Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks	)	WC Docket No. 18-141
	)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	)	WC Docket No. 17-144
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25

COMMENTS OF CENTURYLINK

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TABLE OF CONTENTS

Page

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	)	
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COMMENTS OF CENTURYLINK

CenturyLink, Inc.[1] hereby files these comments in response to the Wireline Competition Bureau's Public Notice seeking focused comment on certain overlapping issues in the price cap Business Data Services (BDS) and USTelecom Forbearance Petition proceedings.[2]

I. INTRODUCTION AND SUMMARY

The Public Notice highlights the degree to which these dockets are intertwined. In each proceeding, the Commission is addressing, among other things, whether price deregulation of ILEC-provided DS1 and DS3 services is warranted, given intense competition from and rapid migration to competitors' facilities-based alternatives. In the BDS context, these ILEC services

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[1] This submission is made by and on behalf of CenturyLink, Inc. and its wholly owned subsidiaries.

[2] *Wireline Competition Bureau Seeks Focused Additional Comment in Business Data Services and USTelecom Forbearance Petition Proceedings and Reopens Secure Data Enclave*, WC Docket Nos. 18-141, *et al.*, Public Notice, DA 19-281 (WCB Apr. 15, 2019) (Public Notice), 84 Fed. Reg. 17371 (Apr. 25, 2019).

are sold as "end user channel terminations" and "interoffice transport," which historically were tariffed and governed by price cap regulation. Pursuant to Section 251(c)(3) and the Commission's unbundling rules, ILECs sell comparable services as "unbundled loops" and "unbundled transport," provided via interconnection agreements and priced at TELRIC. Regardless of what they are called or how they are priced, these services are functionally identical and can be used interchangeably, as they often are. As a result, the Commission's findings with respect to DS1 and DS3 services in the BDS proceeding are directly relevant, and potentially determinative, in the USTelecom Forbearance Petition proceeding. In areas where the Commission has determined that price cap regulation of BDS TDM end user channel terminations or transport is unnecessary and unwarranted, for example, it is difficult to understand how it could be "necessary," as defined in Section 10, for the ILEC to provide access to functionally identical services at much lower TELRIC rates.

In the *BDS Order*, the FCC concluded that price cap carriers' TDM transport services are subject to sufficient competition to be exempted from ex ante pricing regulation on a nationwide basis,[3] as 92.1 percent of buildings with BDS demand in price cap territories were located within a half mile of competitive fiber transport facilities by 2013.[4] Competition for TDM transport services has only accelerated since then, as CenturyLink and other price cap carriers have demonstrated in the BDS Remand proceeding. Cable companies have evolved from new entrants to established providers of BDS, focused on expanding their fiber networks and increasing the capability of their ubiquitous HFC networks. Fiber-based CLECs, such as Zayo,

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[3] *Business Data Services in an Internet Protocol Environment*, WC Docket Nos. 16-143 *et al*., Report and Order, 32 FCC Rcd 3459, 3500-02 ¶¶ 90-92 (2017) (*BDS Order*), *remanded in part sub nom., Citizens Telecomms. Co. of Minn., LLC v. FCC*, 901 F.3d 991 (2018), *mandate stayed until* Nov. 12, 2019 (Order, 8th Cir. Nov. 9, 2018) (Nos. 17-2296 *et al*.) (*Stay Order*).

[4] *BDS Order*, 32 FCC Rcd at 3501 ¶ 91.

also have increased their BDS revenues and significantly expanded their fiber networks. This competition is largely driven by the continuing migration from price cap carriers' TDM services to Ethernet and, increasingly, dark fiber, which is available from cable companies, CLECs, infrastructure providers, and via self-provisioning.[5] These trends have eliminated any market power price cap carriers once possessed over their TDM transport services.

The Commission has now supplemented the record in the BDS proceeding with the April Data Tables, which show that about 78 percent of verified ILEC wire centers are a half mile or closer to competitive fiber and/or buildings with a competitive connection, and the majority are even closer to competition.[6] These tables confirm that competitors can connect to the vast majority of ILEC central offices, and particularly those with meaningful demand for business services, to supplement their own competitive networks.[7] The data thus directly rebut the CLECs' unsupported arguments that the Commission lacks an adequate record in the BDS Remand proceeding to maintain the *BDS Order*'s nationwide forbearance from ex ante pricing regulation of price cap carriers' TDM transport services.[8] That is especially the case given that the April Data Tables dramatically understate competition for these services, as cable companies

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[5] *See* Comments of CenturyLink, WC Docket Nos. 17-144, 16-143, 05-25, at 8-12 (filed Feb. 8, 2019) (CenturyLink BDS Remand Comments). *See also* Comments of AT&T, WC Docket Nos. 17-144, 16-143, 05-25, at 6-11 (filed Feb. 8, 2019); Reply Comments of AT&T, WC Docket Nos. 17-144, 16-143, 05-25, at 5-9 (filed Mar. 11, 2019); Comments of Verizon, WC Docket Nos. 17-144, 16-143, 05-25, at 2 (filed Feb. 8, 2019); Reply Comments of Verizon, WC Docket Nos. 17-144, 16-143, 05-25, at 1 (filed Mar. 11, 2019).

[6] Declaration of Glenn Woroch and Robert Calzaretta in Support of USTelecom Petition for Forbearance at 2 (Woroch/Calzaretta Declaration), attached to Letter from Patrick R. Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed May 6, 2019) (USTelecom May 6, 2019 Ex Parte).

[7] *See* USTelecom May 6, 2019 Ex Parte at 11.

[8] *See, e.g.*, Comments of Sprint Corporation, WC Docket Nos. 17-144, 16-143, 05-25, at 2-9 (filed Feb. 8, 2019); Comments of Incompas, WC Docket Nos. 16-143, 05-25, at 4-13 (filed Feb. 8, 2019).

and other competitors frequently bypass ILEC networks entirely, eliminating the need for them to connect to ILEC wire centers to reach end-user customers.[9] Indeed, the Form 477 data submitted by USTelecom confirm this fact, showing that, as of December 2017, nearly 90 percent of the U.S. population and 90 percent of households had access to cable services with at least 25 Mbps download speeds.[10]

Given this compelling data on ILEC transport, the Commission should adopt its proposal in the BDS proceeding to continue to exempt price cap carriers' TDM transport BDS from ex ante pricing regulation on a nationwide basis. Likewise, in the USTelecom Forbearance Petition proceeding, the Commission should forbear on a nationwide basis from Section 251(c)(3) and the Commission's rules requiring price cap carriers to provide DS1 and DS3 transport at TELRIC rates.

The Commission also must apply similar consistency in its treatment of price cap carriers' DS1 and DS3 end user channel terminations and unbundled loops. While nationwide relief from all loop unbundling requirements is warranted, as USTelecom has demonstrated, the Commission must, at a minimum, forbear from requirements to unbundle DS1 and DS3 loops in any county in which it has eliminated ex ante pricing regulation of DS1 and DS3 end user channel terminations. Simply put, the considerations that led the Commission to eliminate price cap regulation of DS1 and DS3 end user channel terminations in these counties require the Commission to forbear, pursuant to Section 10, from price cap carriers' obligation to sell functionally-equivalent unbundled DS1 and DS3 loops at even lower TELRIC rates. In addition, the Commission should eliminate these unbundling requirements in census blocks in which cable

[9] CenturyLink BDS Remand Comments at 7; USTelecom May 6, 2019 Ex Parte at 11.

[10] Woroch/Calzaretta Declaration at 3-4; USTelecom May 6, 2019 Ex Parte at 4-5.

companies are offering download speeds of at least 25 Mbps, as reflected in the most recent Form 477 data.[11]

II. INTENSE FACILITIES-BASED COMPETITION JUSTIFIES NATIONWIDE RELIEF IN BOTH THE BDS REMAND AND USTELECOM FORBEARANCE PROCEEDINGS.

The 2015 Data Collection confirmed that price cap carriers' business data services, including interoffice transport and DS1 and DS3 end user channel terminations, were subject to substantial competition in 2013, even without fully accounting for cable providers' dramatic growth in enterprise services. That competition has only accelerated.

In the *BDS Order*, the Commission found that price cap carriers' TDM BDS, and especially low-capacity DS1s and DS3s, has been eclipsed by packet-based services, which BDS purchasers clearly view as a competitive substitute.[12] This growth in packet-based services has fueled competitive investment. By 2013, competing transport networks were nearly ubiquitous. Competitors had deployed competing transport networks to 95% of census blocks with BDS demand, collectively containing 99% of business locations.[13] Indeed, 92% of locations with BDS demand were within a half mile of competitive transport facilities, excluding HFC facilities.[14] A number of major markets had as many as 28 competitive transport providers.[15] This competitive entry had occurred despite the fact that the bulk of price cap carriers' BDS transport and a

[11] As explained by USTelecom, the Commission must at the very least forbear from unbundling requirements where there is demonstrable evidence of facilities-based competition. *See* USTelecom May 6, 2019 Ex Parte at 2.

[12] *See BDS Order*, 32 FCC Rcd at 3472, 3490 ¶¶ 26, 68.

[13] *Id.*, 32 FCC Rcd at 3496 ¶ 79.

[14] *Id.*, 32 FCC Rcd at 3501 ¶ 91.

[15] *Id.*, 32 FCC Rcd at 3496-97 ¶ 79.

significant portion of their DS1 and DS3 end user channel terminations had been free from price cap regulation since the early 2000s.[16]

Yet, as the Commission recognized in the *BDS Order*, the 2015 Data Collection provided an overly conservative view of BDS competition, by failing to fully account for cable providers' HFC deployment.[17] That assessment of competition is even more underinclusive today. Over the past six years, cable providers have evolved from new entrants to established providers of BDS. According to a recent Atlantic-ACM report, "[c]able companies are leveraging [their] ubiquitous HFC and rapidly expanding fiber networks to gain share in the Wholesale Wireline access market."[18] The report notes that cable companies already "can offer gigabit or better service in 66% of their footprint."[19] All major cable companies are focused on expanding their network footprints and speed offerings, and Comcast, Cox, and other cable companies are working to increase the capacities of their Ethernet over HFC offerings.[20] The result is rapid growth in cable providers' wireline revenues. Collectively, cable providers are expected to grow from a 36.4% share of wireline revenues in 2017 to a 48.1% share by 2023, "as they deploy fiber, benefit from DOCSIS 3.1, and gain traction in Business and Wholesale markets."[21] These trends will only continue, with cable providers "expected to see share gains across markets, with continued expansion and upgrades of fiber and HFC footprint and focus on growing business and

[16] *BDS Order*, 32 FCC Rcd at 3496 ¶ 79.

[17] *Id.*, 32 FCC Rcd at 3501 ¶ 91.

[18] Atlantic-ACM, *U.S. Telecom Wireline and Wireless Sizing and Share Forecast: 2018-2023* (Oct. 2018), at 80 (*Atlantic-ACM 2018-2023 Forecast*).

[19] *Id.* at 17. As noted by USTelecom, the large cable companies intend to deploy gigabit services across most or all of their residential and business footprints. USTelecom May 6, 2019 Ex Parte at 5 & n. 24.

[20] *See Atlantic-ACM 2018-2023 Forecast* at 80.

[21] *Id.* at 24.

wholesale traction[.]"[22] For wireline business services, Atlantic-ACM projects that cable companies' collective market share will grow from 19.7% to 30.7% between 2017 and 2023.[23] Cable's share of business broadband revenues is expected to grow from approximately 63 to 71% during this period, benefiting from DOCSIS 3.1 rollouts and network expansions.[24] For business data transport services, cable companies "are forecast, collectively, to pick up 6.3% additional market share from 2017 to 2023, driven by competitive pricing and a growing ability to meet the needs of larger organizations[.]"[25]

Of course, cable companies are not the only alternatives to the price cap carriers' BDS. Fiber-based CLECs, such as Zayo, continue to increase their share of BDS revenues.[26] According to Atlantic-ACM, "CLECs are aggressively expanding their footprints via network builds or M&A while ILECs are attempting to remain competitive by making major investments to prepare their networks for 5G[.]"[27] For example, Verizon is deploying fiber in 50 markets outside its ILEC footprint; Zayo and Windstream announced or completed 2,000 and 1,700 mile fiber builds, respectively; Spectrum announced $1 billion in fiber network expansion in 2018,

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[22] *Atlantic-ACM 2018-2023 Forecast* at 27.

[23] *Id.* at 27, 132. Cable's expected market share gain of business wireline revenues will be "driven by less downside exposure to legacy products and their continued move up-market to [the] largest business customers[.]" *Id.* at 48.

[24] *Id.* at 53. Cable companies, as well as certain other competitors such as Cogent, also have an opportunity to gain market share for business dedicated Internet access (DIA) services, with differentiation for those services predominately driven by pricing. *See id.* at 54.

[25] *Id.* at 60.

[26] *See id*. at 148.

[27] *Id.* at 45.

adding about 50 on-net buildings a day on average; and AT&T announced the addition of three million home and business locations to AT&T fiber in 2018.[28]

As the Commission recognized in the *BDS Order*, this competition is largely being driven by the ongoing migration away from price cap carriers' legacy TDM services to higher capacity packet-based services.[29] According to Atlantic-ACM, revenues for business Internet access are forecast to grow at compound annual growth rates of 3.5% from 2017 to 2013, "driven by a seemingly insatiable demand for bandwidth by Business end users[.]"[30] During this same period, legacy transport is forecast to decline from $3.2 billion to $1.2 billion.[31] Cable and fiber-centric CLECs also will continue to take market share from ILECs for wholesale wireline services.[32]

CenturyLink has experienced these trends as both a BDS seller and purchaser. Between 2015 and 2018, CenturyLink's ILEC revenues for TDM-based BDS of DS3 capacity and below declined by one third. Its revenues for TDM transport of the same capacities dropped 9% annually during this period. In addition to these ILEC operations, CenturyLink competes aggressively in other price cap carriers' incumbent service areas, in part, through its former Level 3 affiliate. That affiliate purchases from more than 100 non-ILEC providers, with those purchases making up more than half of its third-party BDS purchases. Between 2015 and 2018, CenturyLink's procurement of TDM-based transport at DS3 capacity and below from

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[28] *Atlantic-ACM 2018-2023 Forecast* at 45.

[29] *BDS Order*, 32 FCC Rcd at 3490-91 ¶ 68.

[30] *Atlantic-ACM 2018-2023 Forecast* at 15, 46 ("While price competition [for this service] remains fierce, continued increases in fiber availability from both LECs and Cable companies will offset pressure driving average ARPU up as businesses buy higher end services[.]") *Id.*

[31] *Id.* at 16.

[32] *Id.* at 92. From 2017 to 2023, cable companies' combined market share will increase from 8.7 to 15.3% and CLECs' combined share from 15.7 to 18.9%. *See id.*

unaffiliated providers fell an average of 10% annually. During this period, CenturyLink's Ethernet purchases grew substantially, and its purchase of dark fiber transport increased dramatically, almost exclusively through arrangements with cable companies and CLECs.

III. NATIONWIDE RELIEF IS ALSO JUSTIFIED BY THE APRIL DATA TABLES AND THE COMMISSION'S FORM 477 DATA.

USTelecom's recent ex parte submission further confirms that nationwide relief is warranted in both the BDS Remand and USTelecom Forbearance Petition proceedings. In that filing, USTelecom submitted an analysis of the Commission's April Data Tables showing that approximately 78 percent of verified ILEC wire centers are a half mile or closer to competitive fiber and/or buildings with a competitive connection, and the majority are even closer to competition.[33] These tables confirm that competitors can connect to the vast majority of ILEC central offices, and particularly those with meaningful demand for business services, to supplement their own competitive networks.[34] The data thus directly rebut the CLECs' unsupported arguments that the Commission lacks an adequate record in the BDS Remand proceeding to maintain the *BDS Order*'s nationwide forbearance from ex ante pricing regulation of price cap carriers' TDM transport services.[35] That is especially the case given that the April Data Tables dramatically understate competition for these services, as cable carriers and other

[33] Woroch/Calzaretta Declaration at 2.

[34] *See* USTelecom May 6, 2019 Ex Parte at 11.

[35] *See* note 8, *supra*; *and see* Ex Parte letter from Thomas Jones, (Granite Telecommunications, LLC, Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, and Access One, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed Nov. 8, 2018); Comments of CalTel, WC Docket No. 18-141, Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks (filed Aug. 6, 2018).

competitors frequently bypass ILEC networks entirely, eliminating the need for them to connect to ILEC wire centers to reach end user customers.[36]

USTelecom's ex parte submission also includes an analysis of recently released Form 477 data showing that, as of December 2017, nearly 90 percent of the U.S. population and 90 percent of households had access to cable services with at least 25 Mbps download speeds.[37] This Form 477 data provides additional justification for the nationwide unbundling relief sought by USTelecom. Similar to the Form 477 data the Commission used, in part, to identify "competitive" and "noncompetitive" counties, the more recent Form 477 data show that cable companies offer nearly ubiquitous fiber-based alternatives to the ILECs' DS1 and DS3 services, whether provided as BDS or UNEs, that bypass the ILECs' networks altogether.

IV. AT A MINIMUM, THE COMMISSION MUST FORBEAR FROM UNBUNDLING REQUIREMENTS ANYWHERE IT HAS ELIMINATED EX ANTE PRICING REGULATION OF CORRESPONDING BUSINESS DATA SERVICES.

The record in the USTelecom Forbearance Petition proceeding fully supports the nationwide relief USTelecom seeks from all unbundling requirements. However, if the Commission does not grant the entirety of this relief, it must, at a minimum, forbear from unbundling requirements for DS1 and DS3 transport and loops anywhere it has eliminated ex ante pricing regulation of DS1 and DS3 interoffice transport and end user channel terminations, respectively. Thus, the Commission at the very least must eliminate the requirement for price cap carriers to provide unbundled DS1 and DS3 transport on a nationwide basis and unbundled DS1 and DS3 loops in counties it deemed competitive in the *BDS Order*.

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[36] CenturyLink BDS Remand Comments at 7; USTelecom May 6, 2019 Ex Parte at 11.

[37] Woroch/Calzaretta Declaration at 3-4; USTelecom May 6, 2019 Ex Parte at 4-5. USTelecom also noted that "cable broadband deployment at higher speed tiers is rapidly growing and is available to similar portions of U.S. households at higher speed tiers." USTelecom May 6, 2019 Ex Parte at 5.

The only material differences between DS1/DS3 BDS and UNEs are how they are priced and how they are purchased and provisioned. Both groups of these circuit-based services are purchased primarily or exclusively by wholesale customers and used to serve end user business customers or other telecommunications providers. It is not unusual, for example, for a CLEC to switch from ordering a DS1 end user channel termination to an unbundled DS1 loop, or vice versa. From a functional standpoint, TDM BDS and UNEs thus are identical and interchangeable. This fact is confirmed by the similar definitions of these services in the Commission's orders and rules. For last-mile facilities, the Commission's rules define an end user channel termination as "[a] dedicated channel connecting a local exchange carrier end office and a customer premises, offered for purposes of carrying special access traffic[,]"[38] and a local loop network element as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."[39] The *BDS Order* defines "transport" to include "interoffice facilities,"[40] whereas the Commission's rules similarly define UNE "dedicated transport" to include "incumbent LEC transmission facilities between wire centers or switches owned by incumbent LECs[.]"[41]

Given these commonalities, the Commission's overarching policies and determinations in the *BDS Order* should apply with equal force in the UNE context. In the *BDS Order*, the Commission concluded that "intense competition" in the BDS marketplace warranted significant

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[38] 47 C.F.R. § 69.801(d).

[39] 47 C.F.R. § 51.319(a).

[40] *BDS Order*, 32 FCC Rcd at 3500 ¶ 90 n.288.

[41] 47 C.F.R. § 51.319(d)(1). Both the BDS transport and UNE dedicated transport definitions extend to ILEC facilities between ILEC switches and other carriers' switches, though the Commission's rules no longer require ILECs to unbundle such entrance facilities. *See BDS Order*, 32 FCC Rcd at 3500 ¶ 90 n.288; 47 C.F.R. §§ 51.319(d)(1), (d)(2)(i).

changes to the Commission's regulatory structure to "account[] for these dynamic competitive realities[]" and "create a regulatory environment that promotes long-term innovation and investment by incumbent and competitive providers alike[.]"[42] The Commission further recognized that ILECs' circuit-based DS1s and DS3s are becoming obsolete, as demand has shifted to higher capacity and more versatile packet-based alternatives.[43]

"Against this competitive backdrop," the Commission decided to "move away from the traditional model of intrusive pricing regulation for incumbent LECs, recognizing that ex ante pricing regulation is of limited use—and often harmful—in a dynamic and increasingly competitive marketplace[,]" and that the competition envisioned for BDS in the Telecommunications Act of 1996 (1996 Act) had largely been realized.[44] Importantly, this competition is facilities-based, rather than relying on the use of UNEs.[45] Based on this finding of competition, the Commission adopted a framework for regulating BDS based on its market analysis "and a careful balancing of the costs and benefits of ex ante pricing regulation that deregulates counties where the provision of price cap incumbent LECs' business data services is deemed sufficiently competitive."[46]

Reasoned decisionmaking requires the Commission to take a consistent approach between its widescale elimination of price cap regulation of DS1 and DS3 services in the *BDS Order* and its resolution of USTelecom's request to forbear from the requirement that price cap

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[42] *BDS Order*, 32 FCC Rcd at 3461 ¶ 1.

[43] *Id.*, 32 FCC Rcd at 3461-62 ¶ 3.

[44] *Id.*, 32 FCC Rcd at 3462-63 ¶¶ 4 (footnote omitted), 5.

[45] Indeed, the Commission explicitly excluded circuits provided using UNEs from its analysis of competition in BDS markets. *Id.*, 32 FCC Rcd at 3520 ¶ 132 n.401.

[46] *Id.*, 32 FCC Rcd at 3462 ¶ 4.

carriers' provide access to DS1 and DS3 facilities at TELRIC rates. Specifically, the Commission should forbear from unbundling of DS1 and DS3 UNEs in any area where it has eliminated ex ante pricing regulation of the corresponding BDS elements.

Such an outcome is fully consistent with Section 10's three-prong standard. USTelecom's request clearly satisfies the first prong of that standard, as the Commission's findings in the *BDS Order* confirm that DS1/DS3 unbundling is not necessary to ensure just, reasonable, and nondiscriminatory rates, terms, and conditions in any area in which the Commission has found that ex ante pricing regulation is not necessary for the corresponding business data service.[47] The second prong of that standard also is met, because DS1 and DS3 UNEs are rarely, if ever, used to serve residential customers, and the Commission has already determined that there is sufficient competition in these areas to protect purchasers of DS1 and DS3 services without maintaining ex ante pricing regulation of these services.[48] Also, importantly, the Commission's competitive findings in the *BDS Order* ignored the availability of UNEs and UNE-based competition.[49] Thus, as a matter of logic, counties found to be "competitive" in the *BDS Order* will still be competitive in the absence of DS1 and DS3 UNE loops, and DS1 and DS3 loops are not necessary to protect consumers, given the presence of that competition. And, with respect to third prong of Section 10, the Commission's in-depth competition and economic analysis in the *BDS Order*, finding that elimination of ex ante pricing

[47] *See* 47 U.S.C. § 160(a)(1) (requiring the Commission to consider whether enforcement of the regulation or provision is necessary to ensure that the charges, practices, classification, or regulations for the associated telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory).

[48] *See* 47 U.S.C. § 160(a)(2) (requiring the Commission to determine whether enforcement of the regulation or provision is necessary for the protection of consumers).

[49] *BDS Order*, 32 FCC Rcd at 3520 ¶ 132 n.401.

regulation would promote competition and investment by all providers,[50] demonstrates that forbearance from DS1/DS3 unbundling requirements in these areas is consistent with the public interest, as required by Section 10(a)(3) and 10(b).[51]

As to UNE DS1 and DS3 loops, the Commission, at minimum, should eliminate the requirement for price cap carriers to unbundle these facilities in counties deemed competitive pursuant to Section 69.803 of the Commission's rules.[52] The competitive market test used to identify those counties "assesses the availability of actual and likely competitive options in the provision of last-mile services and subjects to ex ante pricing regulation only circuit-based DS1 and DS3 end user channel terminations and certain other business data services provided by price cap incumbent LECs in areas the test finds lack a competitive presence[,]" and therefore is directly relevant to the determination whether unbundled DS1 and DS3 loops are "necessary," as defined in Section 10.[53] This "pragmatic" approach considers both "competitive conditions in the market" along with the Commission's policy objectives "to determine on balance which areas are best positioned to benefit from price deregulation and which areas will benefit more from continued price cap regulation."[54] Recognizing that "[e]x ante pricing regulation can have negative features[,]" the Commission sought to limit ex ante pricing regulation to areas where there appear to be few competitive alternatives for purchasers of DS1 and DS3 end user channel terminations, while eliminating such regulation in counties where entry is relatively widespread

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[50] *See BDS Order*, 32 FCC Rcd at 3460-61 ¶ 1, 3505-06 ¶¶ 100-02.

[51] *See* 47 U.S.C. § 160(a)(3) (requiring the Commission to determine whether the requested forbearance is consistent with the public interest); 47 U.S.C. § 160(b) (requiring the Commission to consider whether the requested forbearance will promote competitive market conditions).

[52] 47 C.F.R. § 69.803.

[53] *See BDS Order*, 32 FCC Rcd at 3503 ¶ 97.

[54] *See id.*, 32 FCC Rcd at 3505 ¶ 100.

to avoid regulated rates that could inadvertently be set below competitive levels and thereby harm long run incentives to invest.[55] This approach thus fully comports with the Commission's obligation under Section 10 to ensure that forbearance from these unbundling obligations is consistent with the public interest and promotes competitive market conditions.[56]

For UNE DS1 and DS3 transport, this means that the Commission should forbear nationwide from the requirement for price cap carriers to provide these UNEs, similar to the Commission's nationwide elimination of ex ante pricing regulation of price cap carriers' TDM transport in the *BDS Order* and proposal to adopt the same rule on remand in the *BDS Second Further NPRM*.[57] All the factors that led the Commission to eliminate ex ante pricing and tariff regulation of TDM transport in the *BDS Order* are equally relevant to unbundling of DS1 and DS3 transport. Aside from the Commission's detailed competitive analysis justifying nationwide action in the *BDS Order* and *BDS Second Further NPRM*, nationwide forbearance from unbundling of DS1 and DS3 transport is also supported by the *BDS Order*'s finding that maintaining ex ante pricing regulation of BDS TDM transport services in any area would discourage competitive entry and that increasing demand for these services would provide incentives for competitive providers to deploy additional transport facilities to compete for this demand.[58]

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[55] *See BDS Order*, 32 FCC Rcd at 3505 ¶ 101.

[56] *See* 47 U.S.C. §§ 160(a)(3), (b).

[57] *See BDS Order*, 32 FCC Rcd at 3501 ¶ 91; *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket Nos. 17-144 *et al*., Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, 33 FCC Rcd 10403, 10453-57 ¶¶ 147-56 (2018) (*BDS Second Further NPRM*).

[58] *See BDS Order*, 32 FCC Rcd at 3501-02 ¶ 92.

V. CONCLUSION

For all these reasons, the Commission should adopt its proposal in the BDS proceeding to continue to exempt price cap carriers' TDM transport services from ex ante pricing regulation on a nationwide basis. Similarly, the Commission should grant USTelecom's request to forbear from price cap carriers' unbundling obligations nationwide, and, in any case, must forbear from DS1 and DS3 unbundling any area in which it has eliminated ex ante pricing regulation for the corresponding business data services.

Respectfully submitted,

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