Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulation of Business Data Services for	)	
Rate-of -Return Local Exchange Carriers	)	WC Docket No. 17-144

COMMENTS OF AT&T

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I. INTRODUCTION

AT&T Services, Inc., on behalf of itself and its affiliates (collectively, "AT&T"), submits these comments in response to the Commission's April 17, 2018 Notice of Proposed Rulemaking.[1] The Commission initiated this NPRM in response to a petition filed by USTelecom and ITTA[2] requesting the Commission launch a rulemaking to allow "model-based" rate-of-return carriers to opt into the Commission's rules for price cap carriers' business data services (BDS).[3] Petitioners argued that the rate-of-return rules impose unnecessary cost burdens on their BDS that are not borne by competing CLECs and cable companies and limits their flexibility to respond to consumer needs. The NPRM proposes "to allow electing A-CAM carriers to convert their lower capacity TDM BDS offerings to an incentive regulatory approach modelled on the rules the Commission adopted for price cap carriers' lower speed BDS in noncompetitive areas, while still allowing such carriers to be subject to the switched access rate transition and the Eligible Recovery

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[1] *In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 17-144 (rel. April 18, 2018) ("NPRM").

[2] Petition of ITTA and USTelecom (filed May 25, 2017) ("*Petition*"). The Petition defines these "model-based" rate-of-return carriers as those either electing to receive broadband-only universal service support pursuant to amounts specified in the Alternative-Connect America Fund Cost Model (A-CAM) to support broadband and voice services or are otherwise affiliated with price cap carriers and receive support based on the Connect America Cost Model (CACM) or reverse auctions. (hereinafter "A-CAM Carriers"). *Petition at 2.*

[3] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al*., Report & Order, FCC 17-43 (rel. April 28, 2017) ("*BDS Order*").

rules applicable to rate-of-return carriers."[4] The NPRM seeks comment on creating a competitive market test (CMT) to assess the availability of competitive options for last-mile service in areas served by A-CAM carriers and whether to relieve A-CAM carriers' lower-speed TDM BDS offerings of *ex ante* pricing regulation in areas deemed competitive by the CMT.[5] In addition, the NPRM requests comment on whether the Commission should eliminate *ex ante* pricing regulation "of packet-based and TDM-based business data services providing bandwidth in excess of a DS3 offered by those carriers that elect to move their lower speed BDS offerings from rate-of-return regulation to incentive regulation."[6] AT&T files these comments in response to the questions raised in the NPRM on these proposals.

First, it is not axiomatic that allowing electing carriers to retain the benefits of being rate-of-return carriers for switched access or universal service support is necessary or desirable for the A-CAM carriers to take advantage of the relief provided in the *BDS Order*. Indeed, the Commission's rules[7] require that *all* of a carrier's study areas (and even more importantly, all interstate services within those study areas) move from rate-of-return regulation to price cap regulation when a rate-of-return carrier elects to opt into the price cap regime. This rule, referred to as the "all-or-nothing rule," prevents the skewing of incentives presented if some services are managed under rate-of-return rules and others under price cap rules.

Second, if the Commission decides to proceed with waiving its all-or-nothing rule to allow A-CAM carriers to be price cap carriers when providing BDS and remain rate-of-return when providing switched access services, the Commission must ensure that any carriers opting into this

[4] NPRM ¶ 9.
[5] *Id.* ¶ 35.
[6] *Id.* ¶ 53. The NPRM also proposes that rate-of-return carriers receiving other non-A-CAM fixed support be allowed to choose similar incentive-based regulation. *Id* ¶ 60.
[7] *See* §61.41(a)(3) and §61.41(b).

newly-created dual regime set their initial price cap rates fairly, in a manner that reflects ongoing switched access and rate-of-return pricing reforms, and that starts the A-CAM carriers off on a footing equivalent to that of currently existing price cap carriers.

Third, it must be noted that for the ILECs who had been operating under price cap regulation for 27 years, the recent BDS proceeding was a single-step transition. Competitive BDS services that were previously under price cap regulation were relieved of that regulation. Here, the NPRM proposes granting A-CAM carriers two simultaneous steps of relief – transitioning BDS services that have been under rate-of-return to price caps, and also freeing certain of these BDS from *ex ante* regulation altogether. While AT&T does not necessarily object to A-CAM carriers moving into the price cap regime with regulatory forbearance for competitive BDS, again, the Commission must ensure that they do so in a manner that takes into account the regulatory history of the ILEC price cap regime. This means that the market test the Commission adopts be A-CAM-carrier specific and centered upon the competitive landscape in the A-CAM carriers' study areas to determine whether a given county should be deemed "competitive" or "non-competitive" under the contours of the Commission's *BDS Order*.

Finally, AT&T supports the NPRM's proposal to grant relief to the A-CAM carriers for their packet-based services and higher-speed (>DS3) TDM products that mirrors the regulatory relief the Commission granted the price cap ILECs in the 2007 forbearance orders[8] and reaffirmed in the *BDS Order*.

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[8] *See, e.g.*, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corp. for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18707 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007), *aff'd sub nom. Ad Hoc v. FCC*, 572 F.3d

II. DISCUSSION

A. The Commission is right to focus on market-based regulation policies.

The NPRM proposes to trim the regulatory burdens imposed on BDS offered by A-CAM carriers. In many respects, the NPRM proposes to continue the process of updating the regulatory framework for BDS that the FCC began two decades ago for price cap incumbent local exchange carriers. The Commission has held that competition is the single best way of ensuring maximum customer benefit.[9] AT&T commends the Commission's efforts to drive towards a more market-based regulatory paradigm and update regulations to reflect today's market competition, spurring increasing investment and innovation by all competitors. As discussed below, any relief granted in this proceeding should align electing A-CAM carriers with price cap carrier regulation and with the competitive realities of their particular market territories. Further, the Commission must ensure that any actions the Commission takes in this proceeding not incentivize opportunities for cost shifting or access arbitrage.

B. The "all-or-nothing" rule requires a carrier electing price cap regulation to move all its services from rate-of-return to price caps at the same time.

The Commission has concluded that the incentives inherent in price cap regulation for carriers to maintain and enhance efficient operations are preferable to the legacy rate-of-return regulation for many LECs.[10] For 27 years, rate-of-return carriers have had the ability to opt out of

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903 (2009); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008) ; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. §160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) ("*Forbearance Decisions")*.

[9] *See* NPRM ¶ 6 ("forbearance from burdensome regulations when competition exists increases the amount of competition in the marketplace, ensuring that rates and practices for services are just, reasonable, and not unreasonably discriminatory" *citing Forbearance Decisions*).

[10] *See In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶21 (1990).

rate-of-return regulation, in favor of incentive regulation, as long as the election of incentive regulation applies to all their study areas. Section 61.41(a)(3) of the Commission's rules explicitly allows rate-of-return carriers to convert to price cap regulation on an elective basis.[11] Section 61.41(b) further requires, however, that any carrier that elects to file a price cap tariff in one study area must otherwise file price cap tariffs in *all* their study areas.[12] In addition, any carriers that participate in the National Exchange Carrier Association (NECA) pooling arrangements must remove themselves from the pools before entering price caps.[13]

The reason for this restriction is well-founded. Because rate-of-return regulation allows prices to be set based on cost, higher costs result in higher prices. In contrast, price cap regulation fixes prices, so higher costs do not result in higher prices – they only result in reduced carrier profits. But if a holding company has both rate-of-return and price cap study areas, there may be an incentive for internal cost shifting among study areas (price cap vs. rate-of-return) or even among services (*e.g.,* switched access vs. special access) within the same study area – mitigating any diminution in the holding company's profits.[14] Because the Commission could not be assured that its Part 32 rules would provide an ironclad bulwark against such shifts across study areas within a holding company, it instituted the "all or nothing rule."

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[11] 47 C.F.R. §61.41(a)(3).

[12] 47 C.F.R. §61.41(b). The rule does not apply to any average schedule affiliates.

[13] *See Policy and Rules Concerning Rates for Dominant Carriers,* 55 FR 42375-01 ¶ 29 (Oct. 19, 1990).

[14] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, 69 FR 25325-01 ¶ 4 (May 6, 2004) (*MAG Plan Order*) (citing the two problems the Commission sought to avoid by adopting the all-or-nothing rule: 1) to prevent a carrier from shifting costs from its price cap affiliate to its rate-of-return affiliate so as to recover those costs through the higher cost-based rates of the rate-of-return carrier and thereby increasing the price cap carrier's profits and 2) to prevent carriers from gaming the system by switching back and forth between the price cap and rate-of-return regimes). *See also Policy and Rules Concerning Rates for Dominant Carriers,* 55 FR 42375-01 ¶ 29 (Oct. 19, 1990) ("Our 'all or nothing' rule is intended to prevent cost shifting to affiliates that are regulated under rate of return from affiliates that are subject to price caps.").

As time passed, certain carriers have applied for and received waivers from the all-or-nothing rule, but such waivers have traditionally been granted when a holding company faces a merger or an acquisition. In these instances, the Commission was adequately confident that the reason animating the waiver was administrative, rather than to enable competitive gaming or cost-shifting.[15] Further, in accordance with §61.41(b), the Commission's previous waivers of the all-or-nothing rule have been at the study area level – whereby a holding company's price cap affiliates would remain subject to price cap for all the services (both switched and special) in their historically price cap-regulated study areas and the rate-of-return affiliates would remain subject to rate-of-return for all the services in their historically rate-of-return study areas.[16] By permitting waivers only at the study area level, the Commission was able to rely on both its Part 32 accounting rules that require all costs to be identified and separated at the study area level – and because study areas are specific to states, the Commission could also rely on the vigilance of state regulatory commissions to take steps to ensure that cost-shifting across state jurisdictions did not occur.

But these safeguards do not exist if different regulatory regimes are allowed to apply to different interstate services within the same study area – which is what is being proposed by the NPRM.[17] Part 32 is not service-specific within a study area, and state regulator visibility is

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[15] *See In the Matter of Petition of FairPoint Communications, Inc., for Waiver of Sections 61.41(b) and (c) of the Commission's Rules*, Order, 23 FCC Rcd 892 (2008) ("*2008 Waiver Order")* (granting FairPoint's request to remain rate-of-return in the study areas of its legacy serving area and remain price cap regulated in the study areas of its newly acquired exchanges in Maine, New Hampshire and Vermont); *In the Matter of Petition of Virgin Islands Telephone Corporation, for Election of Price Cap Regulation and Limited Waiver of Pricing and Universal Service Rules; China Telephone Company, FairPoint Vermont, Inc., Maine Telephone Company, Northland Telephone Company of Maine, Inc., Sidney Telephone Company, and Standish Telephone Company Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief; Windstream Petition for Limited Waiver Relief*, Order, 25 FCC Rcd 4824 (2010) (allowing FairPoint to convert certain of its legacy rate-of-return LECs in Maine, New Hampshire and Vermont to price cap regulation, to align with it's the study areas of its recently acquired price cap affiliates in those states, but maintaining its rate-of-return status on its LECs operating outside of those states).

[16] *Id.* In granting the relief, the Commission found the requested waiver consistent with the policy objectives of the all-or-nothing rule and that the benefits outweighed any risk that FairPoint would game the system. *See 2008 Waiver Order* at ¶7.

[17] The NPRM states that any A-CAM carrier's election to move its BDS to price cap would be made "on an all-or-nothing basis for all of an A-CAM carrier's study areas" – seemingly in accord with §61.41(a)(3). *See* NPRM ¶ 17

similarly impaired. For these reasons, the fact that certain carriers have received waivers of the all-or-nothing rule for whole study area conversions is inapposite to the present situation. Allowing different services within a study area to be subject to different regulatory regimes presents far more acute dangers of cost-shifting. Therefore, just as the current price cap carriers have, any A-CAM carrier electing the price cap regime for BDS should be required to accept the price cap regime for all its services within all its study areas.

The NPRM states it does not propose to require A-CAM carriers that elect to transition their BDS to price cap regulation to also transition their switched access services to incentive regulation because "[t]he transition provisions for switched access rates and Eligible Recovery rules for rate-of-return carriers adopted by the USF/ICC Transformation Order are well established, have been upheld on appeal, and have been partially implemented."[18] It predicts that "disrupting these transitions would likely impose additional costs and increase uncertainty, deterring investment and deployment."[19] These justifications, while sound, miss the mark.

First, this is not an instance where the Commission would be imposing a new regulatory regime on the rate-of-return carriers. Petitioners are seeking to *voluntarily elect* the price cap regime and with that election comes benefits and responsibilities. Sections 61.41(a)(3) and §61.41(b) require that any electing carrier adopt the price cap regime across *all* their study areas (for *all* services within those study areas). The rules were enacted to prevent cost shifting and

(this election would be at the holding company level for all study areas in all states, rather than on an individual carrier or individual study area basis.). However, the ability for those same A-CAM carriers to elect price cap regulation for their BDS while retaining the benefits of their rate-of-return status for their other services, as proposed in the NPRM, would be contrary to the all-or-nothing rule and would necessitate a waiver. In fact, the original Petition included an explicit request for a waiver of the all-or-nothing rule. *See* Petition at 16. The Commission recognizes this in the NPRM in stating its intent to amend § 61.41 to create an "exception" for the "alternative regulatory structure" proposed in the NPRM. *See* NPRM ¶ 15.

[18] NPRM ¶ 15

[19] NPRM ¶ 15.

gaming between the rate-of-return and price cap regulatory regimes.[20] Though conditioned on applying to all the study areas where the A-CAM carriers receive A-CAM support, the NPRM would allow the electing carrier to operate under (and benefit from) different regulatory rules within the same study area depending upon the service. An electing carrier would be able to offer BDS on a price cap basis and still have its remaining interstate services stay subject to the rate-of-return regulatory regime *within the same study area*. While the Commission has been able to conclude that gaming was not a substantial risk when an all-or-nothing rule waiver was considered and granted at the study area level,[21] there is no assurance that those incentives would not be present if the rule was waived for a carrier on a service by service basis.[22] Indeed, as noted earlier, the concern would actually be magnified. Allowing the A-CAM carriers to remain under rate-of-return for some services while transitioning to price cap for others will unquestionably involve separate accounting mechanisms among services sold within the same study area which could skew incentives and unnecessarily complicate the annual review process.[23]

Second, allowing electing carriers to benefit from incentive regulation for one category of their services and wear their rate-of-return hats when providing switched access or obtaining

[20] *See infra* Footnote 14.
[21] *See infra* Footnote 16.
[22] For example, when services like special access remain a component of the cost study and cost allocation a carrier uses to develop its rates for its other services, such as switched access, the incentives exist for unlawful cost recovery. This becomes even more problematic if the costs that support the carrier's switched access rates are already high, *e.g.,* they fail to recognize the recent industry efficiencies enabled by the shift from a facilities-based infrastructure to a software defined network.
[23] In this regard, the NPRM also includes a proposal to forbear from the Commission's cost assignment rules and separations requirements for those A-CAM carriers electing incentive regulation. NPRM ¶ 30. AT&T agrees that if the electing A-CAM carrier were to choose incentive regulation for all of its (interstate) services in all of its study areas, the cost assignment rules are not needed to protect against a carrier misallocating regulated and non-regulated costs. However, if the A-CAM carrier were allowed to retain its rate-of-return status for some of its services when electing price cap regulation for their BDS, the cost allocation rules remain necessary and important safeguards to ensure there is no improper cost shifting. "The all or nothing rule was adopted initially to prevent gaming, where a carrier might be motivated to reduce costs allocated to its price cap regulated study areas and then increase costs in its rate-of-return study areas where it could recover those costs pursuant to rate-of-return formulas." *Petition* at 17. *See also MAG Plan Order* ¶ 4.

universal support will be more disruptive to the transition adopted by the USF/ICC Transformation Order. In November 2011, the Commission released its *Transformation Order*, in which it determined that a "uniform national bill-and-keep framework" would eventually be the default regime.[24] The Commission did not immediately move to bill-and-keep as the default regime, nor did the Commission apply its transitional rate reductions to all types of switched access services. Instead, the Commission adopted a "gradual and measured" "multi-year transition," and did so for only some switched access rate elements – such as terminating end office switching and "certain transport rate elements" – and for only certain carriers in specific circumstances.[25] For other rate elements, including originating access services, and other tandem switching and tandem transport services, the Commission did not "specify the transition to reduce these rates" and instead asked for further comment, which was received in 2012.[26]

The Commission's initial rate reductions in tariffed access charges focused on reducing the difference between intrastate and interstate terminating rates and then on reducing terminating end office rates.[27] The Commission thus determined that, as part of its initial transition, terminating intrastate access rates should be brought into parity with interstate rates, and that terminating end office rates be transitioned to zero over a multi-year period.[28] The Commission also determined that it was appropriate to adopt different transitions for price cap carriers (and CLECs that

[24] *In the Matter of Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 34, 736 (2011), *pet. for rev. denied, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert denied*, *United States Cellular Corp. v. FCC*, 135 S. Ct. 2072 (2015) ("*Transformation Order*").
[25] *Transformation Order* ¶¶ 35, 798, 800.
[26] *Id.* ¶ 800.
[27] *See id*. ¶ 800 (the rules focus first on where the "most acute intercarrier compensation problems, such as arbitrage, currently arise"); *see id*. ¶ 804 n.1508.
[28] The Commission also capped "all interstate switched access and reciprocal compensation rates" as of the date of the *Order*, which was December 29, 2011. *See Transformation Order* ¶ 801. The Commission also adopted an "Access Recovery Charge" ("ARC") so as to "mitigate the effect of reduced intercarrier revenues on carriers." *Id.* ¶ 36. The ARC could be assessed only by incumbent LECs, and not CMRS carriers. 47 C.F.R. § 51.713.

benchmark to price cap carriers) and for rate-of-return carriers.[29] The Commission promulgated one rule for rate-of-return carriers and another rule – Section 51.907, entitled "Transition of price cap carrier access charges" – that applies the transition to price cap carriers.[30]

While different transitions for price cap carriers and rate-of-return carriers may have made sense in 2011, those distinctions should not unfairly benefit carriers that would be electing to be treated as price cap carriers for their BDS services. The transition for price cap carriers will be complete this July, while the transition for rate-of-return carriers is scheduled to complete in just two years – July 2020. In addition, the NPRM proposes that A-CAM carriers will be eligible to take advantage of any relief ordered by the Commission beginning the July 1 following adoption of the order.[31] Considering that reply comments are not due in this docket until July 2, the soonest that A-CAM carriers will be able to take advantage of the relief would be July 2019. At that time the transition for rate-of-return carriers would be nearly complete – rate-of-return carriers would be required to reduce their terminating end office access rates to $0.0007 per minute in July 2018; further reducing them to zero in 2020. Therefore, in balancing the equities, there would be little harm in requiring any A-CAM carriers electing incentive regulation relief in July 2019 to skip a small step of the transition by adjusting their terminating end office access rates to bill and keep.

Finally, while it is true, as discussed above, that the rates for originating interstate switched access for rate-of-return carriers have been capped and that their terminating switched access end office services are transitioning to "bill and keep," rate-of-return carriers' terminating tandem switching and transport are not reformed and remain under the rate-of-return regime.[32] The Commission has several dockets open in which it is seeking comments on additional reforms on

[29] *Id.* ¶ 801.
[30] 47 C.F.R. § 51.907; *id.* § 51.909 (rate-of-return carriers).
[31] NPRM ¶ 18.
[32] *Transformation Order*, ¶¶ 801-805.

transport as well as to the remaining switched access elements. How will those future reforms be enacted? Will these electing carriers still be able to carry-forward their status as rate-of-return carriers in complying with those future reform efforts? Allowing these carriers to retain their rate-of-return label going forward will undoubtedly complicate any future relief.

Therefore, AT&T requests that the Commission decline to waive the "all-or-nothing" rule for these carriers, especially as proposed in the NPRM, and require that any A-CAM carrier that elects incentive regulation have that election apply across all its study areas and, even more critically, across all of its interstate services within a study area. [33]

C. **If the Commission nonetheless decides to waive the all-or-nothing rule, it must set A-CAM carriers' initial price cap rates appropriately**.

The NPRM proposes to allow the A-CAM carriers to use their existing rates to set their BDS rates under incentive regulation.[34] AT&T requests that, should the Commission grant its *per se* waiver of the all-or-nothing rule, it require that any electing carrier's initial price cap BDS rates reflect the appropriate rate-of-return that that carrier would have transitioned to under the Commission's rate-of-return framework.[35] As the Commission noted in the *2016 Rate-of-return Reform Order*, "[t]he rate-of-return is a key input in a rate-of-return incumbent LEC's revenue requirement calculation, which is the basis for both its common line and special access rates and its universal service support."[36] The Commission held further "[a] rate-of-return higher than

[33] For similar reasons, any electing A-CAM carrier that participates in the NECA pools should be required to exit the NECA pool for both its switched and special access services to avoid additional complexities in the annual review process and to avoid potential gaming. There are approximately 274 ACAM carriers currently residing in the NECA traffic sensitive pool where their switched and special access services both reside. It would be difficult to validate the appropriate allocation of those costs if one set of services (*e.g.,* BDS) is removed from the NECA pool and is placed under price caps while their switched services remain in the NECA pool.

[34] NPRM ¶ 20.

[35] *In the Matter of Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, ¶¶ 325-326 (rel. Mar. 30, 2016) ("*2016 Rate-of-return Reform Order*").

[36] *2016 Rate-of-return Reform Order* ¶ 226.

necessary to attract capital to investment results in excessive profit for rate-of-return carriers and unreasonably high prices for consumers."[37]

Rate-of-return carriers are in the midst of major transition which decreases their allowable rate-of-return from 11.25% to 9.75% over the course of six years.[38] The Commission found that an allowable rate-of-return of 9.75 percent provides a reasonable level of compensation. As of July 1, 2018, this transition will be only halfway done with the rate-of-return reflected in the A-CAM carriers' rates at 10.5%.[39] This ongoing transition must be taken into consideration in determining the initial rate-of-return the A-CAM carriers will use to set their price cap BDS rates to ensure that A-CAM carriers' rates start off at the level the FCC has determined is "consistent with the Act and today's financial conditions."[40] Specifically, since any A-CAM carriers electing to take the relief proposed in the NPRM would be *voluntarily electing* incentive regulation, in essence rescinding their rate-of-return status, they should no longer benefit from the extended transition provided to rate-of-return carriers. This election would not be a regulatory change or mandate being thrust upon them – unlike the "significant regulatory changes" the Commission relied upon in implementing the 6-year transition.[41] Therefore, at a minimum, any electing A-

[37] *2016 Rate-of-return Reform Order* ¶ 226. *See also id.* ¶ 227 (an inefficiently high rate-of-return creates distortions and other unintended and difficult to predict consequences); *id*. ¶ 319 ("to be reasonable, the rate-of-return must not produce excessive rates at the expense of the ratepayer."). Indeed, the Commission settled on a rate-of-return at the very high end of its determined zone of reasonableness between 7.12 and 9.75 percent. *Id*. ¶ 321.
[38] *2016 Rate-of-return Reform Order* ¶ 326. The Commission implemented a transition in recognition of the regulatory burdens on rate-of-return carriers and to avoid rate shock. *See id*. ¶ 325 ("We recognize that rate-of-return incumbent LECs have been subject to significant regulatory changes in recent years, and that such changes are occurring at a time when these carriers are attempting to transition their networks and service offerings to a broadband world.[ ] At the same time, we find that we must represcribe the almost 25-year old rate of return to meet our statutory obligations.[ ] To minimize the immediate financial impacts that represcription may impose on carriers, the Commission adopts, for the first time, a transitional approach to represcription.").
[39] *2016 Rate-of-return Reform Order* ¶ 326. Should A-CAM carriers not be eligible to take advantage of any relief ordered by the Commission until the July 1 following adoption of the order the Commission, (NPRM ¶ 18), the prescribed rate-of-return reflected for the A-CAM carriers would be 10.25% on July 1, 2019. *Id.*
[40] *2016 Rate-of-return Reform Order* ¶ 10.
[41] *Id.* ¶ 325.

CAM carrier's initial rate-of-return should be adjusted downward by 75 basis points to reflect the rate-of-return that would have been reached at the end of the transition.[42]

Regulatory consistency also supports setting the rate-of-return at 9.75% for any rate-of-return carrier electing incentive regulation. The *BDS Order* recognized the competitive marketplace for BDS in price cap carrier serving areas and relieved the price cap ILECs from the price cap regime in competitive counties – moving from price cap to non-price cap. Prior to that decision, however, these carriers were subject to incentive regulation for nearly 27 years and, as a result, saw significant rate reductions from the rates they had been earning under rate-of-return.[43] Petitioners are seeking relief for their BDS commensurate to the price cap ILECs. However, they are seeking this same relief in two immediate steps – rate-of-return to price cap to non-price cap - without their BDS being subject to the transitioned price reductions, built-in incentives and pricing safeguards (*e.g.*, X-factor) of the price cap regime nor sharing any cost efficiencies with customers. Setting electing A-CAM carriers' initial rate-of-return at the 9.75% level immediately upon converting to price cap, while not completely correcting, would help alleviate any rate disparities and aligns with the Commission's finding that a 9.75% rate of return is more than reasonable.

D. Any path to relieving A-CAM carriers of *ex ante* pricing regulation for their lower-speed BDS from price cap must include a fair Competitive Market Test.

The NPRM seeks comment on whether the Commission should adopt a competitive market test (CMT) to assess competition for lower-speed BDS in the areas served by A-CAM providers

[42] *2016 Rate-of-return Reform Order* ¶ 326. This adjustment could be taken as an exogenous cost adjustment. See NPRM ¶ 27.

[43] This is demonstrated by a simple comparison of price cap carrier rates to current A-CAM carrier rates. For example, using a composite 3-year term plan DS1 price consisting of 2 Channel Terminations and 10 miles of Channel Mileage facility and required termination fees, the top 25 A-CAM carriers (based on AT&T's 2017 spend for DS1 and DS3) have an average price of $1,234 per month. In contrast, the average Zone 3 (most rural zone) 3-year term rate across AT&T's 21-state footprint is roughly $420.

that would remove *ex ante* pricing regulation in areas the CMT found to be competitive.[44] The NPRM questions whether this CMT should be (1) the same CMT the Commission adopted in the BDS Order relieving A-CAM carriers of *ex ante* pricing in those counties already deemed competitive for price cap carriers' service areas[45]; (2) a variation of the existing CMT – using just the second prong (477 data) for A-CAM areas[46]; (3) a CMT similar to the existing CMT but using data specific to areas served by electing A-CAM providers[47]; or (4) a whole new CMT specific to BDS in areas served by A-CAM providers.[48]

Any CMT adopted for the A-CAM carriers must be based on a review of competition that impacts the A-CAM carrier, and not by merely imputing the competitive/non-competitive status of a price cap carrier in a county to an A-CAM carrier's study area within that same county. As the Commission notes, the CMT that resulted from the price cap BDS proceeding was based on the analysis of competitive facilities within the price cap carriers' study areas. If a county included both price cap and rate-of-return study areas, the county's competitive or non-competitive status was determined *solely* based on the presence of competitive facilities within a certain distance of the price cap carriers' facilities. The resulting county-based CMT results reflect only competition within the price cap carriers' portion of the county. The existing CMT from the *BDS Order* cannot be used to gauge competition in A-CAM servings areas.

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[44] NPRM ¶35.
[45] As the NPRM describes the existing CMT features two prongs, based on data from price cap study areas. The first measures whether 50 percent of the locations with BDS demand in a county are within a half-mile of a location that was served by a competitive provider, based on the 2015 Collection. The second uses Form 477 data to measure whether a cable operator offers a minimum of 10/1 Mbps broadband service in 75 percent of the census blocks in the county. If either prong is satisfied, that county is deemed competitive for price cap carriers' BDS. NPRM ¶ 36.
[46] Under this approach, the Commission would then deem competitive, for purposes of relieving electing A-CAM carriers' lower speed TDM BDS services from ex ante pricing regulation, any county where a cable operator or other competitive provider offers a minimum of 10/1 Mbps broadband service in 75 percent of the census blocks in the portion of the county served by an electing A-CAM carrier. NPRM ¶ 37.
[47] NPRM ¶ 40. This option would require the Commission undertaking a new data collection.
[48] NPRM ¶ 41.

Therefore, the Commission should rely on A-CAM study-area-specific facilities data to determine a county's status and either rely on Form 477 data from A-CAM serving areas, or, alternatively, collect facilities/location data from the A-CAM carriers and competitive providers within their study areas to apply both prongs of the price cap carriers' CMT. Considering that initiating a new data collection would be a time-consuming and burdensome exercise, AT&T supports use of the Form 477 data as a surrogate CMT.[49]

E. The Commission should grant the same relief to A-CAM carriers' IP-based and high speed TDM services that they have granted price cap carriers' services.

The NPRM seeks comment on whether the Commission should eliminate *ex ante* pricing regulation of packet-based and TDM-based (≥DS3) BDS offered by those carriers that elect to move their lower speed BDS offerings from rate-of-return regulation to incentive regulation.[50] AT&T believes that removing *ex ante* pricing regulation for these services for electing A-CAM carriers will encourage competitive entry and network investment and provide an incentive for the transition to packet-based technologies.

In AT&T's experience, much of the higher speed dedicated services provided by rate-of-return carriers are used for backhaul, including from wireless towers. Wireless backhaul also is an attractive market to CLECs and cable operators, who, based on AT&T's own market observations, compete hard to serve towers and expand their backhaul footprints. Often, we have found that rate-of-return carriers would like to bid against these other backhaul providers but are constrained by the inflexibility of the rate-of-return regime. In AT&T's view, granting forbearance

[49] Similarly, after a 12-year-long proceeding on price cap carrier BDS reform, the largest data collection ever analyzed by the Commission, and an extensive record of economic analysis, there is no need for the Commission now to reinvent the wheel on the building blocks of the CMT such as the relevant product market, geographic market, or what qualifies as competitive entry.
[50] NPRM ¶ 53.

to the A-CAM carriers for higher speed services will introduce additional competition into the marketplace and drive down prices.

III. CONCLUSION

For the foregoing reasons, AT&T requests that any relief ordered by the Commission require that electing A-CAM carriers accept incentive regulation for all their study areas and for all of their interstate services within a study area; the initial BDS price cap rates be based on the Commission's prescribed rate-of-return of 9.75%; any CMT is specific to the competitive conditions that exist in A-CAM carriers' serving areas; and *ex ante* regulation be removed from A-CAM carriers' packet-based and high speed (≥DS3) TDM services.

Respectfully submitted,

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