

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

In the Matter of

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 Services

RM-10593

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## **INTRODUCTION AND SUMMARY**

The Commission should adopt a permanent policy framework for Business Data Services that reflects the common ground Verizon and INCOMPAS have reached. The principles we proposed in April and the outline we proposed in the June 27th joint letter reflect a compromise that can move the industry past its decades-long debate, ensure a rational pricing structure for Business Data Services, and encourage facilities-based competition as the marketplace continues its technology evolution.<sup>1</sup>

Competition yields the best market results. And the framework we've proposed with INCOMPAS would rely first on competition to discipline prices. In competitive areas, we propose no ex ante price regulation of Business Data Services. Market forces in those areas, and the Commission's general Title II authority, are sufficient to ensure availability of Business Data Services at reasonable rates.

In other areas without concentrated demand and where competition has lagged, however, the Commission should do more. There, it is appropriate to regulate Business Data Services prices on a technology-neutral basis. Those regulations should ensure customers can obtain Business Data Services at reasonable prices today. And they should promote investment and foster market entry by facilities-based providers, so that as markets become more competitive, market forces take hold and the need to regulate prices dissipates.

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<sup>1</sup> See Letter from Kathleen Grillo, Verizon, and Chip Pickering, INCOMPAS, to Marlene Dortch, FCC, WC Docket No. 05-25 & RM-10593 (FCC filed Apr. 7, 2016) ("Verizon and INCOMPAS April 2016 Joint Letter"); Letter from Kathleen Grillo, Verizon, and Chip Pickering, INCOMPAS, to Marlene Dortch, FCC, WC Docket Nos. 16-143 & 05-25 (FCC filed June 27, 2016).

Verizon and INCOMPAS came to a middle ground after advocating opposing views for many years because it is time for a new start. The Business Data Services marketplace has changed—profoundly—and packet-based services from many different providers are replacing the TDM-based services that legacy telephone companies typically provided. Cable companies in particular have become major competitors in providing Business Data Services, and their marketplace presence is growing. The longstanding focus on regulating legacy TDM special access no longer makes sense.

Instead, it is time for a new approach that treats providers of Business Data Services evenhandedly. Verizon supports the general approach the Commission proposed in the FNPRM that would eliminate the dominant-carrier framework for Business Data Services, with its roots in a long-gone era, and replace it with a technology-neutral framework that promotes investment in new technologies, including by new market entrants. As Chairman Wheeler and others have recognized, encouraging facilities-based competition and ensuring reasonably priced Business Data Services is important for many reasons, including to enable the rapid and widespread deployment of 5G wireless networks.

Verizon has approached this process from its unique perspective as one of the country's largest sellers *and* purchasers of Business Data Services. And we recognize that no approach will be perfect. But with an eye towards a workable framework that is practical and administrable for all participants in the Business Data Services marketplace and the Commission, that is rooted in record evidence, that adheres to “basic economic principles,” and that “meet[s]

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not only today's marketplace, but tomorrow's as well,"<sup>2</sup> Verizon proposes the following details to build on the principles Verizon and INCOMPAS already have proposed:

*First*, the Commission should adopt an administratively workable competitive market test. The test should be based on census blocks, which are granular enough to avoid problems that broader areas like MSAs create, but large enough to avoid the administrative headaches and other shortcomings of a building-by-building approach. In determining whether a census block is competitive, the Commission should analyze whether facilities-based providers have deployed fiber within that census block. If four or more facilities-based providers have deployed fiber within a census block, there is sufficient actual and potential competition to discipline prices. For purposes of applying this test, the ILEC would be deemed to have fiber in all areas, and no consideration would be given to the use of UNEs or best-efforts services. Price regulation is not needed in census blocks that meet the test. In census blocks that do not meet the test, some form of regulation would be appropriate to ensure reasonable prices.

*Second*, the Commission should determine whether certain types of Business Data Services should be deemed competitive or non-competitive based on bandwidth thresholds. For example, the evidence suggests that very high bandwidth Business Data Services can be competitively supplied, while relatively low bandwidth Business Data Services have been slower to attract competition. The Commission should establish a high-bandwidth threshold of 1 Gbps, at or above which services would be deemed competitive, and a low-bandwidth threshold of 50 Mbps, at or below which services would be deemed non-competitive.

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<sup>2</sup> *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143, 15-247, 05-25, and RM-10593, FCC 16-54, ¶¶ 8, 10 (rel. May 2, 2016) ("FNPRM").

*Third*, packet-based Business Data Services in non-competitive areas—excluding services above a threshold the Commission determines competitive—should be subject to light-touch price regulation based on benchmarks. All Business Data Services providers would be subject to the benchmarks, except there would be a process to exempt new entrants from regulation for some period of time. The benchmarks would take into account variables such as speed, term length, and class of service. Rates at or below the benchmarks would be presumed just and reasonable. Providers should be free to charge above the benchmarks, but they would then bear the burden of demonstrating their rates are just and reasonable if challenged. And if a challenge is pending, a purchaser should be able to pay the benchmark rate until the Commission determines the higher rate is justified. To preserve just and reasonable prices going forward, benchmarks should be adjusted annually, either based on a measure of improved efficiency, or based on findings of rate changes in competitive markets. Benchmarks should apply to all Business Data Services providers except new entrants, ensuring that all providers comply with their common carrier duties to provide these services on just and reasonable rates, terms, and conditions. Verizon itself has been refused access to Business Data Services in some cases.

*Fourth*, TDM-based Business Data Services would remain subject to price caps. There would be a one-time downward adjustment to the current caps to account for the freeze that has been in place for several years, and this adjustment would be phased in over two years. Going forward, starting in the first year, there would also be an annual productivity factor net of inflation, which would be based on publicly available data so that price-cap carriers do not have to submit burdensome cost studies.

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A framework based on these principles ensures that purchasers of Business Data Services can obtain reasonable pricing, treats all providers alike, and allows market entrants to offer Business Data Services based on new technologies without burdensome regulation. The framework also anticipates that as markets become more competitive, even the light-touch benchmark regulations will recede.

At the same time that the Commission released the FNPRM, it also released a *Tariff Investigation Order*, in which it found unlawful certain tariffed pricing terms for legacy special access services, including so-called “all-or-nothing requirements,” but left open how to implement the all-or-nothing finding for existing customers without unnecessary market disruption. Most critically, the Commission should not allow buyers and sellers of Business Data Services to escape their existing commitments. The Commission should allow those existing arrangements to run their course, with the all-or-nothing language removed prospectively but otherwise unchanged, so that both parties receive the benefit of the bargain they struck.

**I. THE VERIZON/INCOMPAS PROPOSALS PROVIDE A PATH TOWARDS A WORKABLE FRAMEWORK FOR BUSINESS DATA SERVICES**

As we said in the Verizon and INCOMPAS April 2016 Joint Letter,<sup>3</sup> and as the Commission noted in the FNPRM, it is time for a new start and a new framework for Business Data Services.<sup>4</sup> The proposed framework we have outlined embraces the fundamental principles the Commission identified in the FNPRM. First, as the Commission said, “[w]here competition

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<sup>3</sup> See Verizon and INCOMPAS April 2016 Joint Letter at 2-3.

<sup>4</sup> See FNPRM ¶ 4.

exists, there is little for government to do except to maintain the traditional oversight of telecommunications services, because competition is the single best way of ensuring that customers benefit.”<sup>5</sup> That said, where competition is not sufficient, it is appropriate for the Commission to address non-competitive market conditions so that customers can compete and innovate. Second, the new framework for Business Data Services should be technology neutral.<sup>6</sup> Third, the framework should remove barriers that may inhibit the migration away from TDM services.<sup>7</sup> And fourth, the framework should work not only for today’s marketplace but also for the future, and should encourage new facilities based market entry.<sup>8</sup>

To adopt and implement the Verizon and INCOMPAS proposed approach, the Commission should first adopt a test to identify competitive markets. Once it has done that, it should determine how it will ensure reasonably priced packet-based and TDM-based Business Data Services in non-competitive markets. The Verizon and INCOMPAS outline provides key principles and proposals to accomplish those tasks. And while Verizon and INCOMPAS have not yet reached agreement on many of the details, in the discussion below, Verizon explains not only why the Commission should adopt the broad framework of the joint proposal, but also how the Commission can and should fill the key remaining gaps.

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<sup>5</sup> *Id.* ¶ 5.

<sup>6</sup> *See id.* ¶ 6.

<sup>7</sup> *See id.* ¶ 7.

<sup>8</sup> *See id.* ¶ 8.

## A. The Commission Should Adopt a Workable Competitive Market Test

Although the record does not point conclusively to one specific approach, and no framework will be perfect, a new framework must be rooted in the record and adhere to certain basic economic principles.

- The test should eschew overly narrow product and geographic markets.<sup>9</sup>
- It should recognize that competition for Business Data Services has developed in areas where there is concentrated demand, but that lower-bandwidth services are less likely to be competitive.<sup>10</sup>
- It should account for both actual competition and potential competition.<sup>11</sup>
- It should be technology neutral, recognizing that many different types of providers and networks compete to provide a wide range of Business Data Services.<sup>12</sup>
- It should be administratively workable for the Commission and sellers and buyers of Business Data Services alike.<sup>13</sup>

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<sup>9</sup> See Marc Rysman, *EMPIRICS OF BUSINESS DATA SERVICES* (Apr. 2016) (“Rysman White Paper”) at IV.B (attached to FNPRM as Appendix B) (“[W]hile I examine competition at the level of different geographic regions, analysis of competition in a narrow geographic region may not properly measure competition.”).

<sup>10</sup> See FNPRM ¶¶ 162, 235-236 (“Supply of BDS with a bandwidth in excess of 50 Mbps tends to be more competitive than supply of BDS with lower bandwidths.”); *id.* ¶ 237 (“We also note that the Rysman White Paper concludes that there may not be market power in the supply [of] BDS at bandwidths in excess of approximately 50 Mbps.”).

<sup>11</sup> See Rysman White Paper at II, IV.C, Tables 14-16; FNPRM ¶ 161 (“Potential competition is important, that is, nearby suppliers can constrain BDS prices.”); *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*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, ¶ 69 n.152 (2012) (subsequent history omitted) (recognizing that analysis “must take account of both actual and potential competition, as well as sources of intramodal and intermodal competition”).

<sup>12</sup> See FNPRM ¶¶ 6, 256-260.

<sup>13</sup> See *id.* ¶¶ 72, 209, 286-287, 295.

**1. The Commission Should Adopt Bandwidth Thresholds To Identify Categories of Business Data Services that Are Competitive or Non-Competitive**

The FNPRM correctly recognizes that a wide range of services and technologies comprise the Business Data Services marketplace, and that different types of technologies compete with one another.<sup>14</sup> The Commission’s proposed technology-neutral definition of Business Data Services is consistent with this view.<sup>15</sup> There is no need to expand it to specify minimum performance guarantees, because those cannot easily be determined or monitored.<sup>16</sup> Nor does it make sense to include very low speed services, which are increasingly irrelevant as customers move to higher and higher tiers of Ethernet bandwidth.<sup>17</sup>

Although the Commission should not define granular markets for each bandwidth at which Business Data Services are offered, there is support in the record for a competitive market test that creates some broad divisions between Business Data Services above or below a certain bandwidth threshold. For example, the “Rysman White Paper concludes that there may not be market power in the supply [of] BDS at bandwidths in excess of approximately 50 Mbps.”<sup>18</sup> At very high bandwidths, Business Data Services can be competitively supplied in all instances because of the significant revenue opportunities these services offer. And growing bandwidth needs and 5G deployment likely will push customers to demand services at higher and higher speeds. By contrast, at the lower end of bandwidths, the record indicates that competitive supply

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<sup>14</sup> *See id.* ¶¶ 45-50, 160, 189.

<sup>15</sup> *See id.* ¶ 279.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* ¶¶ 80-84.

<sup>18</sup> *Id.* ¶ 237; Rysman White Paper at IV.C.

has been slower to develop.<sup>19</sup> Thus, the Commission should establish a high-bandwidth threshold of 1 Gbps, at or above which services would be deemed competitive, and a low-bandwidth threshold of 50 Mbps, at or below which services would be deemed non-competitive.

It is unnecessary for the Commission to distinguish multi-location businesses from other types of businesses. Although the FNPRM suggests “competitive supply to other customers may not place a competitive constraint on supply to these ‘spread-out’ multi-site customers,”<sup>20</sup> the record does not support that suggestion. Nor does it make sense: although multi-location customers may have fewer options for one-stop providers capable of providing services everywhere they seek service, their competitive options at each individual site is no different than it is for other types of businesses. That multi-location customers may prefer a more efficient way to acquire service is not a basis for treating them as a distinct customer market. To the extent, however, the Commission has specific concerns related to multi-location customers, imposing a restriction on geographic tying, as the FNPRM proposes, would help ensure that multi-location customers can pick and choose between suppliers in competitive and non-competitive areas, if that is the option they prefer.<sup>21</sup>

The Commission also need not distinguish between wholesale and retail customers. Wholesale customers have long purchased Business Data Services in a similar manner to retail customers, often from the same contracts or tariffs. Both types of customers receive discounts based on business considerations rooted in economics, rather than based on some arbitrary

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<sup>19</sup> See FNPRM ¶¶ 81-84, 162.

<sup>20</sup> FNPRM ¶ 201.

<sup>21</sup> See FNPRM ¶¶ 457-458, 461.

identity. And a contrary approach could lead to mischief. Some carriers might be inclined to try to distinguish their common carrier offerings as applying solely to retail customers, which could deny their competitors access to the same services. As discussed further below, Verizon has experienced this as a buyer of Business Data Services.<sup>22</sup>

**2. Subject to the Thresholds, the Commission Should Find Business Data Services Competitive in Census Blocks with Four or More Facilities-Based Providers**

For Business Data Services that fall between the low-bandwidth threshold and the high-bandwidth threshold, the Commission should establish a test based on the number of fiber-based providers in a geographic area. A workable, realistic geographic area is the census block. And a census block should be deemed competitive if within that census block there are four or more facilities-based providers that have deployed fiber.

Analyzing competition at the census block level is an administratively feasible and conservative approach that accounts for actual and potential competition.<sup>23</sup> The FNPRM concludes that “the likely BDS geographic market, even for lower bandwidth services, likely

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<sup>22</sup> See Declaration of Daniel Higgins, attached as Exhibit A.

<sup>23</sup> The record does not support adopting a building-specific market definition, as some commenters have proposed. Such an approach is inconsistent with how providers and consumers alike view the marketplace, how competitive forces operate in the Business Data Services marketplace, and how competitors decide to deploy their facilities. See FNPRM ¶ 206; Verizon Feb. 2016 Reply at 14-17. It is also administratively infeasible, as it would involve potentially millions of discrete geographic markets nationwide. See NCTA Feb. 2016 Reply at 13, n.24 (“[I]t is difficult to envision any regime in which the Commission could reliably determine the regulatory status of millions of commercial buildings without conducting a challenge process that would be far more burdensome than the one relied on in the context of the Connect America Fund.”); Rysman White Paper at IV.B (referring to “about 1.217 million (unique locations) in the data”); Frontier Feb. 2016 Reply at 24; CenturyLink Feb. 2016 Reply at 23.

extends beyond the area of the average Census block in which there is BDS demand.”<sup>24</sup> The record demonstrates that “a supplier’s presence anywhere in most, if not all Census blocks could have a material competitive effect on other suppliers.”<sup>25</sup> But it also demonstrates that competition outside a given census block may discipline competition within that census block. The Rysman White Paper found, for example, “that competitive supply in a unique location anywhere in a Census block, and competitive supply anywhere in the Census tract, is correlated in both statistically and economically significant ways with lower prices within the Census block.”<sup>26</sup> Thus, analyzing facilities-based competition by census block is conservative because, if anything, it undercounts the facilities that are capable of disciplining prices within each block.

This proposed approach also appropriately takes into account both actual and potential competition. It considers all fiber deployed within a census block, even if that fiber has not yet been connected directly to a building. This is consistent with the Rysman White Paper, which found that competitive fiber anywhere in the census block (and even the larger Census tract) is capable of disciplining prices within a block. This makes sense because, as the FNPRM found, competitors generally are capable of and do extend their networks distances equal to the radius or diameter of most census blocks.<sup>27</sup>

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<sup>24</sup> FNPRM ¶ 204.

<sup>25</sup> *Id.* ¶ 214.

<sup>26</sup> *Id.* ¶ 238 (citing Rysman White Paper at IV.C, Tables 14-16).

<sup>27</sup> *See id.* ¶ 214 (“[I]f the median Census block were a circle, then it would be approximately 0.2 miles across. . . . If the Census block at the 75th percentile were circular, then it would be around 0.4 miles across.”); Rysman White Paper at IV.B (“Narrative evidence suggests that CPs generally build out no more than a quarter to a half-mile. Answers varied, but these sorts of distances appeared consistently in the narrative responses.”).

A more complex question is how many competitors in a census block are necessary to ensure just and reasonable prices. The Rysman White Paper found even a single potential competitor is capable of imposing price discipline under certain circumstances.<sup>28</sup> This is consistent with the Commission’s prior finding that “under certain conditions duopoly will yield a competitive outcome.”<sup>29</sup> The Commission’s analysis also found, however, that “the competitive effect on pricing increases as the number of competitors in the area increases.”<sup>30</sup> Thus, the question of how many competitors are sufficient becomes a balancing act. If the Commission sets the bar too high—that is, requiring a large number of providers before declaring an area competitive—it will end up regulating in far more areas than necessary. Imposing price constraints where they are not needed could discourage potential entrants by ratcheting down rates and eliminating potential margins in areas where additional competition is likely.<sup>31</sup>

A reasonable, conservative approach is to find any census block competitive where four or more facilities-based providers—including the ILEC, which would be assumed to have a

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<sup>28</sup> See Rysman White Paper at IV.C and Table 19.

<sup>29</sup> *Petition of Qwest Corp. for Forbearance*, Memorandum Opinion & Order, 25 FCC Rcd 8622, ¶ 30 (2010).

<sup>30</sup> FNPRM ¶ 294.

<sup>31</sup> See, e.g., *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, Further Notice of Proposed Rulemaking, 14 FCC Rcd 19717, ¶ 5 (1999) (“if prices were set too low, the return on capital would be insufficient to attract investment into the industry”); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, ¶ 84 (2001) (“[I]f a target rate were set too low, a barrier to competitive entry would be created.”).

ubiquitous fiber presence—have deployed fiber in that census block. The Rysman White Paper shows that this level of competition has a significant effect on prices, including reductions of at least 15 percent with respect to DS-3 services.<sup>32</sup> And given the Commission’s finding that services above 50 Mbps are even more competitive than those at lower speeds,<sup>33</sup> it is reasonable to expect the same or even larger price effects for those services in markets where there are four or more facilities-based providers with a fiber presence. In areas with high business density where Business Data Services’ revenues are concentrated, there is an even greater probability that facilities-based providers will be able to justify extending their fiber to serve additional locations.<sup>34</sup>

This approach is conservative for the additional reason that it would necessarily rely on 2013 data despite evidence of extensive new entry since that time, and it does not fully account for the game-changing entry of cable, including the significant potential competition it imposes in light of cable’s rapid expansion in the Business Data Services marketplace. As the FNPRM recognizes, “in 2013, cable provision of BDS was much more limited than it is today. In particular, BDS was not typically supplied over HFC. Looking forward, it may already be or soon will be the case that cable companies are able to supply BDS everywhere they have deployed DOCSIS 3.0.”<sup>35</sup> At a minimum, the Commission must include the most recent data it

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<sup>32</sup> See Rysman White Paper at Table 19.

<sup>33</sup> See FNPRM ¶ 162.

<sup>34</sup> See *id.* ¶ 55.

<sup>35</sup> *Id.* ¶ 221 (footnote omitted); see also *id.* ¶ 236 (“More recently, cable began offering BDS services over HFC, as well as fiber, and has forced even the largest incumbent LECs to focus on maintaining market share.”).

has available regarding cable deployment. Those data include the supplemental data that several cable companies filed after the original data collection, although the data still are from 2013 and do not reflect cable's more recent market activity.<sup>36</sup>

## **II. REGULATION OF TDM-BASED SERVICES SHOULD PRESERVE INCENTIVES TO MIGRATE TO PACKET-BASED SERVICES AND FOR MARKET ENTRY**

Although TDM-based services still constitute a large fraction of total Business Data Services' revenues, "the future is in IP-based, packet-switched communications," and a new framework for Business Data Services should "remove barriers that may inhibit migration away from TDM to encourage the migration to new technologies."<sup>37</sup> The record demonstrates that Ethernet services are more cost effective and offer superior functionality and speeds compared to TDM-based services; that competitive providers already focus overwhelmingly on providing Ethernet services; and that Ethernet services are required to support the backhaul requirements of

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<sup>36</sup> See Letter from Matthew Brill, Latham & Watkins LLP, Counsel for Comcast, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (FCC filed June 1, 2016) (submitting business locations that were serviceable via HFC plant from Metro-Ethernet-enabled headends in 2013); Letter from Samuel L. Feder, Jenner & Block LLP, Counsel for Charter Communications, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (FCC filed May 27, 2016) (submitting a list of census blocks served by Metro-Ethernet capable nodes); Letter from Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (FCC filed May 12, 2016) (clarifying that the areas in which it was capable of serving business customers via HFC plant can also be ascertained based on its responses to II.C.1.a and II.C.1.b of the data collection). See also Declaration of Glenn Woroch & Robert Calzaretta ¶ 13 (June 17, 2016), attached to Motion to Strike filed by CenturyLink et al., WC Docket Nos. 16-143, 15-247, 05-25; RM-10593 (FCC filed June 17, 2016) (finding that "the ratio between the number of census blocks originally reported as housing cable services capable of providing Metro Ethernet and the number of census blocks that were actually served by a Metro-Ethernet-capable headend is about 1 to 22 (1:22). In other words, the number of census blocks with BDS facilities owned by these cable operators increased 22 fold from their original submission to the [Special Access Data Collection].").

<sup>37</sup> FNPRM ¶ 7.

5G deployment.<sup>38</sup> Packet-based and TDM-based Business Data Services are in the same product market,<sup>39</sup> and the Commission should avoid imposing regulation that suppresses TDM rates too drastically, which would create artificial incentives to purchase these services instead of migrating to Ethernet. This is contrary to the Commission's goals and would distort the marketplace.

Yet while regulation of TDM-based services must not interfere with the transition to packet-based services, it is also important to minimize the administrative burden associated with regulating these legacy, declining services. TDM-based Business Data Services are already subject to price caps, and retaining that legacy regime for these legacy services is likely to pose fewer burdens than shifting to a new one. Both Verizon and INCOMPAS therefore agree that it makes sense to retain price caps for TDM-based Business Data Services nationwide.

We also agreed that there should be a one-time adjustment to these rates (implemented over a two-year period) to account for the freeze in rates under the *CALLS Order*, and that going forward there should be an annual adjustment to rates based on an X-factor net of inflation. In calculating this one-time reduction, the Commission should use data in the record to determine the effect that competition has actually had on prices, such as the estimates contained in the Rysman White Paper. With respect to rate adjustments going forward, the Commission should rely on publicly available data. As the FNPRM proposes, the Commission should use the KLEMS data, which provides a public source for industry-level data on input prices and total

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<sup>38</sup> See FNPRM ¶¶ 78, 80-84, 283 n.708.

<sup>39</sup> See FNPRM ¶ 197.

factor productivity for the telecommunications industry.<sup>40</sup> But the Commission should not require price-cap carriers to submit cost studies, which would impose unnecessary administrative and financial burdens on carriers.<sup>41</sup>

### **III. THE COMMISSION SHOULD ADOPT LIGHT-TOUCH REGULATION OF PACKET-BASED SERVICES IN NON-COMPETITIVE CENSUS BLOCKS**

The dominant carrier regime, with its 1980's roots, is not an appropriate vehicle to regulate the multi-provider, multi-technology marketplace for Business Data Services. It is especially inappropriate for packet-based Business Data Services like Ethernet, which many companies, including notably many cable operators, successfully compete to provide. Yet as Verizon and INCOMPAS have agreed, there are areas where the market today is not sufficiently competitive to ensure reasonably priced packet-based Business Data Services. In those areas, some form of rate regulation is appropriate.<sup>42</sup> The framework for that rate regulation should be less burdensome than the dominant-carrier regime it replaces, acknowledging the dynamic nature of the Business Data Services marketplace.<sup>43</sup> A benchmarking approach, such as one the FNPRM proposes, can ensure the availability of just and reasonable rates without imposing an

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<sup>40</sup> See FNPRM ¶ 378.

<sup>41</sup> See *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, Order on Reconsideration, 2 FCC Rcd 6283, ¶ 146, n.218 (1987) (“Use of an average schedule eliminates the necessity of conducting expensive and burdensome cost studies”) (citing *MTS and WATS Market Structure: Average Schedule Companies*, Report and Order, 103 FCC 2d 1017, 1018-19 (1986)); *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 270 (1990) (establishing “procedures [that] are intended to reduce the need for costly and burdensome cost studies that are normally required to establish access rates upon leaving NECA pools”).

<sup>42</sup> See Verizon and INCOMPAS April 2016 Joint Letter at 2.

<sup>43</sup> See FNPRM ¶¶ 74, 270, 497.

undue burden on providers of Business Data Services and while still preserving incentives for investment and competition.

**A. Ethernet Benchmarks Should Apply to All Providers of Business Data Services Except New Entrants**

Verizon proposes that the Commission adopt benchmarks that would apply to all Ethernet services in areas deemed non-competitive, excluding any services above a threshold that the Commission finds are competitive in all cases. Ordinarily, if there is a dominant provider of a service in a market, subjecting only that provider in that market to the benchmarks would ensure just and reasonable rates. If the dominant provider's rates are regulated, competitive providers would be expected to match or undercut those regulated rates in order to attract customers.<sup>44</sup>

Here, however, there is an additional concern beyond the availability of just and reasonable rates. For example, as discussed in the attached declaration of Daniel Higgins, a major cable operator, which also is a major supplier of Ethernet service, has refused to sell Ethernet service to Verizon within Verizon's ILEC franchise area, and has reiterated this refusal on multiple occasions.<sup>45</sup> Verizon may use alternative Ethernet suppliers within its footprint for several reasons, including because some customers seek to have facilities diversity at their locations but also wish to obtain all of their Business Data Service through one-stop shopping with a single provider.<sup>46</sup> Business Data Services providers that refuse to deal are failing to comply with their common carrier obligations.

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<sup>44</sup> See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, First Report and Order, 85 FCC 2d 1, ¶¶ 79, 88 (1980).

<sup>45</sup> See Higgins Decl. ¶ 5.

<sup>46</sup> See Higgins Decl. ¶ 4.

Allowing cable operators or other Business Data Services providers to avoid their common carrier duties is problematic for several reasons. First, in the case of cable operators, these refusals to deal have plainly anticompetitive motivations: cable operators are constructing their own nationwide Wi-Fi networks to compete with Verizon and other wireless providers.<sup>47</sup> Thus, allowing cable operators to refuse service to competing wireless providers could impede the deployment of wireless networks, contrary to the Commission's goals and the public interest.<sup>48</sup> Second, allowing some providers of Business Data Services to avoid their common carrier duties would create an uneven regulatory playing field.<sup>49</sup> Requiring some competitors to operate as common carriers, but not others that offer comparable services, would confer unfair competitive advantages and distort the marketplace.<sup>50</sup>

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<sup>47</sup> See Sue Marek, *Analyst: Comcast Triggers MVNO Deal, Will Launch Wi-Fi-First Service in 2016*, FierceWireless (Oct. 21, 2015), <http://www.fiercewireless.com/story/analyst-comcast-triggers-mvno-deal-will-launch-wi-fi-first-service-2016/2015-10-21>; Colin Gibbs, *Report: Comcast Seeking Wireless Tech Execs with Network, MVNO Experience*, FierceWireless (Apr. 12, 2016), <http://www.fiercewireless.com/story/report-comcast-seeking-wireless-tech-exec-network-mvno-experience/2016-04-12>; Tom DiChristopher, *Comcast CEO: We're Keeping Options Open To Compete in Wireless*, CNBC.com (May 16, 2016), <http://www.cnbc.com/2016/05/16/comcast-ceo-were-keeping-options-open-to-compete-in-wireless.html>; see also Verizon Jan. 2016 Comments at 56.

<sup>48</sup> See FCC Chairman Tom Wheeler, *The Future of Wireless: A Vision for U.S. Leadership in a 5G World*, Prepared Remarks, National Press Club, Washington, D.C. (June 20, 2016), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0620/DOC-339920A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0620/DOC-339920A1.pdf); FNPRM ¶ 5.

<sup>49</sup> See FNPRM ¶ 257 (“We note that business data services are telecommunications services, regardless of the provider supplying the service. BDS providers are therefore common carriers.”) (footnote omitted); *id.* ¶ 257, n.672 (“[C]ompetitive providers offer BDS as common carrier services under the forbearance from tariffing that was granted for carriers other than an incumbent LEC.”) (citing Hyperion Order, 12 FCC Rcd 8596, 8596-97 (1997)).

<sup>50</sup> *Telephone Number Requirements for IP-Enabled Service Providers*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd 19531, ¶ 1 (2007) (it is a goal of the Commission to “ensure regulatory parity among providers of similar services,” in order to “minimize marketplace distortions arising from regulatory

Given the potential for abuse in this market, the Commission has the legal authority—under at least Sections 201 and 202 of the Act—to subject competitive providers to a benchmark to ensure that common carriers comply with their duty to provide service on just and reasonable terms. As the Commission has explained in another context, a benchmarking approach “is a commonplace aspect of the regulation of interstate communications services and enables the Commission to fulfill its core statutory responsibility that rates be just and reasonable. . . . It is primarily an enforcement mechanism which provides an objective and time-tested standard by which to assess the reasonableness of rates in response to a complaint or an investigation.”<sup>51</sup> The Commission has explained that, because it is a “standard practice” to require common carriers to justify their rates in a formal complaint proceeding filed under sections 201 and 208 of the Act, imposing a benchmark simply imposes obligations similar to those that carriers would face in such complaint proceedings.<sup>52</sup>

Subjecting competitive providers to benchmarks would not require them to provide service to any location at which a customer may seek service. As with ILECs today, the fact that competitive providers of Business Data Services are common carriers does not transform them into carriers of last resort, and federal law does not impose such requirements on incumbent carriers or any kind of provider of Business Data Services.<sup>53</sup> In situations where customers

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advantage”).

<sup>51</sup> *Rates for Interstate Inmate Calling Services*, Order Denying Stay Petitions and Petition to Hold in Abeyance, 28 FCC Rcd 15927, ¶ 4, n.25 (2013).

<sup>52</sup> *Id.*

<sup>53</sup> *High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 37 n.254 (2008) (“Carrier of last resort obligations for incumbent LECs are a matter of state law.”).

request Business Data Services at locations where there are no facilities available, under construction, or planned for construction based on projections of future demand, it is a just and reasonable practice for common carriers to charge special construction charges to construct those facilities.<sup>54</sup> The Commission need not further regulate the use of these special construction charges, which are economically necessary to cover the additional costs of building new facilities.

Finally, to the extent the Commission has concerns that certain entrants would face undue burdens even under a benchmarking approach with streamlined procedures, the Commission could adopt a mechanism to exempt certain providers from rate challenges in some cases. For example, the Commission could adopt a rule that no Business Data Services provider could be subject to a rate challenge within some period after entering a particular geographic market. This would allow new entrants greater flexibility to set their rates when they first enter a new market, and thereby maximize the incentives for such entry in the first instance.

**B. Ethernet Benchmarks Should Be Based on Transparent Pricing Information That Can Be Challenged in a Streamlined Proceeding**

As with the competitive test, there is no perfect approach to setting benchmarks but the Commission should follow certain key principles.

- First, the source for the benchmark should be transparent pricing information.<sup>55</sup> The Commission should use the prices actually charged in the marketplace, which are known to both sellers and buyers.

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<sup>54</sup> See *Investigation of Access and Divestiture Related Tariffs*, Memorandum Opinion & Order, 97 FCC 2d 1082, 1309 (1984) (approving special construction requirements after certain changes, which are reflected in Verizon’s tariffs).

<sup>55</sup> Verizon Feb. 2016 Reply at 27, 33. See also CenturyLink Feb. 2016 Reply at iv (“CLECs ignore actual Ethernet rates, pointing instead to so-called ‘rack rates,’ but fail to acknowledge that most purchasers never pay anything close to those charges.”); AT&T Feb. 2016 Reply at 16 (noting that Professor Baker’s analysis is based on “a very incomplete and distorted picture of

- Second, the Commission should where possible compare like services. Although the Commission proposed setting Ethernet rates based on TDM rates, that approach is problematic because TDM services come in two main increments (1.5 Mbps DS-1s and 45 Mbps DS-3s), neither of which is comparable to any of the primary Ethernet services, much less the full range of Ethernet services, which ranges from a few megabits to multiple gigabits.<sup>56</sup>
- Third, the benchmark should be set at a level that, while in the range of reasonableness, should not be so low that it deters competition. As the Commission has recognized, rates set too low deter entry by eliminating the potential margin for competitive providers.<sup>57</sup>

Consistent with these principles, Verizon proposes Ethernet benchmarks based on the actual rates paid by Ethernet purchasers in non-competitive areas. A benchmark would be established for the primary categories of service, which may take into account variables such as bandwidth, term, and class of service. Unfortunately, the pricing data the Commission collected cannot serve this purpose. Those data are both three years old and suffer from other shortcomings, as Verizon’s January 2016 comments described and the Rysman White Paper acknowledged.<sup>58</sup> Verizon would propose a process by which each ILEC submits information regarding the average rates it actually charges in non-competitive areas for each type of Ethernet service it offers—not the rack rates that few if any customers pay.

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actual prices at buildings with competitors’ connection”).

<sup>56</sup> See FNPRM ¶ 47.

<sup>57</sup> See n.31, *supra*.

<sup>58</sup> Verizon Jan. 2016 Comments at 12-16, 62-63 (FCC filed Jan. 17, 2016); Rysman White Paper at III (“As with the revenue data, we do not observe billing data if the BDS service is part of a larger managed service contract. . . . For pricing data, providers report billing revenue, not prices. Even within a single buyer-seller relationship, we observe substantial variation in monthly revenue, even going to zero. . . . An additional challenge is how different providers price different elements of their service.”).

After gathering information on the rates charged in the non-competitive areas in each ILEC territory and for each type of Ethernet service, the Commission should subject these rates to a one-time, across-the-board reduction to derive the benchmark rates. The purpose of this reduction would be to replicate competitive effects in non-competitive areas. For example, the Rysman White Paper found that four or more facilities-based competitors to the ILEC in the census block but not the building reduced DS-3 prices by approximately 15 percent.<sup>59</sup> The Commission could therefore use record data, or carrier pricing data, or some combination of both, to determine the appropriate level of price reduction needed to ensure that rates reflect healthy levels of competition.

To ensure that rates remain at competitive levels in future years, the Commission should either adopt an annual efficiency measure, or readjust rates every three years as part of its proposed periodic review, and should continue to use this chosen approach in future years. If the Commission adopts an efficiency measure, it should be based on publicly available data, such as the KLEMS data described in the FNPRM.<sup>60</sup> The Commission should not require carriers to provide cost studies, which would be unnecessarily burdensome.<sup>61</sup> As part of its proposed reviews every three years, the Commission could collect data on prices in competitive areas to determine whether there have been changes, and use those changes to adjust the benchmark in non-competitive areas. This approach has the advantage of tracking the actual operation of the marketplace, rather than relying on a proxy.

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<sup>59</sup> Rysman White Paper at Table 19.

<sup>60</sup> See FNPRM ¶¶ 377-378, 406-407 & App. C, ¶¶ 4-6.

<sup>61</sup> See n.41, *supra*.

ILEC rates would be publicly disclosed.<sup>62</sup> The Commission could require ILECs to publish these rates on their respective websites. All provider rates set at or below the benchmark would be presumed lawful until the Commission finds otherwise. Where a party challenges a rate that complies with this benchmark, the challenging party would bear the burden to overcome the presumption of lawfulness, and unless a challenger overcomes that presumption, the party whose rates are being challenged need not justify its rates.

To ease the burden on both the challenger and challenged party, the Commission can adopt a streamlined complaint proceeding to resolve allegations that provider rates are not just and reasonable. For example, the Commission could adopt a process by which challenges would be resolved within 60 days. It could also specify limited categories of evidence that would be deemed presumptively relevant in demonstrating that a rate is unreasonable and for overcoming that presumption. This would enable providers to maintain data in the ordinary course that could be used in Business Data Services rate proceedings.

Finally, to ensure that sellers of Business Data Services do not have perverse incentives to price above the benchmark, the Commission should adopt a process whereby purchasers are permitted to receive service at the benchmark rate while a rate challenge is pending. If the Commission ultimately finds that the above-benchmark rate is reasonable, the challenger will be required to make a one-time true-up payment equal to the difference between the benchmark rate and the charged rate found reasonable. If the Commission finds the above-benchmark rate

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<sup>62</sup> See FNPRM ¶ 436.

unreasonable, the seller would be required to charge the benchmark rate (or any other rate the Commission found reasonable) going forward.

#### **IV. THE COMMISSION SHOULD NOT FURTHER REGULATE TERMS AND CONDITIONS**

The Commission should not permit purchasers of Business Data Services to break their existing arrangements with sellers, but should instead permit existing arrangements to complete their terms. Existing arrangements between providers of Business Data Services and their customers reflect an economic bargain between sophisticated parties.<sup>63</sup> Part of that bargain involves the seller giving the buyer immediate benefits that are paid for over the life of the arrangement. For example, buyers reap substantial benefits immediately in exchange for a commitment to maintain specified volumes for a set term. For these reasons, the remedy of a “fresh look” of existing arrangements is “a rare exercise of Commission discretion”<sup>64</sup> that the Commission uses “sparingly.”<sup>65</sup> Any “fresh look” would effectively grant buyers a windfall in the form of discounts already received, without any corresponding commitment. This would unduly interfere with parties’ expectations.<sup>66</sup>

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<sup>63</sup> See Jan. 2016 Direct Case of Verizon at 27.

<sup>64</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 16991 (2003) (subsequent history omitted).

<sup>65</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 As Amended by the Cable Television Consumer Protection & Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633, ¶ 24 (2007).

<sup>66</sup> Cf. FNPRM ¶ 111 (stating Commission’s desire to avoid “unnecessary disruption of the market for these services”).

**REDACTED – FOR PUBLIC INSPECTION**

There also is no basis for a “fresh look” with respect to purchasers’ commitments to maintain certain volumes under discount plans to which they subscribe.<sup>67</sup> Those commitments formed an essential basis for the bargain those parties struck.<sup>68</sup> In response to the Order, Verizon is evaluating its discount offerings and will modify them prospectively consistent with the Order. But allowing customers to retain benefits premised on certain commitments without enforcing those commitments would grant subscribers an unwarranted windfall.

There also is no need for further regulation of early termination and shortfall fees. The Commission’s Order specifies that changes to early termination and shortfall fees apply not only to future customers but also existing customers.<sup>69</sup> As with the commitment-level provisions discussed above, any further regulation of early termination or shortfall fees would unbalance the economic bargain between Verizon and subscribers to provide subscribers with a windfall.

Similarly, the Commission’s Order with respect to the discount plans designated in the tariff investigation eliminates any need for further regulation of terms and conditions of Verizon’s discount plans.

\* \* \*

### **CONCLUSION**

The Commission should adopt a framework for Business Data Services that reflects the common ground Verizon and INCOMPAS have reached and the additional details Verizon has proposed in these comments.

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<sup>67</sup> See *id.* ¶ 112.

<sup>68</sup> See Jan. 2016 Direct Case of Verizon at 27.

<sup>69</sup> See FNPRM ¶¶ 140, 158.

**REDACTED – FOR PUBLIC INSPECTION**

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*Of Counsel*

Respectfully Submitted,

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June 28, 2016

**REDACTED – FOR PUBLIC INSPECTION**

# **EXHIBIT A**

## **DECLARATION OF DANIEL HIGGINS**

**REDACTED – FOR PUBLIC INSPECTION**

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

In the Matter of	
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 Services	RM-10593

**DECLARATION OF DANIEL HIGGINS**

1. My name is Daniel Higgins. I am the same Daniel Higgins that made a declaration in these proceedings on March 1, 2016, supporting positions Verizon has taken.

2. In my earlier declaration, I explained that Verizon is a buyer and seller of Business Data Services, and as a purchaser of Business Data Services, we seek to purchase the most efficient Business Data Service available to serve our retail customers. Verizon has relationships with the major cable companies and purchases Ethernet services from them—including Ethernet over Fiber and Ethernet over HFC—where they are the best access option available. But as I explained in my earlier declaration <<**BEGIN HIGHLY CONFIDENTIAL**

**END HIGHLY**

**CONFIDENTIAL**>>. The purpose of this declaration is to provide additional detail about that refusal to deal.

**REDACTED – FOR PUBLIC INSPECTION**

3. Although Verizon's preference is to provision retail Business Data Services over our own network facilities, we purchase wholesale Business Data Services from other providers when that is the most efficient option. This is sometimes true even within our own ILEC territory. Verizon does not have facilities available to provide Ethernet services at every customer location within our ILEC territory.

4. In addition, some Verizon customers seek to have facilities diversity at their locations but also wish to obtain all of their Business Data Services through one-stop-shopping with one provider. In those instances, Verizon will obtain wholesale Business Data Services from another provider to meet our retail customers' needs.

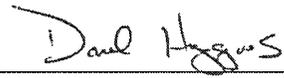
5. <<BEGIN HIGHLY CONFIDENTIAL END HIGHLY  
**CONFIDENTIAL**>> is a major supplier of Ethernet service. We seek to purchase wholesale Ethernet service from it to provide diversity and where it is the most efficient option for us. But it refuses to sell Ethernet service to Verizon in our ILEC franchise areas, and it has confirmed this position more than one once. <<BEGIN HIGHLY CONFIDENTIAL

**END HIGHLY CONFIDENTIAL**>> Based in part on that correspondence, it is our understanding that this company takes the same position with respect to other incumbents, which it has reiterated to us as recently as May.

6. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 27, 2016

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Daniel Higgins