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April 13, 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,"[1] Sprint Corporation ("Sprint") and Windstream Services, LLC ("Windstream") hereby submit 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*[2] in WC Docket No. 05-25, RM-10593
- *Second Protective Order*[3] in WC Docket No. 05-25, RM-10593
- *Data Collection Protective Order*[4] in WC Docket No. 05-25, RM-10593

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[1] *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).

[2] *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).

[3] *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*").

[4] *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*

- *Business Data Services Data Collection Protective Order*[5] in WC Docket Nos. 15-247 & 05-25, RM-10593
- *Tariff Investigation Protective Order*[6] 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 "locations that companies serve with last-mile facilities";[7]
- "Pricing, to the extent such information is not publicly available, for . . . all [packet-switched data services]";[8]

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."[9]

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 and Windstream, in addition to filing this redacted version electronically via ECFS, will submit one original and two hardcopies without redaction to the Secretary's Office. Sprint and Windstream will also submit one copy without redaction to Christopher Koves, Pricing Policy Division, Wireline Competition Bureau.

Special Access Services, Order and Data Collection Protective Order, DA 14-1424, 29 FCC 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).

5 *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).

6 *See id.* App. B ("*Tariff Investigation Protective Order*").

7 *Second Protective Order* ¶ 6.

8 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*").

9 *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.

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

Sincerely,

Paul Margie
Counsel to Sprint Corporation

REDACTED – FOR PUBLIC INSPECTION

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

April 13, 2017

Ex Parte

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

Re: Business Data Services in an Internet Protocol Environment, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25; *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, RM-10593

Dear Ms. Dortch,

The Commission is scheduled to vote on a business data services ("BDS") order in just one week. But despite making specific findings on the lack of competition in the BDS marketplace, relevant product markets, and relevant geographic markets in its recent 2016 *Order and Further Notice*,[1] the Commission is making an unexpected 180-degree turn in the draft report and order[2] that it released two weeks ago. Instead of seeking input on an evidence-based new framework that would reflect a reasoned change in policy, the *Draft Order* instead informs the public that the Commission is not obligated to propose new rules or findings of its own before moving to a final order. The result of the Commission's truncated procedure is a BDS framework that is unsupported by the record, arbitrary in key respects, and inconsistent with fundamental notice responsibilities. If adopted on the current record, the hastily composed framework described in the *Draft Order* would fail American businesses—especially small businesses—and violate the statutory requirements of the Administrative Procedure Act ("APA").

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[1] *See 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*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, 31 FCC Rcd. 4723 (2016) ("*Order and Further Notice*").

[2] *See 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*, Draft Report and Order, FCC-CIRC1704-04, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593 (rel. Mar. 30, 2017) ("*Draft Order*").

Sprint Corporation ("Sprint") and Windstream Services, LLC ("Windstream") submit this letter to urge the Commission to address these deficiencies by issuing the *Draft Order* as a further notice of proposed rulemaking that explains the Commission's reasoning, and that seeks comment on the *Draft Order*'s use of novel and untested theories of competition, reliance on new data sources, unexpected effort to deregulate transport services, and changed conviction that the Commission should eliminate protections even in areas proven to be insufficiently competitive.

At a minimum, the Commission should mitigate the legal deficiencies in the *Draft Order*, and the impact it would have on purchasers of businesses broadband across the country, by (1) adjusting the first prong of the competitive market test ("CMT") to reflect the current record on entry barriers; (2) eliminating the second prong of the CMT, which is based on an arbitrary, inadequately noticed, and unsupported theory of the impact of cable facilities in the consumer broadband market on the separate market for BDS services; (3) addressing the topic of transport deregulation in a subsequent notice of proposed rulemaking; and (4) providing American businesses with enough time to pursue the competitive alternatives the *Draft Order* claims are around the corner before facing the prospect of BDS rate shock.

I. The *Draft Order* Makes Arbitrary Conclusions about the State of Competition in the Markets for DS1 and DS3 BDS.

The *Draft Order*, once adopted, would deregulate over 90 percent of locations with demand for DS1 and DS3 services that are currently subject to price cap regulation.[3] To support such sweeping change—thereby reversing specific findings made less than a year ago in the *Order and Further Notice* that lower bandwidth services are inadequately competitive[4]—the *Draft Order* relies on assumptions about the cost structure of facilities-based business data services for lower bandwidth customers that are not supported by the record. The *Draft Order* also ignores direct evidence of supracompetitive pricing for DS1 and DS3 services at locations without multiple service providers, instead improperly relying on the very kind of "generalized statements about marketplace trends broadly" that it later claims are insufficient to support regulatory action.[5] As a result, the *Draft Order* fails to provide a reasoned basis for its conclusions, and undermines the Chairman's commendable commitment to "restore the place of economic analysis at the FCC."[6]

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[3] *See Draft Order* ¶ 135.

[4] *See Order and Further Notice* ¶¶ 237-255.

[5] *Draft Order* ¶ 264.

[6] FCC Chairman Ajit Pai, "The Importance of Economic Analysis at the FCC," Remarks at the Hudson Institute at 2 (Apr. 5, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0405/DOC-344248A1.pdf.

First, the *Draft Order* states that providers are "commonly willing to extend their existing network out approximately a half mile, and in some instances further, to meet demand."[7] Ignoring the extensive evidence submitted by competitive providers about the factors that affect their own investment decisions and the barriers to entry,[8] the *Draft Order* misleadingly takes a distance that some competitive providers have cited as a *rarely achieved upper limit* for constructing laterals from splice points to provide *higher-capacity* Ethernet circuits as support for the position that all competitors will *routinely* extend their facilities a half mile from any part of their fiber network even for customers seeking less lucrative *lower-capacity* service. The statement in the *Draft Order* is wrong, even at higher capacities, and is especially inappropriate for locations with lower bandwidth demands, such as those with customers of DS1 and DS3 services, given that providers must recover the same fixed costs of extending their network to serve these lower expected revenue customers.[9]

Second, the *Draft Order* assumes that the pace of network investment by the cable industry will bring competitive alternatives to BDS customers on a widespread basis in the "medium term,"[10] including the overwhelming majority of lower bandwidth customer locations that are currently connected only to the incumbent LEC's network.[11] However, it is not reasonable for the Commission to rely on past cable investment, driven by "growth in *consumer* broadband demand,"[12] to project the future availability of capital for the additional investment needed to bring facilities-based competition to the approximately 1.2 million locations with

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[7] *Draft Order* ¶ 113.

[8] *See* Letter from Paul Margie, Counsel, Sprint, to Marlene H. Dortch, Secretary, FCC, at 7-11, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Mar. 22, 2017) ("Sprint March 22 Ex Parte") (discussing record evidence of entry barriers); Letter from John Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 17-21, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Mar. 27, 2017) ("Windstream March 27 Ex Parte") (same).

[9] *See id.*

[10] *See Draft Order* ¶¶ 54-61.

[11] *See, e.g.*, Windstream March 27 Ex Parte at 3 (citing analysis of the Commission's data collection indicating that approximately 86 percent of customer locations with aggregate bandwidth demand of below 50 Mbps have no provider offering service other than the incumbent).

[12] *Draft Order* ¶ 55. Windstream recently received special construction quotes from an ILEC, including one of nearly $150,000 for a DS3 line and another of over $80,000 for a 10Mbps Ethernet circuit, in cities in which the ILEC is already receiving CAF funding for residential broadband networks. The magnitude of these quotes—assuming they are indeed justified and not unreasonable special construction charges—indicate there are still significant additional costs to "repurposing" shared networks designed and built for best-efforts broadband service to provide BDS.

demand in the far different BDS marketplace.[13] Furthermore, focusing on cable's smaller *BDS* business, even if cable providers maintained the same pace of adding buildings to their fiber network, the total number of buildings connected by cable providers over the medium term would still be a small fraction of the total number of locations with BDS demand.[14]

Third, the *Draft Order* further assumes that competitive providers with facilities nearby, but not connected to a customer location, will be able to discipline ILEC prices by making competing bids for service contracts.[15] But the record demonstrates that the impact that potential bidders may have on the ability of an ILEC to sustain supracompetitive prices is modest at best and entirely speculative at worst. As explained elsewhere in the record, regression analyses of the Commission's data collection show that the presence of in-building competitors has a greater impact on lowering prices than the presence of nearby providers.[16] Moreover, the assumption that a "bidding market" for BDS would discipline ILEC prices in lieu of actual competitive providers rests on a thin theoretical foundation. As Dr. Jonathan Baker highlighted in his declaration, "the very authority on bidding markets cited in the [white paper of ILEC economists] explodes the myth, which it describes as heavily pushed by legal and economic consulting firms, that in bidding markets, market share does not imply market power."[17]

Fourth, the *Draft Order* relies on mischaracterized, or irrelevant, nation-wide revenue figures to support its conclusion that growth in competitive Ethernet services, including high capacity services, are indicative of competition in the markets for DS1 and DS3 services, despite the presence of inconsistent data submitted in its own proceeding and cited by its own economist. The *Draft Order* states that competitive providers "earned $23 billion of the $45 billion in business data services revenue in 2013" as evidence of a "dynamic" marketplace.[18] But this statement is misleading, at best. As the Commission's economics consultant, Dr. Marc Rysman, explicitly stated in his analysis of the data collection, the competitive providers' share of revenue includes competitors' reselling of ILEC special access services and unbundled network elements together with competitors' own services, and thus "overstate[s] the competitive presence of"

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[13] *See* Marc Rysman, *Empirics of Business Data Services*, 31 FCC Rcd. 4919, 4934, attached as Appendix B to *Order and Further Notice*.

[14] *See Draft Order* ¶¶ 56-59 (citing number of buildings connected to networks of largest cable providers).

[15] *See id.* ¶ 112.

[16] *See* Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 63, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 14, 2016).

[17] Reply Declaration of Jonathan B. Baker at ¶ 12, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (refiled Apr. 14, 2016) (internal quotation marks omitted) (quoting Paul Klemperer, Bidding Markets 4 (June 2005), http://www.nuff.ox.ac.uk/users/klemperer/biddingmarkets.pdf).

[18] *See Draft Order* ¶ 2.

non-ILEC providers.[19] Indeed, Dr. Rysman noted that "it is probable that a substantial share of [competitive provider] revenue over circuit-based lines actually represents lines leased from ILECs, since facilities-based entry from [competitive providers] tends to focus on packet-based technology."[20] The Commission fails to explain why these facts do not render its use of these figures incorrect.

Fifth, the *Draft Order* also cites revenue and pricing data for Ethernet services, without demonstrating their relevance to the existence of constraints on ILEC prices in the very-different DS1 and DS3 product markets.[21] The statements from AT&T and Verizon relied upon in the *Draft Order* do not support the conclusion that cable Ethernet is a viable substitute for DS1 and DS3 special access in most geographic markets. AT&T's description of the decrease in its DS1 business, for example, does not state how much if any of that loss is to cable providers, as opposed to AT&T's own Ethernet offerings.[22] Verizon's statement on its experience with decreased *Ethernet* orders is also not relevant to the question of whether DS1 and DS3 customers have choices of alternative providers.[23] Moreover, as set out elsewhere in the record,[24] the prices for lower bandwidth cable Ethernet services are still *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** the rates for ILEC DS1 service under existing price caps.[25] Nonetheless, the Commission fails to even consider these problems with its analysis.

Sixth, the *Draft Order* fails to address recent industry consolidation, thereby compounding the arbitrariness of its selective analysis of nationwide market trends and corrupting the results of the CMT. Level 3, the nation's largest CLEC, has agreed to merge with CenturyLink, a leading ILEC, in a transaction that already has been approved by the companies'

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[19] *See* Dr. Marc Rysman, *Empirics of Business Data Services* at 7 (rev. June 2016) ("Rysman Rev. White Paper"), https://apps.fcc.gov/edocs_public/attachmatch/DOC-340040A6.pdf.

[20] *Id.* Moreover, the revenue data does not account for the recent acquisitions of Level 3 and XO.

[21] *See Draft Order* ¶¶ 56-61, 66-71.

[22] *See id.* ¶ 67.

[23] *See id.*

[24] *See, e.g.*, FCC TDM-to-IP Benchmarking Proposal, appended as Attachment 3 to Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed June 3, 2016) (comparing AT&T DS1 and DS3 discount plan rates with AT&T Switched Ethernet commercial contract rates).

[25] *Compare id.* (showing AT&T DS1 monthly rate of $126 as tariffed), *with Draft Order* ¶ 71 (citing TWC's monthly rate of *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** for 5 Mbps Ethernet service).

respective shareholders and numerous state regulatory authorities.[26] The FCC also has approved Verizon's acquisition of XO Communications, another of the nation's largest CLECs, a transaction that closed earlier this year.[27] These recent transactions confirm the record evidence that, contrary to the *Draft Order*'s predictions, network expansion at any appreciable scale over the medium- or even long-term cannot be achieved by construction due to the enormous barriers to entry in the BDS marketplace.

Moreover, the ILEC-CLEC combinations demonstrate that there is less wireline competition available for BDS purchasers, especially purchasers that operate in, or serve customers that operate in, multiple locations in need of dedicated connectivity. These purchasers will soon have fewer choices among large footprint carriers than they did in the past.

Importantly, the *Draft Order* also does not account for the impact of these transactions on the *Draft Order*'s already flawed metric for determining market concentration. Relying on a leaderboard published by Vertical Systems Group, which shows that non-ILECs have increased their positions in a ranking of the top ten Ethernet providers as measured by *retail* port share,[28] the *Draft Order* finds that "Ethernet business data services . . . are largely competitive."[29] Yet with the recent close of the Verizon-XO transaction and the pending consummation of the CenturyLink-Level 3 transaction, the retail port shares of the two largest CLECs on this very list will soon be attributed to two ILECs in the leaderboard's top five. The *Draft Order*'s failure to account for these imminent and drastic changes to the competitive landscape is arbitrary,

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[26] *See* Press Release, CenturyLink, Inc. and Level 3 Communications, Inc., CenturyLink and Level 3 Shareholders Approve Merger (Mar. 16, 2017), http://news.level3.com/2017-03-16-CenturyLink-and-Level-3-shareholders-approve-merger; Press Release, CenturyLink, Inc., Delaware, Hawaii, Maryland, and D.C. Approve CenturyLink – Level 3 Merger (Apr. 12, 2017) (reporting approvals by Delaware, Hawaii, Maryland, the District of Columbia, Georgia, Ohio, Utah, West Vriginia, Texas, Connecticut, Indiana, Louisiana, and Nevada).

[27] *See Applications of XO Holdings and Verizon Communications Inc. for Consent to Transfer Control of Licenses and Authorizations*, DA 16-1281, 31 FCC Rcd. 12,501 (Wireline Comp., Int'l & Wireless Telecomms. Burs. 2016); *Domestic and International Section 214 Applications Granted for the Transfer of Control of Earthlink Holdings Corp. to Windstream Holdings, Inc.*, Public Notice, DA 17-92, 32 FCC Rcd. 805 (Wireline Comp. & Int'l Burs. 2017); Press Release, Verizon, Verizon Completes Purchase of XO Communications'' Fiber Business (Feb. 1, 2017), http://www.prnewswire.com/news-releases/verizon-completes-purchase-of-xo-communications-fiber-business-300400440.html.

[28] As Sprint and others have repeatedly explained, retail port share data does not provide any indication of *facilities-based* competition, as ILEC ports resold by competitors are attributed to competitors rather than the ILEC. *See* Sprint March 22 Ex Parte at 21-22.

[29] *Draft Order* ¶ 65 & n.191.

especially considering the long-term view of competition upon which *Draft Order*'s framework claims to be built.

Seventh, drawing on the flawed base of evidence discussed above, the *Draft Order* rejects the findings of its own outside economic expert, Dr. Marc Rysman, that ILECs exercise market power over DS1 and DS3 services. The *Draft Order* acknowledges that Dr. Rysman detected price changes for ILEC DS1 and DS3 services in response to competition—*i.e.*, evidence of ILEC market power—but dismissed his analysis on the basis that these price changes "often became statistically insignificant after implementing changes to the analysis in response to peer reviewers."[30] The *Draft Order* ignores the many sources of evidence on ILEC pricing behavior that corroborate Dr. Rysman's findings.[31] Addressing only one, the *Draft Order* summarily dismisses it by asserting, without explanation, that the corroborating evidence is "disputed."[32] On that basis, the *Draft Order* concludes that Dr. Rysman's data "was too noisy to draw any firm conclusions."[33]

As an initial matter, the *Draft Order's* characterization about the impact of peer review is simply incorrect. As the Commission previously found, even after implementing changes to respond to peer reviewers, Dr. Rysman's regressions still "show [that] competition lowers ILEC prices by an amount that is statistically distinguishable from no effect."[34] Even worse, the *Draft Order* sets aside Dr. Rysman, and all of the evidence corroborating his low-bandwidth results, based on the apparent belief that the expectations of "analysts and forecasters," and nationwide trends in the BDS market, provide better, more reliable evidence of where competition exists and where it does not.[35] But as explained above, the generic evidence upon which the Commission relies is misleading, and non-responsive to the key exercise of identifying competitive and non-competitive markets. The Commission cannot rationally dismiss one source after the other based on poorly explained or entirely non-existent evidentiary flaws, only to rely on *far worse* evidence that is completely unsuited to the fundamental task of this proceeding.

Finally, in addition to its deeply flawed assessment of the market, the new regulatory framework in the *Draft Order* also prioritizes deregulation above a reasoned evaluation of the

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[30] *Id.* ¶ 72.

[31] *See* Sprint March 22 Ex Parte at 17-18.

[32] *Draft Order* ¶ 73 (citing Decl. of Ed Carey at 2-4 & Table 1, attached as Exhibit C to Comments of Sprint, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016)).

[33] *Id.* ¶ 72.

[34] Federal Communications Commission Staff, *Update on the Use of Cluster-Robust Standard Errors in Business Data Services Regressions* at 3 (rel. Aug. 22, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0822/DOC-340891A1.pdf.

[35] *Draft Order* ¶ 73.

record in another critical way. Although the *Draft Order* states that its aim is to "balance the costs and benefits of applying ongoing regulation to particular business data services," the *Draft Order* ignores critical benefits, highlighted in the record, of policies that promote more affordable and economically rational pricing for ILEC BDS, which is an essential input into competitive enterprise communications solutions that integrate BDS connectivity with other functionalities.[36]

II. The *Draft Order*'s Competitive Market Test is Flawed and Inadequately Noticed

Under the *Draft Order*'s CMT, the Commission "will treat as competitive a particular county" if one of the following two conditions is met:

1) "50 percent of the locations with BDS demand in that county are within a half mile of a location served by a competitive provider based on the *2015 Collection* or"

2) "75 percent of the census blocks in that county have a cable provider present based on the Commission's Form 477 data."[37]

As explained below, this CMT is arbitrary, inadequately noticed, and evidence of the kind of agency caprice that the APA prohibits.

Entry barriers at DS1- and DS3-level capacities. Neither prong of the CMT accounts for the distinctive competitive barriers present in the market for lower bandwidth services, including the DS1 and DS3 channel terminations that are the subject of the CMT. While the *Draft Order* acknowledges that BDS product markets are bandwidth-specific, and that lower-bandwidth BDS is therefore subject to different competitive conditions than higher-bandwidth BDS,[38] the Commission bases a CMT that governs DS1s and DS3s on predictions about competitive buildout that apply exclusively to BDS at the highest bandwidths. The record demonstrates that there is no economic case for overbuilding an incumbent provider's facilities for less than 100 Mbps of demand, especially over a half-mile as the first prong of the CMT assumes.[39] The record also demonstrates that ILECs possess widespread market power for lower

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[36] *Id.* ¶ 12; *see* Reply Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking at 29-30, WC Docket Nos. 16-143, 05-25, RM-10593 ("Windstream Aug. 9 Reply Comments"); Declaration of Robert D. Willig, appended as Attachment B to Windstream Aug. 9 Reply Comments ¶ 26 (explaining that the availability of BDS inputs "boosts incentives to invest in the provision of better and more cost effective retail services, as well perhaps as investment in infrastructure").

[37] *Draft Order* ¶ 84.

[38] *See id.* ¶ 26.

[39] *See, e.g.*, Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 6 (noting that it is "infrequently the case that Level 3 can deploy a new fiber connection to

bandwidth services, as shown by the whopping 86 percent of buildings served by the ILEC alone at capacities of 50 Mbps and below,[40] and by regression analyses demonstrating that the presence of in-building competitors and nearby providers reduces ILEC DS1 rates by as much as 51 percent, which demonstrates that a nearby provider alone cannot discipline ILEC prices.[41] The durable ILEC monopoly over DS1s and DS3s and their packet-based equivalents, and price differentials that prove market power under the theory of the Commission's own economic

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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"), appended to Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket Nos. 05-25, 16-153, 15-247, RM-10593 (filed June 28 2016); Reply Comments of TDS Metrocom, LLC at 2, 15, WC Docket No. 05-25, RM-10593 (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."); Declaration of David Schirack and Mike Baer ¶ 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.") ("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, 16-143, RM-10593 (filed June 28, 2016); CostQuest White Paper #1 at 2, appended as Attachment A to Letter from Jennie B. Chandra, Vice President of Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, GN Docket Nos. 13-5, 12-353, RM-10593 (filed June 8, 2015) ("[A]n 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 cross-over point in the build-versus-buy analysis.").

40 *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Oct. 21, 2016) (showing that based on the Commission's data, more than 86 percent of buildings that have aggregate demand of less than 50 Mbps have no competitive provider); Rysman Rev. White Paper at 15, Table 7, 16-17, Table 9 (77 percent of locations and 68 percent of census blocks with BDS demand are subject to a pure BDS monopoly, and 99 percent of locations and 96 percent of census blocks with BDS demand are subject to a BDS duopoly).

41 *See* Reply Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services ¶ 5, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Aug. 9, 2016); *see also* Rysman Rev. White Paper at 34, Table 19 (showing much smaller effect on ILEC DS1 rates of having nearby but no in-building provider).

expert,[42] would not exist if competitive entry from facilities a half-mile away were generally possible, as the *Draft Order*'s CMT incorrectly assumes.

Unsurprisingly, the Commission's half-hearted attempts to find record support for its claim "that most business data services providers are willing and able to profitably invest and deploy facilities within a half mile of existing competitive facilities,"[43] even at lower capacities, collapses upon reasonable examination. As explained above, the *Draft Order* inappropriately cites to filings indicating that a half mile is *the uppermost* limit a CLEC will build a lateral connection, that such builds are often impossible due to buildout barriers, and that, where they are possible, the new customer must purchase a very high capacity circuit—and not the DS1, DS3, or packet-based equivalents that are the subject of the CMT.[44] In fact, these same pleadings explain that, regardless of the distance, it is *almost never* possible to build to a new customer to provide service at 100 Mbps or less.[45]

The *Draft Order* also purports to support its half-mile distance with assertions about growth in fiber-based cable BDS and Ethernet services generally,[46] which, as discussed above, simply is not relevant to whether there is competition for *lower bandwidth* services, nor to the CMT's critical task of determining *where* such competition exits.

Internally inconsistent product market definitions. Curiously, the second prong of the CMT relies on the fiction—rejected elsewhere in the *Draft Order*[47]—that best efforts broadband services are substitutes for BDS. This internal inconsistency is arbitrary on its face, and the Commission's efforts to justify it in the *Draft Order* are unsupported.

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[42] *See* Rysman Rev. White Paper at 2 ("The goal of these regressions is to test whether prices fall when there is local competition. If so, I take this as evidence of market power in the BDS industry, where there is not competition.").

[43] *Draft Order* ¶ 44.

[44] *See* 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 (filed Jan. 27, 2016).

[45] *See* Schirack/Baer Declaration ¶ 16.

[46] *Draft Order* ¶ 113 (noting that "in 2013 cable already supplied BDS, largely over fiber facilities, to more than one in ten locations with BDS demand, and may well reach 23.5 percent of locations today").

[47] *Id.* ¶¶ 30-31.

As it did in the *Order and Further Notice*,[48] the Commission correctly concludes that best efforts broadband services and BDS are not in the same product market in the *Draft Order*.[49] Yet the second prong of the CMT assumes that the presence of nearby cable coaxial facilities "used to provision best-efforts services"[50] nevertheless should qualify as a measure of BDS competition. There is no plausible economic theory that could explain the Commission's decision to assume that facilities it admits are used almost exclusively to provide *non-BDS* services will discipline prices for *BDS* charged by BDS incumbents. To support the CMT's giant logical leap, the Commission appears to advance two arguments, neither of which has record support.

First, the Commission suggests that cable providers can readily provide BDS over best-efforts facilities by offering an Ethernet-over-HFC ("EoHFC") product. But the cable companies themselves have provided convincing and repeated evidence that this is incorrect. The Commission has no rational basis for rejecting cable operators' evidence that they do "not have the facilities to ubiquitously offer BDS services."[51] As the cable companies explain, the "limited Ethernet over HFC ('EoHFC') services" that cable operators provide "are not BDS,"[52] and are "more akin to a best-efforts service" due to the level of lower availability, jitter, latency, packet

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[48] *Order and Further Notice* ¶¶ 190-196 (discussing why "Best Efforts and Business Data Services Are Not in the Same Product Market"); *see also id.* ¶ 13.

[49] *Draft Order* ¶¶ 30-31.

[50] *Id.* ¶ 31.

[51] Letter from Michael H. Pryor, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 05-25, 16-143 (filed Mar. 24, 2017).

[52] *Id.* at 1; *see also* Letter from Samuel L. Feder, Counsel to Charter, to Marlene H. Dortch, Secretary, FCC, at 4 n.18, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Oct. 3, 2016) (noting "the significant record evidence that Ethernet over coax is not a comparable service" to fiber-based BDS); Comments of the National Cable and Telecommunications Association at 28, WC Docket Nos. 16-143, 05-25 (filed June 28, 2016) (EoHFC performance objectives, to the extent they are even offered at all, "often are well below the performance commitments offered with TDM or fiber-based Ethernet services.").

loss and mean time repair guarantees offered by the cable industry.[53] Record evidence submitted by buyers of EoHFC, including Sprint and Windstream, confirm this fact.[54]

The *Draft Order*, however, has ignored this evidence, and relies instead on statements by ILECs showing that they buy EoHFC to serve some customers that require Ethernet services at some locations. But not all businesses that buy Ethernet services require *dedicated* Ethernet services, and the fact that some customers purchase a non-BDS product in some locations hardly establishes that EoHFC is a BDS substitute for all consumers everywhere. More to the point, if a few buyers suggest that EoHFC can substitute for BDS under some circumstances, while other buyers *and cable providers themselves* assert that the level of performance offered by EoHFC is generally too low for EoHFC to function as anything more than a very occasional BDS substitute, the correct conclusion is not to treat both pieces of evidence as "opinions,"[55] choose the more convenient "opinion," and stretch it beyond recognition. Reasoned decision-making requires the Commission to accept the facts for what they are, and draw reasonable inferences from the entirety of the record. Here, that means concluding that to the extent EoHFC approximates a BDS substitute at all, it does so for, at most, a narrow segment of the BDS marketplace—a fact that does not support the *Draft Order*'s sweeping assumption that the cable industry can provide a *BDS service* to *all businesses* simply because it offers *best-efforts consumer broadband* to a residential customer.

More importantly, the Commission does not appear to recognize that, because of the shared architecture of cable networks, cable operators simply cannot provide EoHFC at meaningful scale, as offering guaranteed performance to a business customer would "subtract[] from the available shared . . . capacity" for the industry's core residential video and broadband business.[56] Cox confirmed that these capacity constraints will remain even as cable operators

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[53] Reply Comments of Cox Communications, Inc. at 6, WC Docket Nos. 16-143, 05-25 (filed Aug. 9, 2016); *see also* Reply Comments of Comcast Corporation at 10, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Aug. 9, 2016) ("[T]he record abounds with evidence that cable providers' Ethernet over-HFC ("EoHFC") products have only modest competitive significance in today's marketplace."); Comments of Comcast Corporation at 31, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016) ("Comcast June 28 Comments") ("The vast majority of businesses seeking Ethernet services demand full carrier-grade performance and SLAs that EoHFC cannot provide.").

[54] *See* Sprint March 22 Ex Parte at 14-15; Windstream March 27 Ex Parte at 14-16.

[55] Draft Order ¶ 93 (describing the Commission's task as choosing from among the "vast differences of opinion among commenters on the current state of competition in the marketplace").

[56] Comments of the American Cable Association at 28, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016).

upgrade their networks to DOCSIS 3.1.[57] Thus, as Comcast concluded, EoHFC "represents a very small segment of the market with little potential for significant growth."[58]

In fact, the business constraints on EoHFC are so strong that even *current* volumes may be unsustainable. Just last month, *Charter suspended its EoHFC service altogether*—canceling, across more than 40% of the country, a product the *Draft Order* claims is a harbinger of ubiquitous BDS competition country. The Commission cannot rationally conclude that HFC facilities discipline BDS rates *everywhere* given the substantial limitations on the cable industry's ability to grow EoHFC products (or even sustain current levels), and the fact that a cable provider's offering of EoHFC services to one business customer precludes offering the same product to other nearby customers.

Second, the Commission depends on the unsupported belief that best-efforts broadband facilities, which it has found to be outside the BDS product market, "can be and are being repurposed to provide business data services."[59] This novel and untested theory of whether "repurposed" HFC facilities provide ubiquitous BDS competition was not described in the *Order and Further Notice*, is entirely unsupported by the record, and is inconsistent with the Commission's product market analysis. The single source of evidence relied upon by the *Draft Order*—a single paragraph from a March 13, 2017 Comcast ex parte with no supporting declarations—does not even begin to suggest that HFC connections are being "repurposed to provide" BDS. To the contrary, the ex parte states that even in areas where a cable operator has built fiber from the headend to the last node on its network, and Comcast makes no claim that it has achieved this level of fiber penetration throughout its franchise areas, Comcast would still have to build a new *fiber* lateral to the customer location in order to provide a BDS product—a "capital-intensive construction project[]" that would be subject to the same "evaluation of incremental investment opportunities" conducted by any BDS provider.[60] Comcast provides no indication of how often, when, where, and under what conditions its investment evaluation would support building out to serve a new, low-bandwidth BDS customer, and therefore provides no evidence for the CMT's assumption that "a cable company competes for any BDS demand, or will do so within a few years, wherever it is supplying mass market broadband services over its own network, or will do so sometime over the next few years."[61]

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[57] Comments of Cox Communications, Inc. at 4, 17, WC Docket Nos. 16-143, 05-25 (filed June 28, 2016).

[58] Comcast June 28 Comments at 31 (Ethernet over HFC "represents a very small segment of the market with little potential for significant growth.").

[59] *Draft Order* ¶ 31.

[60] Letter from Matthew A. Brill, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143, 15-247, 05-25 (filed Mar. 13, 2017).

[61] *Draft Order* ¶ 113.

For these same reasons, CenturyLink's unsupported assertion that "cable companies also use their HFC plant to deploy even faster Ethernet speeds to some commercial locations by constructing all-fiber last mile facilities to those locations"[62] also fails to support the CMT's second prong and the *Draft Order*'s theory that HFC "repurposing" will produce ubiquitous cable competition. CenturyLink does not suggest that cable providers have achieved fiber penetration to the last node throughout their networks, and, in any event, a fiber build would still be necessary to reach a new customer location. CenturyLink provides no evidence to support the claim that such builds are generally cost-justified—a claim that, as discussed above, Comcast flatly contradicts.

Use of Form 477 Data. The second prong of the CMT also relies on the use of Form 477 data in a way that was not proposed by the Commission, and that would be arbitrary on its face given the known inaccuracies of the Form 477 data set.

First, the *Order and Further Notice* did not propose the use of Form 477 data to conduct a CMT. If the Commission wants to use Form 477 data, it should make that proposal and allow comment on the proper test (one that, perhaps, accounts for buildout distances).

Second, the use of Form 477 data would be arbitrary. As the Commission itself has recognized, Form 477 data "may overstate the deployment of services throughout an area" by "indicat[ing] that the services are offered to Americans residing within the census block even if services are offered only to a portion of the residents residing in that census block."[63] Nonetheless, the FCC attempts to craft a new factual finding by claiming it can "infer the presence of cable network facilities" throughout a census block because of cable providers' "locally ubiquitous networks."[64] However, as explained above,[65] even if the Commission could

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[62] *See* Letter from Bryan N. Tramont, Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143, 15-247, 05-25 & RM-10593 (filed Apr. 12, 2017) ("CenturyLink Apr. 12 Ex Parte").

[63] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, FCC 16-6, 31 FCC Rcd. 699, 730 ¶ 75 n.234 (2016); Federal Communications Commission, Wireless Telecommunications Bureau, *Working Toward Mobility Fund II: Mobile Broadband Coverage Data and Analysis* ¶ 21 (Sept. 30, 2016), https://ecfsapi.fcc.gov/file/09302412817453/DOC-341539A1.pdf (noting that the centroid method may "overstate coverage in certain blocks, especially in large or irregularly shaped blocks" (internal citation omitted)).

[64] *Draft Order* ¶ 128.

[65] *See supra* notes 47-61 and accompanying text.

reasonably conclude that cable operators could extend their networks to all locations in a census block, it would have no basis to also conclude that those networks can be used to provide *BDS*.

Failure to account for industry consolidation and worsening competitive conditions. As discussed above, the *Draft Order*'s analysis of nationwide competitive trends arbitrarily ignores recent and pending merger and acquisitions involving a number of major industry players. Furthermore, the *Draft Order*'s CMT apparently will not account for these recent transactions when separating competitive from non-competitive counties. Given the imminent industry consolidation set to occur this year, there is no rational basis for the Commission to count a Level 3 location in CenturyLink's incumbent territory as being served by a competitor when applying the first prong of the CMT. The same reasoning applies to locations served by XO Communications in Verizon's incumbent territory.

Failing to address recent mergers and acquisitions highlights a second arbitrary feature of the *Draft Order*'s CMT. Under the CMT, "once a county is treated as competitive, it will not be retested."[66] Yet the Commission will continue to "review Form 477 data on a regular three-year basis [to] determine whether any additional regulated counties meet the 75 percent threshold."[67] As a result, the CMT would function as a one-way ratchet that only works against purchasers of broadband services. It would require FCC staff and industry to devote resources to a recurring testing procedure that would only provide further relief to incumbents, while arbitrarily foreclosing relief to customers even in areas that qualify as non-competitive under the *Draft Order*'s already under-inclusive criteria because of mergers or other developments that reduce actual or potential competition. This inconsistency alone arbitrarily tips the scale in favor of the incumbents. That is especially the case given the *Draft Order*'s curious and unsupported assumption that "it is unlikely that locations that were competitive . . . would become noncompetitive,"[68] which forms the exclusive basis for adopting a one-way CMT. The combinations likely to close *this year alone* demonstrate that this assumption is *already* wrong. Locations that the CMT would deem competitive have already become or will soon become non-competitive just because of these mergers, and other locations will almost certainly become non-competitive in the future. The Commission cannot craft policy based on a "sunk cost" theory of perpetual forward progress that has been disproven by the record, and that ignores the impacts of these recent and well-publicized transactions.

Internally inconsistent distance assumptions. Unlike the first prong of the CMT, the second prong does not factor in the distance between a BDS customer and the location (if any) where a cable provider actually provides service to the BDS customer. The omission of a consistent proximity requirement alone makes the second prong arbitrary.

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[66] *Draft Order* ¶ 146.

[67] *Id.* ¶ 145.

[68] *Id.* ¶ 146.

Grandfathering areas improperly deregulated. The *Draft Order* would arbitrarily "grandfather" counties in which the ILEC has received Phase II pricing flexibility even if those counties would be deemed noncompetitive under the new CMT.[69] As the *Draft Order* notes, this decision means that customers in *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** locations across 98 counties would be left without protections to ensure just and reasonable rates even though the Commission has concluded that there is insufficient competition. The only rationale offered in the *Draft Order* for this decision is the observation that "[b]ringing these services back into price caps would require that incumbent LECs revamp their billing, information technology, and third-party management systems, at significant cost."[70] But temporary inconvenience to regulated entities cannot be the reason not to implement protections that the Commission has concluded are necessary to ensure just and reasonable prices. This rationale is especially arbitrary in the BDS context because the major impetus for this entire rulemaking was the Commission's concern that the prior framework (i.e., that which produced the Phase II relief) overstated the extent of competition.[71]

Investment incentives. The *Draft Order* rests much of its decision to accept the outcome of under-regulation of BDS in non-competitive areas on the assumption that regulation "directly raises incumbent's costs, making them unwilling to invest, and hence less effective competitors[.]"[72] The *Draft Order* does not recognize, however, that the DS1 and DS3 services it seeks to deregulate are fully depreciated legacy services. This creates a substantial risk of *under*investment by incumbents in the case of under-regulation. As Sprint has explained, the ability of incumbents to charge supracompetitive rates for legacy networks in the vast majority of locations where an incumbent DS1 or DS3 connection is the only option available to a BDS customer *discourages* investment in new, more efficient, fiber-based facilities.[73] Indeed, before it entered into an agreement to be acquired by Verizon, XO Communications confirmed that Ethernet BDS connections are commonly unavailable in locations served by an incumbent only, even when customer demand for such services exists, which suggests that incumbents underinvest in packet-based services in many locations.[74] At a minimum, if the Commission

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69 *See id.* ¶ 156.

70 *Id.* ¶ 174.

71 *See Special Access for Price Cap Local Exchange Carriers*, Report and Order, FCC 12-92, 27 FCC Rcd. 10,557, 10,573 (2012).

72 *Draft Order* ¶ 122.

73 *See* Letter from Paul Margie, Counsel to Sprint, to Marlene H. Dortch, Secretary, FCC, at 6-7, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed Nov. 9, 2016) ("Sprint November 9 Ex Parte").

74 *See* Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking at 17-18, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016).

wishes to pursue this theory, it should explain its reasoning in greater detail and seek comment on the theory's application to the services that are the subject of its *Draft Order*.

III. The *Draft Order*'s Complete Deregulation of Transport Services Has Not Been Noticed and Would be Arbitrary on This Record.

The *Draft Order* would eliminate existing regulation of all TDM transport services based on its conclusion that "competition for TDM transport services is sufficiently pervasive at the local level to justify relief from pricing regulation nationwide."[75]

As an initial matter, the Commission never proposed to take the step of transport deregulation. As the ILECs admit, the *Order and Further Notice* "barely discusses transport,"[76] and certainly did not propose a method for determining whether and where transport competition is adequate to discipline incumbent rates, terms, and conditions. To the contrary, Dr. Rysman's analysis, which was the focus of the *Order and Further Notice*, did not separate transport from channel termination services when evaluating competition, and instead evaluated the marketplace at the level of the full BDS circuit.

Second, eliminating price caps for transport services on a nationwide basis, rather than based on the *actual* presence of transport competition in a particular area or along particular transport routes, would be arbitrary. An ILEC's market power over channel termination extends to the transport service between that ILEC's end office where the channel termination is located and a competitive provider's interconnection point, unless a competitive provider has collocated in that specific ILEC end office and that competitor can obtain a cross-connect to connect its collocated equipment to the ILEC channel termination.[77] The Commission already has concluded that a CMT is necessary to determine where competition sufficiently disciplines incumbent rates, terms, and conditions for the purpose of regulating channel terminations, and the record contains no support for deviating from that conclusion with respect to transport.

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[75] *Draft Order* ¶¶ 88-89.

[76] Letter from James P. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, at 9, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed Mar. 13, 2017); *see also* Letter from Russell P. Hanser, Counsel to CenturyLink and Frontier, to Marlene H. Dortch, Secretary, FCC, at 17, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593 (filed Mar. 20, 2017) ("[N]either the original NPRM nor the analysis by the Commission's expert, Dr. Marc Rysman, contains any meaningful discussion of transport . . . .").

[77] Windstream Mar. 27 Ex Parte at 24-25. Thus, contrary to CenturyLink's suggestion, *see* CenturyLink Apr. 12 Ex Parte at 5-6, the presence of competitive fiber networks in metro areas does not imply that there are competitive alternatives to the ILEC transport service *between* the ILEC end office and the interconnection point on the competitive provider's network.

Third, the inappropriate evidence on transport relied upon by the Commission is arbitrary, and underscores the importance of addressing transport deregulation in a subsequent notice of proposed rulemaking. The *Draft Order*'s primary support for its finding of nationwide transport competition is that a significant percentage of BDS customer locations are located within a half mile of competitive fiber transport, according to calculations the Commission performed after release of the *Order and Further Notice*.[78] But the distance between a customer location and a transport connection is entirely irrelevant to the question of whether that customer has access to competitive transport facilities. By definition, transport services carry traffic to and from an end office, not to and from a customer location. In any case, the Commission does not explain why this percentage justifies nation-wide deregulation rather than targeted deregulation for relevant geographic markets or transport routes. If the Commission's logic relies on additional steps that may explain the connection between this evidence and the *Draft Order*'s finding of nationwide transport competition, the Commission should explain those steps, and seek comment on them, in a further notice.

Fourth, the Commission does not address the record's evidence that ILECs currently charge more for transport services in areas where they are unregulated, and that this premium is even greater for transport than it is for channel terminations.[79] Nor does it address the constraints described on the record limiting the ability of BDS purchasers to take advantage of non-ILEC transport facilities even where available along the relevant interoffice route.[80]

Indeed, the slim body of evidence addressing the *Draft Order*'s sweeping deregulatory findings reveals that the Commission has simply shifted the burden in favor of deregulation in a manner prohibited by the Communications Act. The forbearance on transport services that would be implemented under the *Draft Order* must be supported by evidence establishing that the Act's statutory requirements have been met.[81] In short, the lack of a robust record on transport competition provides a reason to study the matter openly and transparently—not to drastically upend the status quo as the Commission appears set to do according to the *Draft Order*.

IV. Release of the Draft Order Has Not Cured the Commission's Breach of its Notice-and-Comment Obligations

The Commission appears to believe that simply releasing a draft of the order, with only two weeks for analysis prior to a final vote, excuses it from normal administrative procedures. But that simply is not the case. Sprint and Windstream urge the Commission to recognize the harm the Commission's abbreviated procedure has caused to the companies and their ability to participate meaningfully in this proceeding. As explained above and in Sprint and

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[78] *See Draft Order* ¶ 89.

[79] *See* Sprint November 9 Ex Parte at 5.

[80] *See id.* at 3-4.

[81] *See* 47 U.S.C. § 160.

Windstream's prior filings,[82] the *Draft Order* departs dramatically from the findings and proposals described in the *Order and Further Notice*. Yet the release of the *Draft Order* does not substitute for the notice of proposed rulemaking that the APA requires the Commission to release. The *Draft Order* was not circulated to any other Commissioner, let alone voted on, prior to release, was not published in the *Federal Register*, neither seeks nor permits adequate time for comment or input, and does not purport to *propose* any rule at all—all of which are essential procedural requirements under the Commission's own rules and the APA.[83] To make matters worse, the Commission made the *Draft Order* available for review in its entirety *in camera* only in its Washington D.C. headquarters.[84] In any event, the *Draft Order* was released far too close to the Sunshine period to give interested parties a meaningful opportunity to participate and to allow the Commission to develop the record it needs to support review of its decisions on appeal. This is especially the case in a proceeding of this scale and complexity—and given the Commission's radical departure from its past findings and proposals. As a result, neither Sprint nor Windstream has had a realistic opportunity to re-engage its economists and businesspeople to closely evaluate the merits of the Commission's new framework to effectively completely deregulate a *$45 billion annual marketplace*.

The Commission's rejection of requests to facilitate the evaluation of the CMT has further undermined the ability of companies like Sprint and Windstream to provide input on the *Draft Order*'s dramatic changes during this already compressed timeframe. The *Draft Order* builds a new CMT using a massive data set that no party has had a meaningful opportunity to evaluate for this purpose in the two weeks since it was announced, and the Commission has or will soon use that CMT to produce a list of counties where existing protections will be rolled back. The list of deregulated counties generated by the FCC's application of the CMT is critical to the ability of interested parties to understand the impact of the new rules, to evaluate the consumer, business, and competition characteristics of the affected counties, to ensure that the FCC's calculations and assumptions were correct, and to provide more informed submissions on potential revisions to the CMT that would better serve the public interest. Consequently, a group of affected parties requested that the Commission release its execution of the CMT and the resulting county list so they could meaningfully participate and comment on the Commission's new proposal.[85] The Commission, however, dismissed the industry's request to release the Commission's calculation of the results of the CMT, based on the claim that two weeks provided enough time for the parties' lawyers and consultants to generate completely new studies and

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[82] *See* Sprint March 22 Ex Parte at 25-30; Windstream March 27 Ex Parte at 1-2.

[83] *See* 47 C.F.R. § 1.412; 5 U.S.C. § 553.

[84] *See Wireline Competition Bureau Announces Process to Access Unredacted Version of Proposed Business Services Report and Order*, Public Notice, DA 17-301, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593, at 2 (Wireline Comp. Bur. rel. Mar. 30, 2017).

[85] *See* Letter from Chip Pickering, CEO, INCOMPAS, to Chairman Ajit Pai, FCC, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593 (filed Apr. 3, 2017).

results on their own, advise their clients, and advise the Commission of the real-world impact of the new rules.[86]

This is not the case. First, as discussed above, an unannounced and unexpected two-week period to review a proposed new CMT, which was not published in the Federal Register, does not provide parties with a reasonable opportunity to engage economists and conduct large data analyses to reproduce the county list that the FCC has produced inside the agency. Second, even if reproducing the analysis in the applicable timeframe were possible, it would not allow parties to determine if the *FCC's* execution of the CMT correctly applied the data. The need for such analysis is especially critical given the CMT's one-way operation, as the *Draft Order* states that once the FCC designates a county as competitive, there is no streamlined process for reversing that designation.

The FCC's General Counsel, in dismissing the request to publish the agency's work, asserted, without a reasoned legal analysis, that "[t]he rules and procedures governing the public release of such information preclude the Commission from releasing it this week pursuant to your request. As a result, doing so would violate the Trade Secrets Act."[87] It is unclear how that could be the case given the nature of information that would be included in a simple list of counties, especially considering that the list would combine counties derived from a CMT that uses both (1) locations supplied under a protective order and (2) Form 477 data that is *not* subject to a protective order, while masking which data source caused each county to appear on the list. But even if the Commission's unexplained Trade Secrets Act analysis were correct, the appropriate response is not to comply with one federal statute by violating the letter and spirit of another—here, the APA. It is to complete the procedures necessary to release the list publically—which it must do at some point in order for the proposed rules to function as intended—and to make its analysis available to parties for review and replication before adopting final rules that depend so heavily on these county-level determinations.

Thus, on the current path, the Commission risks violating bedrock notice-and-comment requirements on a proceeding of extreme public importance. Yet with a modest pause that the history of this proceeding will judge as mercifully brief, the Commission can make the process of FCC decision-making more open and transparent. By doing so, the Commission can give American businesses the opportunity they deserve to provide meaningful input on the Commission's sweeping new proposal—while improving the likelihood of the Commission's success on appeal. Sprint and Windstream urge the Commission to follow the procedural norms required of federal agencies seeking to adopt a shift in policy of the magnitude contemplated in the *Draft Order*.

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[86] *See* Letter from Brendan Carr, General Counsel, FCC, to Chip Pickering, CEO, INCOMPAS, at 2, WC Docket Nos. 05-25, 16-143, GN Docket No. 13-5, RM-10593 (filed Apr. 7, 2017).

[87] *Id.* at 1.

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As demonstrated above, the Commission's eleventh-hour reversal of its recent findings and proposals is unsupported by the record and will do real and permanent damage to businesses across the country. The Commission should seek comment on any new proposals and on reversals of previous findings, in order to craft evidence-based, properly noticed, and reasoned decisions. At a minimum, the Commission should reduce some of the deficiencies of the *Draft Order* by using a more appropriate distance in the first prong of the CMT, eliminating the second prong of the CMT, and deferring consideration of transport regulation.

Importantly, if the Commission chooses to move forward with the framework described in the *Draft Order*, it should provide customers with enough time to adjust to the sweeping changes to the marketplace that the framework would impose. Sprint and Windstream depend on access to BDS to provide wireline broadband services to business customers and wireless services to consumers in all sectors. The price increase for BDS inputs that would result from deregulation could impact Sprint and Windstream's current business operations severely, as well as plans for further investment that have been years in the making. Smaller businesses, including community banks, local franchises, and rural healthcare clinics that are perhaps more reliant on DS1 and DS3 services, and that must buy BDS for many locations, would also be heavily affected. The *Draft Order*'s commitment to reducing "regulatory certainty" cannot just account for the impact on incumbents.[88] It must account for the impact on the incumbents' customers as well.

To provide companies with enough time to manage these impacts, and to pursue the medium-term competitive alternatives that the *Draft Order* suggests will soon develop, the Commission should adopt a three-year transition period for new rules, as discussed in recent filings.[89] The length of this period is consistent with the *Draft Order*'s reliance on the development of competition in the future as a reason to deregulate today. And it would provide Sprint, Windstream, and other BDS customers the opportunity to spur the competitive investment that the Commission seeks to unleash with its proposal.

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[88] *Draft Order* ¶ 278.

[89] *See* Letter from Karen Reidy, Vice President, Regulatory Affairs, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593 (filed Apr. 11, 2017); Letter from John Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket No. 05-25, RM-10593 (filed Apr. 11, 2017).

Sincerely,

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