BDS support “the use of census blocks as the geographic area for the market competition test.”<sup>16</sup> And INCOMPAS, the trade association that represents many competitive BDS providers, as well as many BDS purchasers, states that “a census block-based test would be reasonable.”<sup>17</sup> The FCC was right to reject MSAs. AT&T has identified no new evidence justifying reversal of this decision.

AT&T also argues that the FCC can cure the deficiency of MSAs by adopting a new and untested rule. They ask the FCC to deem every location in an MSA to be uniformly competitive if 80 percent of ILEC-served locations are within 2,000 feet of a single competitor’s fiber line.<sup>18</sup> Adopting this untested concept as a rule would be arbitrary.

First, the Commission has determined that when examining proximity to fiber facilities, “[t]he distance to a fiber splice point, as opposed to fiber in general,” is the relevant “determining factor in build/buy decisions,”<sup>19</sup> and that “[s]plice points are critical.”<sup>20</sup> This is because the record shows that, “although a fiber optic cable may run through many census blocks, the determining factor for serving a business customer location is how close is the nearest splice point (exit ramp).”<sup>21</sup> Importantly, fiber owners do not install splice points in every census block.

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<sup>15</sup> Comments of Sprint Corporation at 7.

<sup>16</sup> Comments of Birch, EarthLink, and Level 3 at 52, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (“Joint CLEC Comments”).

<sup>17</sup> Comments of INCOMPAS at 7, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (“Comments of INCOMPAS”).

<sup>18</sup> AT&T Ex Parte at 11.

<sup>19</sup> *Order and FNPRM* ¶ 211, n.553.

<sup>20</sup> *Id.* ¶ 212, n.558.

<sup>21</sup> See Third Declaration of Matthew J. Loch ¶ 6, appended as Attachment A to Reply Comments of TDS Metrocom, WC Docket No. 05-25 (filed Feb. 19, 2016) (“Loch Third Decl.”); See also, *e.g.*, Joint CLEC Comments at 50 (“The fact that a competitor has deployed fiber that runs near to a building does not mean that the competitor has a splice point near enough to deploy a connection to a customer.”); Comments of INCOMPAS at 8 (quoting the Commission for the proposition that “[t]he distance to a fiber splice point, as opposed to fiber in general, is an important determining factor in build/buy decisions”); Letter from Tamar E. Finn, Counsel, TDS Metrocom, LLC, to Marlene H. Dortch, Secretary, FCC at 8, WC Docket No. 05-25 (filed Mar. 24, 2016) (“TDS Ex Parte”) (“TDS CLEC has established that the critical distance in determining whether it is economical to construct fiber

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TDS, for example, estimates that it has splice points in only 10 percent of the census blocks that its fiber facilities cross.<sup>22</sup> Assuming that a competitor can build a lateral from any point on its fiber network would represent a fundamental misunderstanding of the technology and process of network deployment. AT&T nonetheless asks the FCC to ignore the agency’s recent conclusion on the importance of splice points, and the record evidence that supports it, and find that distance to mere fiber predicts potential competition. This would be unreasonable.

Second, the record provides no basis for the Commission to depart from its recent findings by concluding that CLECs can build new lines to serve buildings within 2,000 feet at DS1 and DS3 capacities—even if the building is within 2,000 feet of a splice point. As the Commission has determined, “significant entry barriers to putting competitive last-mile facilities into place”<sup>23</sup> typically prohibit providers without incumbent networks from extending their facilities across distances to serve new customers, even in areas with high special access demand.<sup>24</sup> Indeed, just last November, the Commission estimated that competitive entry in the BDS market is possible only “when demand is at least 100 Mbps”—double the capacity of a DS3 circuit—and only when the provider “is already within 0.1 miles of the location”—roughly one quarter of the distance proposed by AT&T.<sup>25</sup> The record evidence in this proceeding only

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to reach a prospective customer is the distance to the nearest splice point, not the distance to the nearest point on the fiber[.]”).

<sup>22</sup> See Loch Third Decl. ¶ 9 (“Although we have fiber in hundreds of census blocks, TDS CLEC only has splice points in approximately 10% of the census blocks that its fiber ring runs through.”); TDS Ex Parte at 9 (“[N]one of the ILECs have offered any evidence as to the number of census blocks with CLEC splice points or the proximity of customers to CLEC splice points.”).

<sup>23</sup> *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, Memorandum Opinion and Order, 26 FCC Rcd. 4194 ¶ 16 (2011).

<sup>24</sup> See, e.g., *Order and FNPRM* ¶ 229; *id.* ¶ 227 (discussing CostQuest study which found “that current barriers are sufficient to deter new construction in most business locations”) (citing CostQuest, *Analysis of Fiber Deployment Economics for Efficient Provision of Competitive Service to Business Locations*, appended as Attachment A to Letter from Jennie B. Chandra, Vice President – Public Policy Strategy, Windstream Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, GN Docket Nos. 13-5, 12-353, RM-10593 (filed June 8, 2015) (“CostQuest Whitepaper”).

<sup>25</sup> *Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 2016 WL 6816318 ¶ 23 (Nov. 16, 2016). See also *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-

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further confirms the Commission’s conclusions. Tellingly, Level 3, which CenturyLink will soon remove as a BDS competitor through acquisition, has stated that it is not economically feasible for it to construct new low-bandwidth connections (DS1/DS3 or equivalent), *no matter how close a potential customer is to one of its fiber splice points.*<sup>26</sup> TDS Metrocom explained that revenue hurdles preclude building a fiber lateral “to a customer located 100 to 1,000 feet and beyond from the nearest splice point” to provide service at “speeds ranging from 10 to 100 Mbps.”<sup>27</sup> Windstream similarly explained that even 100 Mbps circuits cannot economically support expansion, even at close distances.<sup>28</sup> Cable companies also confirm that “low-demand customer[s]” can only be served by incumbent providers that have “incurred the fixed costs of deploying a network in that immediate vicinity.”<sup>29</sup>

Ignoring this evidence, AT&T’s *ex parte* instead selects two statements from Windstream and XO, mischaracterizes them, and presents them out of context.<sup>30</sup> Contrary to AT&T’s assertion that Windstream regularly “extends fiber to buildings that are within [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] of its *fiber facilities*,”<sup>31</sup> Windstream actually stated that it will not even “consider building new fiber facilities to buildings that are further than” [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

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10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 & App. A. ¶ 378 & n.173 (2012) (“2012 FNPRM”) (citing Department of Justice “demand/distance” screens of 0.1 miles for 2 DS3s to “identify buildings where demand was at or above a minimum distance threshold and where a competing carrier had fiber facilities within the corresponding distance”).

<sup>26</sup> Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 4, appended as Appendix to Joint CLEC Comments (June 28, 2016) (“Note that the construction feasibility limits for T1 (1.5 Mbps) and Ethernet (10 Mbps) are negative numbers. This indicates that construction of new fiber connections to provide these products is not economically justified in these MSAs under normal circumstances.”) (“Merriman Declaration”).

<sup>27</sup> Loch Third Decl. ¶ 16.

<sup>28</sup> Declaration of David Schirack and Mike Baer ¶ 16 (“Schirack/Baer Declaration”), appended as Attachment A to Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 05-25 *et al.* (filed June 28, 2016) (“Windstream Comments”). *See also* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 2 (filed Apr. 21, 2016).

<sup>29</sup> Comments of the American Cable Association at 38, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (“Comments of American Cable Association”).

<sup>30</sup> AT&T Ex Parte at 12.

<sup>31</sup> *Id.*

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████████████████████ [END HIGHLY CONFIDENTIAL] and confirmed that “numerous barriers will prevent Windstream from reaching many buildings even within this distance.”<sup>32</sup> AT&T made the same mistake with respect to XO. At no point did XO’s Vice President of Access Management and Implementation state that “as a rule of thumb XO will compete for customers and build laterals to buildings that are within [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL] linear feet of its fiber facilities,” as AT&T claims.<sup>33</sup> Instead, the XO executive stated that “as a rule of thumb, in Tier I cities, XO is extremely unlikely to build if the building is more than [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL] linear feet from a *splice point*,” that “the overwhelming number of builds XO undertakes have been within [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL] linear feet,” and that the vast majority of its 2014 and 2015 builds “were less than [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL] aerial feet (as the bird flies)[.]”<sup>34</sup> Thus, the very evidence that AT&T relies upon to claim that 2,000-foot buildout distances are routine in the industry in fact supports the exact opposite conclusion.

Unsurprisingly, other CLECs in addition to XO and Windstream confirm that typical buildout distances are far shorter than 2,000 feet from mere fiber.<sup>35</sup> AT&T makes no meaningful effort to address this evidence, and instead relies on a faulty analysis that attempts to compute the average lateral distances of Level 3’s existing network. This approach, however, does not provide a reasonable basis for adopting AT&T’s proposal. As Dr. Baker has explained—and as common sense dictates—the layout of Level 3’s existing network does not address *current* entry conditions, because a “low bandwidth connection observed in the data could have been built any

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<sup>32</sup> Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶ 51, appended as Attachment A to Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (Jan. 27, 2016) (“Windstream Decl.”).

<sup>33</sup> AT&T Ex Parte at 12 (internal quotation marks omitted).

<sup>34</sup> Windstream Decl. ¶ 51.

<sup>35</sup> See, e.g., TDS Ex Parte at 9 (average lateral distance is [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL], and the vast majority of on-net builds are less than [BEGIN HIGHLY CONFIDENTIAL] ██████ [END HIGHLY CONFIDENTIAL] from the splice point); Letter from Matthew Brill, Counsel, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Mar. 25, 2016); see also *Order and FNPRM* ¶ 211 & n.548.

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time within the past three decades,” and therefore will “largely reflect entry conditions” of “an earlier era.”<sup>36</sup>

Third, AT&T’s 2,000-foot proposal also fails to account for the substantial record evidence of the costs and non-financial impediments that prevent competitors from building out to serve new customer locations. The record shows that constructing lateral facilities from even nearby fiber facilities is difficult and expensive. Fiber facilities transiting a census block are frequently long-haul transmission circuits.<sup>37</sup> Extending a lateral in an attempt to provide channel termination services would be costly, time consuming, and could undermine such an operator’s primary transit business—the operator of such a facility would have to weigh the prospect of new BDS sales against the increase in the number of potential failure points caused by the installation of new splice points along a long-haul route.<sup>38</sup> Even if the fiber itself passes close to a potential customer location, fiber operators still face substantial costs and other barriers to deploying BDS to serve a customer location,<sup>39</sup> a fact that the Commission repeatedly has acknowledged.<sup>40</sup> A provider, for example, must incur “significant” costs when it “deploy[s] the

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<sup>36</sup> Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 15, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016) (“Baker 08/09 Reply Declaration”).

<sup>37</sup> Declaration of Ed Carey ¶ 9(a), appended as Exhibit A to Opposition to ILEC Direct Cases of Sprint Corporation, WC Docket No. 15-247 (filed Feb. 5, 2016) (“Carey Decl.”).

<sup>38</sup> See Loch Third Decl. ¶ 4; TDS Ex Parte at 10.

<sup>39</sup> See, e.g., Windstream Decl. ¶ 51; Windstream Comments at 30 (“A nearby competitor must surmount high barriers to entry to become an actual competitor. These barriers include not just the cost associated with building a fiber ring and laterals, but also the availability of a close enough splice point at which to access the fiber, the cost of obtaining building access and access to necessary rights of way to a particular location, the cost of obtaining local construction permits, and the substantial delay that can accompany all of these items.”).

<sup>40</sup> See *Order and FNPRM* ¶ 211; see also *id.* ¶ 227 (“[C]urrent barriers are sufficient to deter new construction in most business locations.”); *Petition of Qwest Corporation for Forbearance Pursuant to 47 USC § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622 ¶ 84 (2010) (“*Qwest Forbearance Order*”) (discussing the “extensive economic barriers to the construction of last-mile facilities” and concluding that “nothing in the record . . . indicate[s] that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs”); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 ¶ 305 (2003) (discussing barriers to entry “even where a competitive carrier may be ready, willing, and otherwise able to self-deploy the loop”).

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physical fiber infrastructure into the underground conduit to a particular location.”<sup>41</sup> Sprint previously has shown that these construction costs can amount to \$400 per foot for a simple lateral and up to twice that amount for a customer location that requires redundancy.<sup>42</sup> Further, installation of the electronics needed at the customer’s premises to “light” the fiber will add between \$20,000 and \$50,000 or more to the cost of the lateral, depending on the customer’s service requirements.<sup>43</sup> And these amounts assume that the potential provider is able to overcome the additional costs, delays, and uncertainties associated with obtaining necessary building permits as well as access to rights of way and customer locations.<sup>44</sup> These cost estimates further assume that the fiber operator has enough fibers available to serve a new customer. If the operator does not have enough fibers, it either must pull new ones or augment the capacity of its equipment.<sup>45</sup> These improvements alone cost tens of thousands of dollars and may even run into the hundreds of thousands of dollars.<sup>46</sup>

More fundamentally, the lack of competition in the BDS marketplace itself refutes the claim that the presence of fiber represents potential competition. The record reveals that there were more than one million census blocks with three or more competitors with fiber in which not a single BDS circuit was purchased, and more than 540,000 census blocks with four or more competitors with fiber in which no customer purchased even a single BDS circuit as of 2013. In light of the “failure to provide a compelling explanation for why so little CLEC fiber is actually employed to serve nearby customers,” Dr. Sappington appropriately calls into question “[t]he credibility of the . . . assertion that fiber deployment implies effective competition.”<sup>47</sup>

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<sup>41</sup> *Unbundling Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 ¶ 150 (2005).

<sup>42</sup> Carey Decl. ¶¶ 9(a)-(b).

<sup>43</sup> *Id.* ¶ 9(c).

<sup>44</sup> *Id.* ¶ 9(e); *see also, e.g.*, Comments of Lighttower Fiber Networks I, LLC *et al.* at 14, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (“competitive carriers constructing fiber networks incur costs that are not typically incurred by ILECs under similar circumstances, including franchise fees and building access fees”).

<sup>45</sup> *See* Carey Decl. ¶ 9(d) (discussing dense wave division multiplexing to augment capacity).

<sup>46</sup> *Id.*

<sup>47</sup> Declaration of David Sappington ¶¶ 24-25, appended as Attachment 1 to Reply Comments of Sprint Corporation, WC Docket No. 05-25 (filed Feb. 19, 2016; revised public version submitted Apr. 11, 2016); *see also, e.g.*, Windstream Comments at 19 (“The ILECs’ lack of fiber deployment outside of their territories likewise reveals the impracticability of most competitive overbuilds in the last mile.”).

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More generally, AT&T's 2,000-foot proposal does not cure the basic problem with the use of MSAs: they are simply too large, too varied, and demand within them is too concentrated. If the FCC deemed entire MSAs competitive where 80 percent of ILEC-served locations are within 2,000 feet of a single CLEC's fiber, this would require the FCC wrongly to deem large non-competitive parts of the MSA as being "competitive." As discussed above, the Commission has already concluded, based on the record in this proceeding, that demand is frequently centralized in smaller parts of MSAs. Consequently, if a single CLEC serves the most urban portion of a large MSA where demand is centralized, the 2,000-foot rule would allow AT&T and other ILECs to raise BDS prices across the entire MSA, despite the fact that there is not even a single CLEC potential competitor for many miles. This would punish rural, exurban, and suburban businesses and institutions in every MSA across the country that has a dense urban area with concentrated BDS demand. As a result, even if the Commission were to adopt a 2,000-foot rule, it could not reasonably apply this rule in a manner that does not result in rate hikes in non-competitive areas. At most, it could use such a rule to administer a CMT across smaller geographic areas.

Finally, there is no record evidence on AT&T's 80-percent-of-locations test. AT&T fails to explain how it arrived at this percentage, and therefore cannot justify it as rational and non-arbitrary. Moreover, because the Commission did not seek comment on such a test, it has no record on which to judge its fitness. Indeed, on its face, the 80 percent requirement necessarily will condemn the remaining 20 percent of buildings – many of which are located in the rural, exurban, and suburban areas described above – to higher rates for BDS services, *while providing no corresponding benefit to administration of the CMT*. The FCC cannot rationally adopt a test that builds-in inaccuracy for no other purpose but to minimize the MSAs where ILECs like AT&T will be subject to regulation. As a result, adopting an 80 percent threshold would violate both the APA's notice requirements and command that the agency engage in reasoned decision-making.

**B. The Commission Has Determined that Best-Efforts Broadband Is not in the Same Product Market as BDS.**

AT&T, CenturyLink, and Frontier's recommendations also depend on the FCC determining that best-efforts broadband services are in the same product market as BDS.<sup>48</sup> The full Commission explicitly voted to reject this proposition, however, when it determined that best-efforts broadband services are not competitive substitutes for BDS. The ILECs fail to account for this decision or the record evidence the Commission identified. Nonetheless, they somehow maintain that the FCC can reverse course without any new record evidence.

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<sup>48</sup> AT&T Ex Parte at 14-15; CenturyLink and Frontier Ex Parte at 12.



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In the *Order and FNPRM*, the Commission made a clear finding that the record did not support including best-efforts services in CMT calculations. It concluded that

BDS is distinctly different from the mass marketed ‘best efforts’ broadband Internet access services (BIAS) provided to residential end users, such as AT&T’s U-verse or Comcast’s XFINITY. BDS services typically provide dedicated symmetrical transmission speeds with performance guarantees, such as guarantees for traffic prioritization, guarantees against certain levels of frame latency, loss, and jitter to support real-time IP telephony and video applications, or guarantees on service availability and resolving outages.<sup>49</sup>

Consequently, after explicitly considering AT&T’s arguments on this question, and “based on [the FCC’s] analysis of the data collection, and stakeholders’ comments,”<sup>50</sup> the Commission concluded that “Best Efforts and Business Data Services Are Not in the Same Product Market.”<sup>51</sup>

AT&T, CenturyLink, and Frontier fail to even mention this decision or to demonstrate how the Commission could overturn it without gathering new record evidence. Indeed, the existing record overwhelmingly supports the FCC’s conclusion. The analysis submitted by Drs. Besen and Mitchell established that, “services provided on a ‘best-efforts’ basis are not regarded by most purchasers as substitutes for special access dedicated circuits at guaranteed service levels.”<sup>52</sup> This is because best efforts services lack many of the key features and minimum attributes of BDS offerings, including the “reliability and symmetry that customers seek when they purchase specialized dedicated circuits.”<sup>53</sup>

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<sup>49</sup> *Order and FNPRM* ¶ 13.

<sup>50</sup> *Id.* ¶ 160.

<sup>51</sup> *Id.* ¶ 190-196.

<sup>52</sup> Declaration of Stanley M. Besen and Bridget M. Mitchell ¶ 16, appended as Attachment 1 to Comments of Sprint Corporation, WC Docket No. 05-25 (filed Jan. 27, 2016; revised public version submitted Apr. 11, 2016) (“Besen/Mitchell Decl.”); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 31, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016; revised public version submitted on Apr. 14, 2016) (“Baker Jan. Decl.”) (“Most customers of dedicated services would not substitute . . . a service provided over best efforts broadband in response to a small increase in the price of dedicated services, and few would substitute from best efforts broadband to dedicated services in response to a small decrease in the price of dedicated services.”).

<sup>53</sup> Comments of NASUCA and the Maryland People’s Counsel on Further Notice of Proposed Rulemaking for Business Data Services at 15-16, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016).

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Even cable providers and other ILECs agree. Windstream correctly observes that the distinctions between BDS and best efforts are “apparent in the different offerings of providers . . . [and] in the difference in price that providers are able to charge.”<sup>54</sup> Comcast explains that because best efforts services are “offered with asymmetrical download and upload speeds [and] . . . without [service level agreements] providing availability or performance guarantees,” these services “are priced very differently than dedicated services with [service level agreements] and are not considered competitive substitutes by customers.”<sup>55</sup> Cox explains that its best efforts services are “‘shared among multiple users absent service guarantees, and [are] subject to failure during congestion period[s].’”<sup>56</sup> NCTA observes that best efforts services are suited for “asymmetric Internet access,” and not “higher quality dedicated services” or “point to point applications.”<sup>57</sup> Summing up the state of the record, Comcast concludes, “[t]hese critical distinctions—and the accompanying price differences between BDS and best-efforts services—demonstrate that best efforts services are ‘not . . . in the same product market or markets as BDS.’”<sup>58</sup>

Importantly, the record is also clear that Ethernet over Hybrid Fiber Coaxial (“EoHFC”) services are akin to best efforts services, and cannot be considered a substitute for BDS in any event. As Cox explained, its “fiber based BDS and Ethernet over HFC services are completely different,”<sup>59</sup> and “EoHFC is not viewed by Cox’s customers as a viable alternative to fiber (or legacy TDM services) for many business applications” due to the diminished performance characteristics supported by cable coaxial networks.<sup>60</sup> As a result, Cox concluded that “EoHFC does not fall within the Commission’s definition of BDS.”<sup>61</sup> Similarly, Comcast described EoHFC as a “gap-filler[.]” for a limited customer base, and confirmed that the “vast majority of businesses seeking Ethernet services demand full carrier-grade performance and SLAs that

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<sup>54</sup> Windstream Comments at 25-29.

<sup>55</sup> Comments of Comcast Corporation at 10-11, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (“Comcast Comments”).

<sup>56</sup> Comments of Cox Communications, Inc. at 16, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) (quoting *Order and FNPRM* ¶¶ 13-14) (“Comments of Cox”).

<sup>57</sup> Comments of the National Cable & Telecommunications Association at 9, WC. Docket Nos. 16-143, 05-25 (filed June 28, 2016) (“Comments of NCTA”).

<sup>58</sup> Comcast Comments at 30 (quoting *Order and FNPRM* ¶ 191).

<sup>59</sup> Comments of Cox at 9.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.* at ii.

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EoHFC cannot provide.”<sup>62</sup> Accordingly, Comcast also concluded that EoHFC has, at most, “limited relevance to the BDS marketplace,” and, in any event, “represents a very small segment of the market with little potential for significant growth.”<sup>63</sup>

**C. The Commission Cannot Adopt Rules Based on the Fiction that BDS Is Competitive.**

Adopting the latest proposals from AT&T, CenturyLink, and Frontier would require the Commission to determine that effective competition disciplines BDS prices, terms and conditions for the vast majority of American businesses—even for low-bandwidth services. Such a conclusion would be plainly irrational on this record, which shows that most businesses lack access even to a BDS duopoly, and that only a tiny fraction of businesses have access to effective competition:

- 77 percent of locations and 80 percent of census blocks where BDS is sold have only one provider—a monopoly.<sup>64</sup>
- 97 percent of locations and 95 percent of census blocks where BDS is sold have at most two providers—a duopoly.<sup>65</sup>
- 0.1 percent of commercial buildings<sup>66</sup> and 1.3 percent of census blocks<sup>67</sup> are served by at least four providers.

These data include *all* BDS capacity levels. As detailed below, the FCC’s record on DS1 and DS3 services demonstrates that there is even less competition for these lower-capacity products.

Importantly, the competitive situation has significantly deteriorated even since FCC collected this data. ILECs have purchased three of the largest remaining CLECs – Level 3, XO, and Earthlink—meaning that the Commission should treat connections and facilities reported in the data by these companies as incumbent facilities. The only substantial non-cable facility-based competitor left to compete is Zayo. AT&T’s response to this consolidation? It asks the

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<sup>62</sup> Comcast Comments at 30-31.

<sup>63</sup> *Id.* at 31.

<sup>64</sup> Baker Jan. Decl. ¶ 44; Besen/Mitchell Decl. ¶ 27.

<sup>65</sup> Besen/Mitchell Decl. ¶¶ 26-27.

<sup>66</sup> *Order and FNPRM* ¶ 220 (Table 3).

<sup>67</sup> Besen/Mitchell Decl. ¶ 27 (Table 2).

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FCC to declare that a duopoly represents effective competition. But the Commission ruled that a duopoly does not discipline broadband prices in the *Phoenix Forbearance Order*, and it should not take the extraordinary step of green-lighting duopolies in this proceeding.

**a. The Record Demonstrates that the Marketplace for Lower-Capacity BDS Channel Terminations Is Not Competitive in Most of the Country.**

As an initial matter, the Commission cannot adopt an order that weakens existing TDM price cap regulation based on the fiction that the BDS marketplace is competitive at lower capacities. With respect to DS1 and DS3 services, the record is clear that nearly the entire country lacks adequate competition. Based on the data collected by the Commission, the FCC's own economic consultant, Dr. Rysman, found that 99% of all customer locations are served by at most a BDS duopoly—and 77% are subject to a pure BDS monopoly.<sup>68</sup> Other economists analyzing the Commission's competition data arrived at remarkably consistent results.<sup>69</sup> The same results follow from analyzing the BDS marketplace at the level of the census block. According to Dr. Rysman, 95 percent of census blocks where BDS is sold have at most two facilities-based providers, and over 68 percent of blocks have just one.<sup>70</sup> Drs. Besen and Mitchell likewise found that more than 80 percent of all census blocks with BDS demand are served by only one provider.<sup>71</sup> Importantly, each of these studies addresses BDS competition *at all capacities*, and not just the least competitive, low-capacity DS1 and DS3 services to which the Commission's price cap system currently applies. As a result, the state of competition for DS1s and DS3s is even worse than these numbers suggest. It is therefore not surprising that AT&T argues that the FCC should administer the CMT across huge MSAs, or that CenturyLink and Frontier ask the FCC to rule that competition in some areas of the country means that there is adequate competition everywhere in the country, as these approaches would mask the pervasive competition failures affecting the vast majority of BDS customer locations nationwide.

The Commission cannot set aside these findings on the hope that the presence of mere fiber facilities—*without even a single customer served by a single competitor*—represents adequate potential competition that protects every business within a half a mile from excessive DS1 and DS3 rates. As discussed above, and as network operators have repeatedly explained,

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<sup>68</sup> See Dr. Marc Rysman, *Empirics of Business Data Services* (rev. June 2016) at 15, Table 7 (“Rysman Rev. White Paper”).

<sup>69</sup> See Baker Jan. Decl. ¶ 44, (98% of customer locations are served by at most a duopoly, and 77% of customer locations are subject to a BDS monopoly); Besen/Mitchell Decl. ¶¶ 25- 26 & Table 1 (97% of locations are served by at most two providers, and 73% are served by just one provider).

<sup>70</sup> Rysman Rev. White Paper at 16-17, Table 9.

<sup>71</sup> Besen/Mitchell Decl. ¶¶ 27-28.

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competitors are not building, and cannot build, new lines to serve customers at DS1 and DS3 capacities (and even much higher capacities) due to the barriers to entry that define the BDS competitive landscape.<sup>72</sup> The regression analyses conducted by Dr. Rysman and Dr. Baker confirm the narrative evidence provided by these carriers. These analyses demonstrate that “competitive supply in a unique location is correlated in both statistically and economically significant ways with lower ILEC prices for DS1s and DS3s at that location,”<sup>73</sup> and that DS1 and DS3 rates fall from 25% to as much as 51% as ILECs face greater in-building competition.<sup>74</sup> Thus, while certain ILECs assert that the presence of transiting competitive fiber means that a competitor stands ready to serve each and every nearby location, they provide no record evidence to support this theory, and the Commission’s reliance on such a repudiated assumption would be arbitrary, capricious, and contrary to the evidence.<sup>75</sup>

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<sup>72</sup> See, e.g., Merriman Declaration at 6 (noting that it is “infrequently the case that Level 3 can deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or below[,] . . . because the distance between a customer location and a splice point . . . usually exceeds the construction feasibility limits”); Reply Comments of TDS Metrocom, LLC at 2, 15, WC Docket No. 05-25 *et al.* (filed Feb. 19, 2016) (“a fiber lateral build to any customer located 100 to 1,000 feet from the nearest splice point on TDS CLEC’s fiber network is not competitive at speeds ranging from 10 to 100 Mbps because TDS CLEC could not recover its required revenue and compete with lower RBOC retail rates”); Schirack/Baer Declaration ¶ 16 (“a single 100 Mbps circuit almost never generates the amount of revenue required to justify deployment of a new last-mile connection by its competitive carrier operations, even when Windstream has already deployed fiber feeder in the customer’s vicinity”); CostQuest White Paper (“an economically rational CLEC will not self-deploy to serve a single customer with less than 1 Gbps of capacity per building even if [the] building offers a more attractive option than wholesale lease payments . . . because the revenue hurdle is higher than the crossover point in the build-versus-buy analysis”).

<sup>73</sup> *Order and FNPRM* ¶ 238; Rysman Rev. White Paper at 3, 22-23.

<sup>74</sup> Baker Sept. Supp. Reply Decl. ¶ 17 (“Contrary to what [the ILEC economists] assert, however, potential competition from nearby rivals is not sufficient to constrain ILECs to price business data services competitively. Accordingly, the possibility of potential competition does not undermine the inference of ILEC market power derived from Dr. Rysman’s observation that nationwide, 77.2% of buildings have a single in-building provider (almost always an ILEC) and almost all the rest (21.8%) have only two in-building providers”); see also *Order and FNPRM* ¶ 2.

<sup>75</sup> Baker Sept. Supp. Reply Decl. ¶ 6 (explaining that the ILECs’ claim that competitors can build to any location within 2,000 feet of fiber relies on fundamentally flawed data that “reports nodes used to interconnect with third-party networks, not splice points to which last-mile facilities can be connected,” and “reflects entry conditions” of another age—not today).

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Nor can the Commission adopt an order that ignores direct evidence, some of it provided by an ILEC itself, that ILECs charge higher rates when unconstrained by competition. CenturyLink, for example, admitted that it generally charges much higher rates for DS1 and DS3 services in areas subject to Phase II pricing flexibility than in price cap areas.<sup>76</sup> Sprint expanded on CenturyLink's admission by showing that all ILECs engage in precisely the same practice of charging more where they are free from regulatory constraints.<sup>77</sup> Sprint's comparison of ILEC and CLEC pricing leads to the same inevitable conclusion, as it shows that ILECs charge far more than their competitors even at higher capacities, and even in urban areas.<sup>78</sup> And as Dr. Baker explained, the ILECs' "common practice" of "publish[ing] wholesale price lists on which prices vary by building," which "leads to price variation across buildings within a Census block," both eviscerates the "claim that potential competition from nearby rivals constrains ILEC prices" and provides direct evidence that ILECs exploit their market power to charge higher rates to business customers faced with no other choice.<sup>79</sup>

The Commission also cannot proceed on an unsupported assumption that cable companies will provide ubiquitous BDS competition by offering EoHFC services, as CenturyLink and Frontier speculate. As an initial matter, cable providers *themselves* report that construction and capacity constraints foreclose the possibility of offering EoHFC services at meaningful scale—and that the evolution to newer technological standards like DOCSIS 3.1 will not solve these problems.<sup>80</sup> Moreover, cable providers also have explained that HFC-based services are inferior to and only an occasional substitute for BDS due to the differences between cable and ILEC networks.<sup>81</sup> Notably, despite the clear evidence that EoHFC cannot substitute for BDS at any meaningful scale, several economists re-ran their competition analyses after

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<sup>76</sup> See Letter from Russell P. Hanser, Counsel, CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* at 1 (filed Oct. 28, 2016).

<sup>77</sup> See Letter from Paul Margie, Counsel, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at Attachment A, WC Docket Nos. 16-143 *et al.* (filed Nov. 9, 2016) ("Sprint Nov. 9, 2016 Ex Parte").

<sup>78</sup> See Letter from Charles W. McKee, Vice President, Government Affairs, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Oct. 17, 2016) ("Sprint Oct. 17, 2016 Ex Parte").

<sup>79</sup> Baker Sept. Supp. Reply Decl. ¶ 7.

<sup>80</sup> See, e.g., Comments of Charter Communications, Inc. at 19, WC Docket Nos. 16-143 *et al.* (filed June 28, 2016) ("Comments of Charter"); Comments of NCTA at iv, 27-30; Comments of American Cable Association at 28; Comments of Cox at 4, 17.

<sup>81</sup> See, e.g., Windstream Reply Comments at 18-19; Joint CLEC Comments at 17-18; Comcast Comments at 31-32; Comments of Charter at 9; Comments of Cox at 9; Comments of NCTA at 28.

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incorporating HFC data submitted by the cable companies—and concluded that the new data would not disturb their core findings even if cable companies could offer a perfect BDS substitute over every HFC connection (which they cannot).<sup>82</sup> Thus, even if the Commission could somehow conclude that cable companies are simply incorrect about the performance and capacity constraints facing their *own networks*, it could not also non-arbitrarily conclude that EoHFC services miraculously produce BDS competition for lower capacity services.

Finally, the Commission should reject CenturyLink and Frontier’s reliance on the false claim that “the FNPRM observed that CLECs are the only suppliers of BDS in about 13 percent of census blocks – vastly more than their ILEC counterparts.”<sup>83</sup> CenturyLink and Frontier cite to paragraph 182 of the *Order and FNPRM* to argue that a CLECs are the only BDS provider in “vastly more” census blocks than ILECs.<sup>84</sup> This statement is simply incorrect, and indicative of the ILECs’ attempts to muddy the water to create the semblance of competition where it does not exist. Specifically, while the Commission credited Drs. Besen and Mitchell’s finding that “CLECs are the only supplier in fewer than 14 percent of census blocks” in the paragraph relied upon by CenturyLink and Frontier, the Commission also observed—in the very same paragraph—that the ILEC is the only BDS provider in 67 percent of census blocks, or more than *five times* as many as the CLECs.

**b. The Record Demonstrates that There Is Inadequate Competition for Higher-Capacity Ethernet and TDM BDS Channel Terminations in Many Areas.**

A BDS order that makes policy decisions on competition for higher-capacity Ethernet and TDM products must do so in a manner consistent with the record. The evidence suggests

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<sup>82</sup> Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶¶ 27, 32 (filed July 14, 2016) (“Baker 07/14 Rev. Decl.”) (the “validity of the estimation results I have presented . . . is not called into question by the data” on the HFC); *see also* Baker 08/09 Reply Declaration ¶ 44 (the inclusion of EoHFC offerings “does not materially affect the estimated coefficients on variables accounting for in-building and nearby rivalry”); Further Supplemental Declaration of William P. Zarakas ¶¶ 6, 9, 13 (“Zarakas 08/09 Further Suppl. Decl.”), appended as Attachment A to Reply Comments of Sprint Corporation, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016) (“While the inclusion of the supplemental cable data causes an increase in the total number of census blocks in which cable companies have deployed facilities capable of providing BDS, these data do not materially alter the results of my prior analyses – there are only one or two BDS providers present in the vast majority of census blocks.”).

<sup>83</sup> CenturyLink and Frontier Ex Parte at 11-12.

<sup>84</sup> *Id.*

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that competitive conditions vary depending on location to a greater degree for high bandwidth BDS than for low bandwidth BDS. But as explained below, the record is clear that the marketplace for high bandwidth BDS offerings is often non-competitive.

First, the record shows that the marketplace for higher capacity services remains highly concentrated. For BDS circuits greater than 50 Mbps, including Ethernet services, the FCC’s own data demonstrates that roughly 83% of census blocks, and 94% of BDS customer locations, have at most one ILEC and one competitive provider—and nearly half are served by the ILEC alone.<sup>85</sup>

Second, regression analyses further “suggest the exercise of ILEC market power in the supply of high-bandwidth business data services connections.”<sup>86</sup> As Dr. Baker found, in-building and in-block competition for high-bandwidth connections reduces prices “by 43% according to one estimate and by 25% according to another.”<sup>87</sup> After applying regressions designed to identify patterns obscured by Dr. Rysman’s analysis, Drs. Kwoka and Verlinda and Mr. Zarakas similarly revealed “substantial, if somewhat noisy, evidence that added competition reduces the price of highband service,” and that prices “generally decline as competition strengthens, as would be true where there is market power, thus meeting the test articulated by Dr. Rysman.”<sup>88</sup>

Third, direct evidence of ILEC pricing behavior again suggests that ILECs exercise market power in many parts of the country. As Sprint has explained in detail, the rates it

**[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]  
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**HIGHLY CONFIDENTIAL INFORMATION]**<sup>89</sup> Dr. Baker explained that ILECs “routinely publish wholesale price lists on which prices vary by building,” and Sprint confirmed that

**[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]  
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<sup>85</sup> See Zarakas 08/09 Further Suppl. Decl. ¶¶ 16-17 & Tables 5-6.

<sup>86</sup> Baker 07/14 Rev. Decl. ¶ 10

<sup>87</sup> *Id.* ¶ 3.

<sup>88</sup> Declaration of John Kwoka ¶ 31, appended as Exhibit A to Comments of Sprint Corporation; Declaration of William Zarakas and Jeremy Verlinda, appended as Exhibit D to Comments of Sprint Corporation.

<sup>89</sup> Sprint Oct. 17, 2016 Ex Parte at 1 (emphasis added).



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██████████ [END HIGHLY CONFIDENTIAL INFORMATION].<sup>90</sup> Additional evidence, including Sprint’s internal pricing model, and a comparison to international rates, confirm that rates for Ethernet services exceed competitive levels.<sup>91</sup>

AT&T, CenturyLink, and Frontier’s *ex parte* letters ignore this record evidence. Instead, they offer the Commission only assertions about investment levels and retail port shares at a national-level.<sup>92</sup> As an initial matter, national investment levels and retail port shares tell the Commission nothing about whether higher-capacity Ethernet BDS is competitive or non-competitive within appropriate geographic areas. As discussed above, there are geographic areas where higher-capacity Ethernet BDS is competitive, and other areas where it is non-competitive. To comply with its statutory obligation to ensure that BDS rates, terms, and conditions are just and reasonable, the Commission must either conclude that there is enough competition in every relevant geographic area in the country (which the data demonstrates is not the case) or adopt rules that protect buyers in the geographic areas where competition is inadequate. As a result, the national-level statistics offered by the ILECs are misleading and unhelpful, and, importantly, provide no basis upon which the Commission could legally base a decision.

Equally important, the ILECs’ reliance on retail port share data fails to demonstrate adequate BDS competition even at a nationwide level, because the data set at issue does not measure facilities-based competition in the wholesale marketplace at all. Indeed, the retail port share statistics cited by the ILECs ignore that many non-ILEC companies that sell BDS must purchase facilities from ILECs on the wholesale market in order to serve their retail customers. Moreover, the rise of certain cable companies in retail port share rankings do not provide a meaningful measure of the change in competition over time, because the increase resulted from industry consolidation—and not rapid expansion of competitive facilities. In any event, even by the flawed measure of retail port shares, ILECs are likely to strengthen their dominance of the BDS marketplace in very short order as a result of further industry consolidation. Once closed, the pending combinations of Level 3 and CenturyLink, and of XO Communications and Verizon, would radically alter the retail port share rankings by placing the networks of two of the top ten competitive providers within the control of two leading ILECs.

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<sup>90</sup> See Comments of Sprint Corporation at 24-25; Declaration of Ed Carey ¶¶ 2-6, appended as Exhibit C to Comments of Sprint Corporation.

<sup>91</sup> See Comments of Sprint Corporation at 24-27.

<sup>92</sup> See AT&T Ex Parte at 22 (citing Vertical Systems Group, “2016 U.S. Carrier Ethernet LEADERBOARD” (Feb. 23, 2017), <https://www.verticalsystems.com/vsglb/2016-u-s-carrier-ethernet-leaderboard/>); CenturyLink and Frontier Ex Parte at 4 (citing Vertical Systems Group, “2016 U.S. Carrier Ethernet LEADERBOARD” (Feb. 23, 2017), <https://www.verticalsystems.com/vsglb/2016-u-s-carrier-ethernet-leaderboard/>).

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Furthermore, the Commission cannot ignore the weight of evidence on competition failures based on the unsupported assumption that barriers to entry disappear above 50 Mbps. The record demonstrates that this assumption is wrong. As Dr. Baker explains, and as explained above, there is no “critical bandwidth level between 45 Mbps and 1 Gbps beyond which ease of entry reduces competitive concerns so much as to make regulation unnecessary” according to the evidence on build-buy decisions submitted on the record.<sup>93</sup> The Commission cannot rationally anticipate that competition will expand for the additional reason that the marketplace has further consolidated during the course of this proceeding, as explained above. In fact, as industry observers have reported, CenturyLink’s acquisition of Level 3 “will create arguably the third largest domestic enterprise service player” behind AT&T and Verizon<sup>94</sup>—and further concentrate high-band circuits into incumbent control.

**c. The Record Does Not Support Granting ILEC Rate Hikes for Transport Services.**

AT&T, CenturyLink, and Frontier also argue that the FCC should reverse its decision to protect businesses from unjust and unreasonable prices for transport services by allowing incumbents to increase prices nationwide. Make no mistake, a grant of Phase II flexibility is permission to increase rates. The record demonstrates that when the Commission has granted ILECs Phase II pricing flexibility in specific geographies in the past, they have raised rates as much as 64 percent and, on average, by 25 percent.<sup>95</sup>

To support this rate hike, the ILECs argue that competitive transport networks are now essentially ubiquitous.<sup>96</sup> They do not, however, argue that competition has disciplined ILEC transport prices such that the FCC’s existing rules are no longer necessary. Nor can the ILECs make such an assertion, because there is no record evidence to support it. In fact, AT&T admits that the Commission’s NPRM “barely discusses dedicated transport,”<sup>97</sup> and CenturyLink and Frontier similarly concede that the NPRM does not contain “any meaningful discussion of transport[.]”<sup>98</sup> Furthermore, the FCC’s Rysman report analyzes BDS competition on a full-

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<sup>93</sup> Baker 07/14 Rev. Decl. ¶ 4.

<sup>94</sup> Sean Buckley, *CenturyLink-Level 3: A \$34B deal that creates a global fiber powerhouse, threatening AT&T, Verizon*, FIERCETELECOM (Oct. 31, 2016), <http://www.fiercetelecom.com/telecom/centurylink-level-3-34b-deal-creates-a-global-fiber-powerhouse-threat-to-at-t-verizon>.

<sup>95</sup> See Sprint Nov. 9, 2016 Ex Parte at Attachment A.

<sup>96</sup> AT&T Ex Parte at 5-6.

<sup>97</sup> *Id.* at 9.

<sup>98</sup> CenturyLink and Frontier Ex Parte at 17.

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circuit basis, combining channel terminations and transport facilities. It does not provide record evidence on the price impact of nearby transport competition on ILEC transport pricing—the core of its competition analysis for channel terminations.

With no record on transport services beyond evidence of ILECs' ability to unilaterally raise rates in the absence of regulation, and without having sought comment on the question of competition in the transport market, the Commission cannot overcome its burden of justifying a new policy on transport regulation without issuing an NPRM and gathering data. Furthermore, it could not, as the ILECs appear to suggest, find that evidence of the mere presence of fiber facilities, without any additional exploration or analysis, is adequate in the context of transport regulation when the FCC has found that additional analysis is necessary in the context of channel termination regulation.

**D. The Commission Cannot Dismantle BDS Protections Based on a New Policy that Regulation Is Unnecessary Even in Non-Competitive Markets.**

There is no evidence that BDS competition is adequate for American businesses and broadband purchasers throughout the country. As a result, the Commission must search for a rationale other than the presence of BDS competition to justify the about-face sought by AT&T, CenturyLink, and Frontier. Yet the Commission has not even identified what that rationale would be, even though it is required to do so under the APA.<sup>99</sup> That responsibility is even greater where, as here, the Commission must justify a departure from its established policy of providing pricing relief to customers in non-competitive markets.<sup>100</sup>

The Commission may consider a conclusion that even though the BDS marketplace is insufficiently competitive, the costs of regulation outweigh the benefits to American businesses

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<sup>99</sup> See, e.g., *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991); *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994).

<sup>100</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agencies must “provide a more detailed justification than what would suffice for a new policy created on a blank slate” if the “new policy rests upon factual findings that contradict those which underlay its prior policy” or “when its prior policy has engendered serious reliance interests”); see, e.g., *Access Charge Reform*, 14 FCC Rcd. 14221 ¶ 138 (1999) (in non-competitive areas, the Commission should adopt pricing rules that “replicate, to the extent possible, the results of a competitive market”); Suspension Order ¶¶ 1-7 (suspending pricing flexibility rules to avoid the continued erosion of pricing regulation in non-competitive areas); *Order and FNPRM* ¶ 270 (“relevant markets[] determined non-competitive” should be subject to “specific rules . . . on the ground that customers in those markets are being harmed”); *Qwest Forbearance Order* at 8623 (forbearance from dominant carrier regulation only appropriate upon a finding of competition).

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and the economy at large. But it simply cannot do so rationally on this record. Indeed, the discussion of costs and benefits is largely absent from the record, and even where it does exist, it provides only assessments of the specific elements of the BDS framework the FCC proposed in the *Order and FNPRM*—not of any new proposal to deregulate. For example, the declaration of Dr. Katz submitted by the cable industry makes no attempt to balance costs and benefits, and does not even quantify the costs it claims will result from regulation.<sup>101</sup> The declaration focuses primarily on the merits of regulating non-dominant provision of Ethernet services, and not retaining TDM regulation as it exists today, modernizing the Commission’s existing price cap regime, nor regulating dominant providers of Ethernet BDS.<sup>102</sup> Similarly, the study by Dr. Kovacs submitted by certain ILECs examines the effects of further “price cuts of 5%, 15%, and 25% on providers’ free cash flow,” and therefore does not even begin to address the deregulatory proposals of AT&T, CenturyLink, and Frontier, let alone account for the economic benefits of bringing pricing down to competitive levels.<sup>103</sup>

CenturyLink’s analysis purporting to show that TDM price cap reductions will create costs in the form of reduced investment is similarly insufficient to support reasoned decision-making by the Commission.<sup>104</sup> As an initial matter, CenturyLink’s analysis only addresses the alleged impact of DS1 rate reductions applied in its incumbent territory, and therefore does not address rolling back existing TDM regulations, efforts to rationalize Ethernet rates, or reductions in TDM rates in other parts of the country. Moreover, as Sprint has explained, the fundamental claim that TDM rate reductions diminish investment incentives is “exactly backward,” because the “ILECs’ continued ability to extract monopolist rents from their legacy networks artificially blunts marketplace incentives that, in a competitive environment, would encourage them to upgrade more rapidly to more efficient IP-based technology.”<sup>105</sup> In any event, CenturyLink’s analysis is unreliable on its face. As Sprint has explained, CenturyLink’s “self-serving cost model . . . employs cherry-picked comparisons [of] . . . DS1 ‘costs’ to the average revenue from a tariffed, three-year term DS1 offering,” without including a “a comparison for month-to-month

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<sup>101</sup> Reply Declaration of Michael L. Katz and Bryan G.M. Keating, appended as Exhibit A to Reply Comments of the National Cable & Telecommunications Association, WC Docket Nos. 16-143, 05-25 (filed Aug. 9, 2016).

<sup>102</sup> *Id.*

<sup>103</sup> See Anna-Maria Kovacs, Ph.D., CFA, *Business data services: The potential harm to competitive facilities deployment* at 2, attached to Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Oct. 6, 2016).

<sup>104</sup> See Declaration of Peter B. Copeland, attached to Letter from Craig J. Brown, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 *et al.* (filed Sept. 27, 2016).

<sup>105</sup> Sprint Nov. 9, 2016 Ex Parte at 10.

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rates or any information about DS3s at all.”<sup>106</sup> Moreover, CenturyLink’s claim contradicts its recent financial performance,<sup>107</sup> and statements from its executive explaining that BDS remains a “high margin” offering,<sup>108</sup> both of which preclude the Commission from finding that the revenue potential of BDS is inconsistent with continued investments to serve business customers.

Of course, to the extent these fragmented guesses about regulatory costs can inform Commission action at all, they must be balanced against the benefits of regulation addressing BDS market failure. Given the size of the BDS marketplace, the degree to which current rates remain above competitive levels, and “the spill-over effects that multiply the benefits” of BDS price reductions to all Americans, the only plausible conclusion on the record today is that the billions of dollars in increased annual output generated by rationalizing BDS rules fully justify continued Commission action to resolve BDS competition failures.

It is possible that the Commission has conducted its own assessments of costs and benefits that have led to the sudden change in policy. If that is the case, the Commission must publish its analysis and comply with the APA’s procedural requirements by providing adequate time for the public to comment on this analysis.<sup>109</sup>

## **II. The Commission Must Issue a Further Notice and Seek Comment if It Intends To Substantially Rework the BDS Reform Proposal.**

The APA requires the Commission to publish “a [g]eneral notice of proposed rule making . . . in the Federal Register” that describes “the terms or substance of the proposed

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<sup>106</sup> *Id.*

<sup>107</sup> See Letter from Karen Reidy, Vice President, Regulatory, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 *et al.* (filed Aug. 24, 2016) (explaining that CenturyLink’s SEC filings for 2005 through 2015 show that “on a per subscriber basis, CenturyLink’s revenues are 18 percent higher, and its margins are 32 percent higher”) (“INCOMPAS Aug. 24 Ex Parte”); Letter from Malena H. Barzilai, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143 *et al.* (filed Sept. 22, 2016) (noting that CenturyLink’s net operating income for BDS is up 47%) (“Windstream Sept. 22 Ex Parte”).

<sup>108</sup> CenturyLink, Inc., FQ1 2016 Earnings Call Transcripts at 11 (May 4, 2016), <http://ir.centurylink.com/Cache/1500085040.PDF?Y=&O=PDF&D=&fid=1500085040&T=&iid=4057179>; see INCOMPAS Aug. 24 Ex Parte; Windstream Sept. 22 Ex Parte.

<sup>109</sup> See *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”).

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rule,”<sup>110</sup> and the rationale for its proposal,<sup>111</sup> with enough detail to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.”<sup>112</sup> To comply with the APA’s notice and comment requirements, the Commission must provide information sufficient “to advise interested parties that comments directed to the controverted aspect of the rule should have been made,” and to allow “a reasonable commenter” to anticipate that the rule at issue “would be promulgated.”<sup>113</sup>

While an agency may adopt final rules that differ “in some particulars” from its proposal under this standard, its final rules must in all cases reflect “a logical outgrowth of the one[s] proposed.”<sup>114</sup> The logical outgrowth test forbids the Commission from adopting rules that do not fall within the “range of alternatives”<sup>115</sup> described “with reasonable specificity” in the notice.<sup>116</sup> Moreover, because “notice of individual parts of a proposed rule is not necessarily notice of the whole,”<sup>117</sup> the logical outgrowth test also forbids the Commission from selectively adopting and declining to adopt specific rules of which it did provide notice, if doing so would radically alter the nature and intended impact of its overall proposal. Finally, the Commission must recognize that the touchstone of the notice requirement is to “permit interested parties to participate meaningfully”<sup>118</sup> by submitting comments that are “appropriate” to the subject matter at issue,<sup>119</sup> and that “lead to better-informed agency decision-making.”<sup>120</sup> As a result, the Commission must apply the logical outgrowth test in a manner consistent with the BDS proceeding’s complexity and impact on American businesses and the consumers they serve.

These fundamental precepts of administrative procedure prohibit the Commission from taking action on BDS reform that departs dramatically from the framework proposed in the

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<sup>110</sup> 5 U.S.C. § 553(b).

<sup>111</sup> *Horsehead Res. Dev. Co., Inc.*, 16 F.3d at 1267 (internal quotation marks omitted).

<sup>112</sup> 5 U.S.C. § 553(c).

<sup>113</sup> *First Am. Disc. Corp. v. Commodity Futures Trading Comm’n*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (internal quotation marks omitted).

<sup>114</sup> *Horsehead Res. Dev. Co, Inc.*, 16 F.3d at 1267 (internal quotation marks omitted).

<sup>115</sup> *Id.* at 1268.

<sup>116</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011).

<sup>117</sup> *Horsehead Res. Dev. Co., Inc.*, 16 F.3d at 1268.

<sup>118</sup> *Id.*

<sup>119</sup> *Fertilizer Inst.*, 935 F.2d 1303 at 1312.

<sup>120</sup> *Prometheus Radio Project*, 652 F.3d at 450; *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

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*Order and FNPRM.* In the *Order and FNPRM*, the Commission conducted a comprehensive competition analysis leading it to conclude that the BDS market remains highly concentrated,<sup>121</sup> that barriers to entry are high,<sup>122</sup> that ILECs have market power over lower-bandwidth BDS in many areas,<sup>123</sup> and may have market power even at higher capacities. To ensure that American businesses have access to BDS at just and reasonable rates across the country, the Commission proposed a new regulatory framework to constrain BDS pricing in areas that lack effective competition.<sup>124</sup> To identify areas that lack effective competition, the Commission proposed to apply a CMT at the level of a census block or building,<sup>125</sup> rejected the use of MSAs,<sup>126</sup> and invited comment on, but did not propose, the use of “alternative geographic units.”<sup>127</sup> In areas deemed non-competitive under the CMT, the Commission proposed to retain<sup>128</sup> and modernize its price cap regime for TDM services by implementing a baseline price cap level adjustment,<sup>129</sup> restoring use of a productivity-based X-factor,<sup>130</sup> transitioning non-competitive Phase II services back into price caps,<sup>131</sup> and providing ILECs with the flexibility to use contract tariffs. For packet-based services, the Commission “propose[d] and s[ought] comment” on anchor- and benchmark-based pricing regulation to “ensure that, in non-competitive markets, rates for Ethernet business data services not subject to price cap regulation are just and reasonable.”<sup>132</sup> The Commission also proposed to apply limited rules in all areas that would promote pricing transparency and ensure that BDS sellers with large footprints do not expand their market power

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<sup>121</sup> *Order and FNPRM* ¶¶ 216-223.

<sup>122</sup> *Id.* ¶¶ 224-227.

<sup>123</sup> *Id.* ¶¶ 237-255.

<sup>124</sup> *Id.* ¶¶ 256-447.

<sup>125</sup> *Id.* ¶ 291

<sup>126</sup> *Id.* ¶ 287.

<sup>127</sup> *Id.* ¶ 291.

<sup>128</sup> *Id.* ¶¶ 351-355.

<sup>129</sup> *Id.* ¶¶ 401-415; *see also id.* ¶ 345 (“We believe that Commission action on price caps is over a decade overdue”).

<sup>130</sup> *Id.* ¶¶ 364-386.

<sup>131</sup> *Id.* ¶ 355 (proposing to extend “price cap regulation to business data services presently subject to Phase II pricing flexibility to the extent an application of our proposed Competitive Market Test determines such services are non-competitive”); *id.* ¶¶ 416-418 (proposing to “move” Phase II services “back into price caps”).

<sup>132</sup> *Id.* ¶ 420; *see also id.* ¶¶ 421-433.

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through the use of anticompetitive terms and conditions.<sup>133</sup> The Commission did not propose changes to its regulation of BDS transport.<sup>134</sup>

This proposal defined the structure and purpose of the BDS proceeding, and allowed the Commission to choose implementation tactics from among various alternatives based on what the record showed would best fulfill the Commission’s stated goal of ensuring just and reasonable rates in non-competitive markets. The *Order and FNPRM* did not, however, give the Commission license to dismantle BDS pricing constraints altogether, nor to take steps that would strengthen incumbents’ ability to exercise market power and impose job-killing rates on American businesses for broadband connections. That is because any final agency action on BDS must resemble the proposal as the Commission described it: a “new framework” that establishes a “comprehensive Competitive Market Test to determine whether a relevant market is competitive or non-competitive,” pursues “minimal regulation to protect consumers” in markets that are “determined competitive,” and applies modernized price caps and other pricing constraints in non-competitive areas to provide a remedy to “customers in those markets [who] are being harmed.”<sup>135</sup> A BDS order that rolls back TDM pricing constraints by expanding Phase II flexibility to markets all across the country, or that adopts a new policy related to BDS transport that allows nationwide price hikes, would contain none of these elements. Far from reflecting a logical outgrowth of the Commission’s thoughtful proposal, a BDS order that abandons Congress’s statutory mandate to ensure just and reasonable rates would amount to an altogether different regulatory outcome—one that interested parties had no reason to anticipate in drafting their comments.

Nor can the Commission sidestep notice-and-comment requirements by adopting a BDS framework that bears an external resemblance to its May 2016 proposal, but contains internal components engineered to vitiate the proposal’s intended impact on the BDS marketplace. Such an approach would violate the APA. That is because while the *Order and FNPRM* may have provided adequate notice of certain “individual” elements of such a framework, it will not have provided adequate “notice of the whole.” Thus, a final framework that employs expansive definitions of geographic and product markets, expansive measures of competitive presence, reduced price cap adjustments and X-factors, and no meaningful steps to address packet-based rates in non-competitive areas, would not reflect a logical outgrowth from the *Order and FNPRM*. Indeed, a framework manipulated to broadly eliminate pricing constraints would not just differ from the proposal in the *Order and FNPRM* “in some particulars”—it would undermine the intended outcome of the proposal *by design*.

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<sup>133</sup> *Id.* ¶¶ 312-343.

<sup>134</sup> *See* AT&T Ex Parte at 9 (“The 2016 *Notice*, too, barely discusses transport.”).

<sup>135</sup> *Order and FNPRM* ¶ 270.



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Thus, if the Commission wishes to reexamine the fundamental utility of BDS regulation, it must first issue a further notice describing its proposal and the rationale for its decision. The Commission cannot simply stretch the proposal in the *Order and FNPRM* beyond recognition—and conclude this proceeding with final rules that are fundamentally different in purpose, design, and practical effect from the ones it proposed. That is especially true given the history, complexity, and economic importance of this proceeding. As an initial matter, the *Order and FNPRM* was the culmination of a longer process designed specifically to address FCC-recognized record evidence of the systematic *under*-regulation that resulted from inaccurate pricing flexibility triggers and a price cap mechanism in desperate need of refurbishment after years of deferred maintenance. Specifically, the Commission suspended grants of pricing flexibility in 2012 after finding that its competition triggers did not correspond to the presence of competition,<sup>136</sup> issued a comprehensive data collection in 2013 to better identify markets in need of regulation,<sup>137</sup> sought comment on the competition analysis that it should employ using the data,<sup>138</sup> and conducted a peer reviewed competition analysis<sup>139</sup> before it proposed its May 2, 2016 BDS framework. Moreover, at each step of the way, sophisticated commenters with hundreds of millions, and even billions, of dollars related to this proceeding facilitated Commission action with comprehensive and data-driven submissions that evaluated and refined the Commission’s specific proposals, as well as the underlying analysis that provided the Commission with a rationale to take action.

While these commenters generically discussed the fundamental need for regulation in the hope of accelerating long overdue Commission action, they have not had the occasion to address the new, sweeping, and specific deregulatory proposals that the Commission has been asked to adopt immediately as an order. They have not had the opportunity to evaluate the competition analysis (if any such analysis even exists) underlying any unpublished Commission proposal currently in the works by FCC staff. Nor have they been able to comment to the Commission on their real-world assessment of the costs and benefits that would flow from such a proposal, including the impact on key private sector initiatives such as broadband infrastructure deployment. Critically, commenters have not been able to suggest improvements to any new proposal being considered by FCC staff—including refinements that could help American businesses absorb an increase in BDS rates and mitigate the job loss and service disruptions that could result from hasty and blunt Commission action.

The Commission’s legal responsibilities require it to recognize its previous findings, interpretations of the record, and proposals—and to permit the large and small companies across

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<sup>136</sup> See generally *Suspension Order*.

<sup>137</sup> *2012 FNPRM* ¶¶ 13-51 & App. A.

<sup>138</sup> See generally *2012 FNPRM*.

<sup>139</sup> See generally Rysman Rev. White Paper.

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the country that buy BDS to comment on the ramifications of any reversal currently under consideration. Importantly, these obligations apply even if the Commission attempts to pursue deregulation by declaratory ruling. The APA requires agencies to give all interested parties the opportunity to comment on adjudicatory decisions.<sup>140</sup> Moreover, the Commission's own rules require it to seek comment on petitions for declaratory ruling.<sup>141</sup> CenturyLink and Frontier cannot sidestep that requirement by styling their request for declaratory relief as an *ex parte* letter rather than a petition. Thus, to receive the input necessary to ensure that the Commission proceeds on an informed and reasoned basis, it must provide notice and seek comment on any proposal under consideration and the revised competition analysis that led the Commission to so abruptly consider such a change in direction.

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Sprint urges the Commission to reject AT&T, CenturyLink, and Frontier's proposals and the dramatic price increases that they would create, and to adopt an order built on the consensus developed after the *Order and FNPRM*. There is no lawful basis for the Commission to accept these ILECs' efforts to remove protections for the thousands of American businesses around the nation that buy dedicated broadband services. At a minimum, if the Commission is considering a new proposal similar to the plans proposed by these ILECs, which would represent a fundamental course reversal, it must reveal its reasoning, conduct a new economic analysis that supports such a dramatic change, publish the details of its new proposal, and give the public an opportunity for notice and comment.

Sincerely,



Paul Margie  
*Counsel to Sprint Corporation*

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<sup>140</sup> See 5 U.S.C. § 554(c).

<sup>141</sup> See 47 C.F.R. § 1.2(b).