

**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             |

**COMMENTS OF  
PUBLIC KNOWLEDGE; OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA;  
COMMON CAUSE; NEXT CENTURY CITIES; ENGINE; AND  
SCHOOLS, HEALTH & LIBRARIES BROADBAND COALITION**

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Public Knowledge; Open Technology Institute at New America; Common Cause; Next Century Cities; Engine; and Schools, Health & Libraries Broadband Coalition submit these comments on the Commission’s May 2, 2016 *Further Notice of Proposed Rulemaking* (“*FNPRM*”) regarding business data services (“BDS”) in the above-referenced dockets.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

As the Commission recognizes in the *FNPRM*, BDS supply essential connectivity for businesses, non-profits and community anchor institutions, government agencies, and mobile

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<sup>1</sup> *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 4723 (2016) (“*FNPRM*” or “*Tariff Investigation Order and FNPRM*”).

wireless carriers,<sup>2</sup> and “[BDS] impact the lives of consumers every day.”<sup>3</sup> Yet, the FCC has allowed incumbent providers to exploit their market power in the provision of these critical services by charging exorbitant rates and imposing anticompetitive terms and conditions on purchasers of BDS. As a result, businesses, non-profits and community anchor institutions, government agencies, and mobile wireless carriers must overpay for BDS and those costs are ultimately borne by American consumers and taxpayers. Excessive BDS pricing saps economic growth, costs jobs, limits investment, and burdens local government budgets. Indeed, the Consumer Federation of America recently found that abuse of market power by incumbent BDS providers has resulted in economic losses over the past five years in excess of \$150 billion.<sup>4</sup> Absent FCC action, these economic and social losses will only grow as new broadband devices and applications continue to increase the importance of connectivity for even larger segments of the economy.

The advent of 5G wireless, for example, promises radical increases in the ability of the nation’s communications networks to support high-bandwidth applications; enable ultra-reliable, low latency communications; and make the “Internet of Things” a reality. But, as Chairman Wheeler has recognized, the ability of 5G to deliver on any of these promises depends heavily on wireless providers’ access to cost-effective BDS at hundreds of thousands if not millions of

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<sup>2</sup> *Id.* ¶¶ 44, 70.

<sup>3</sup> *Id.* ¶ 10.

<sup>4</sup> See Mark Cooper, Director of Research, Consumer Federation of America, “The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excess Profits,” at 1, 35 (Apr. 2016), available at <http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf>.

locations.<sup>5</sup> Without access to just and reasonable rates for BDS, wireless 5G deployments – and the economic and social benefits these investments promise to deliver to American consumers, anchor institutions, and businesses – will suffer the types of delays and scale reductions that could cost the United States its lead in technological capacity, job creation and economic growth.

By contrast, a functioning BDS market, with reasonable rates, terms, and conditions, would spur a virtuous cycle of demand, innovation, and investment. For example, American businesses would be able to use savings from lower BDS prices to invest in developing new applications and services and, in turn, drive greater consumer participation in the broadband economy and create more demand for faster and better broadband networks.<sup>6</sup> Moreover, as Engine has explained, access to competitively-priced BDS would lower the costs of starting a small business and result in “more startups, more jobs, and more innovation.”<sup>7</sup> Additionally, reform would allow local governments to reallocate cost-savings towards more productive means, including e-government services. Furthermore, BDS reform would be consistent with President Obama’s recent Executive Order that federal agencies take action to promote competition and the continued growth of the American economy.<sup>8</sup>

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<sup>5</sup> See Prepared Remarks of FCC Chairman Tom Wheeler, “The Future of Wireless: A Vision for U.S. Leadership in a 5G World,” at 6 (June 20, 2016), *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-339920A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-339920A1.pdf).

<sup>6</sup> See Reply Comments of Public Knowledge, Common Cause, Open Technology Institute at New America, and Engine, WC Dkt. No. 05-25, at 6 (filed Feb. 19, 2016).

<sup>7</sup> Evan Engstrom, Policy Director, Engine, *Starting Up the Broadband Economy*, RECODE, Dec. 3, 2015, <http://www.recode.net/2015/12/3/11621108/starting-up-the-broadband-economy>.

<sup>8</sup> See “Executive Order – Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy” (Apr. 15, 2016), *available at* <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase->

BDS reform will also bring substantial benefits to America's schools and libraries. Reasonably priced BDS will help ensure that these anchor institutions have access to affordable broadband at bandwidths necessary to meet the needs of their communities. In fact, 41 percent of schools do not yet meet the Commission's short-term connectivity goal of 100 Mbps for every 1,000 students<sup>9</sup> and approximately 42 percent of libraries have broadband connections no greater than 10 Mbps.<sup>10</sup>

For these and the numerous other reasons discussed in the record,<sup>11</sup> the Commission must act now and adopt long-overdue reform of the BDS market. The FCC should reject incumbent LECs' obvious attempts to delay this 11-year-old proceeding even further and proceed with reform.<sup>12</sup> The *FNPRM* is consistent with the guiding principles proposed by INCOMPAS and Verizon for a new regulatory framework governing BDS.<sup>13</sup> Public Knowledge supports the

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[competition-and-better-inform-consumers.](#)

<sup>9</sup> See EducationSuperHighway, "2015 State of the States," at 12 (November 2015), *available at* <http://stateofthestates.educationsuperhighway.org/>.

<sup>10</sup> See Information Policy and Access Center, University of Maryland and American Library Association, "Digital Inclusion Survey: Public Libraries & Broadband," at 1 (2015), *available at* [http://digitalinclusion.umd.edu/sites/default/files/BroadbandBrief2015\\_1.pdf](http://digitalinclusion.umd.edu/sites/default/files/BroadbandBrief2015_1.pdf).

<sup>11</sup> See, e.g., Comments of Sprint Corporation, WC Dkt. No. 05-25, at 70-79 (filed Jan. 27, 2016) ("Sprint Jan. 27, 2016 Comments") (discussing the ways in which unreasonable BDS rates, terms, and conditions undermine the FCC's broadband policies and harm consumer welfare).

<sup>12</sup> See CenturyLink *et al.* Motion to Strike, WC Dkt. No. 05-25, at 3 (filed June 17, 2016) (alleging that "the Commission has no choice but to start over" in this proceeding—which began in 2005—simply because the largest cable companies recently filed supplemental data showing customer locations that were connected to Metro Ethernet-capable headends in 2013 even if such locations were served using only best efforts broadband Internet access services at the time).

<sup>13</sup> See *FNPRM* ¶ 159 (citing Letter from Kathleen Grillo, Verizon and Chip Pickering, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Apr. 7, 2016) ("INCOMPAS/Verizon Principles")).

INCOMPAS/Verizon guiding principles and the Commission's proposed regulatory framework so long as the agency's final rules prevent BDS providers from exercising market power and promote technology-neutral competition. As discussed below, as the FCC develops its new regulatory framework for BDS, the following key facts and principles should guide its decision making:

- *First*, the BDS market is, by any measure, overwhelmingly concentrated and the market power of incumbent BDS providers requires regulatory oversight.
- *Second*, the Commission's regulatory framework for BDS should be technology neutral and provider neutral. The industry's transition from TDM to packet-based technology does not change the fundamental economics of deploying the network facilities necessary to provide BDS, including the extremely high financial and operational barriers to such deployment. Consistent with longstanding antitrust principles, moreover, the FCC's new framework should apply to all providers that can exercise market power, even if those providers are not incumbent LECs. A BDS provider's power to control price matters more than its historical regulatory label.
- *Third*, the Commission's regulatory framework for BDS should be based on actual competition, not the specter of potential competition. As discussed in Part II.C below, if the FCC relies on the presence of competitive fiber in a census block as a proxy for effective BDS competition, it risks repeating the same mistake it made when it adopted its flawed pricing flexibility triggers for BDS.
- *Fourth*, the Commission should adhere to well established principles of economics when developing and applying the Competitive Market Test proposed in the *FNPRM*. Specifically, the Commission should use the general approach set forth in the Department of Justice's Horizontal Merger Guidelines and define the relevant geographic market as the customer's location. In addition, the FCC should rely on its precedent that duopoly markets tend to result in supra-competitive prices and refrain from deeming markets with only two facilities-based providers as competitive.
- *Fifth*, the Commission should establish benchmark prices for BDS that reflect a competitive market. As discussed in Part II.E, the Commission should not establish just and reasonable rates for packet-based BDS by benchmarking them against the very same incumbent LEC TDM rates that the Commission has already suggested are unreasonably high.
- *Sixth*, the Commission should ensure that incumbent providers' terms and conditions for BDS do not impede competition in the market. As discussed in

Part II.F, the FCC should prohibit the percentage commitments in incumbent LEC tariff pricing plans as unjust and unreasonable in violation of Section 201(b) of the Act.<sup>14</sup> Ultimately, these provisions harm American businesses, anchor institutions, and consumers in the downstream retail business and mobile wireless markets.

The BDS market is badly broken and reform has eluded the Commission for too long. The costs of continued market failure – in terms of lost economic growth, reduced investment, lower employment and untapped innovation – are simply too great to continue to ignore. The Commission must act now to reform its BDS regime.

## II. DISCUSSION

### A. The BDS Market Is Overwhelmingly Concentrated and Warrants Regulatory Oversight.

The Commission correctly finds in the *FNPRM* that “concentration by any measure appears high” in the BDS marketplace.<sup>15</sup> Multiple economists retained by purchasers of BDS all reached this conclusion based on their analysis of the data collected by the Commission. These experts found that the incumbent LEC is the only facilities-based provider in three-quarters of locations with special access demand and that *nearly all* such locations have no more than two providers.<sup>16</sup> Moreover, the record demonstrates that the Herfindahl-Hirschman Index (“HHI”), a

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<sup>14</sup> 47 U.S.C. § 201(b).

<sup>15</sup> *FNPRM* ¶ 216.

<sup>16</sup> *See id.* ¶ 175 (explaining Dr. Jonathan Baker’s findings that “almost all buildings (at least 95%) have no more than two providers”); *id.* ¶ 178 (describing Susan Gately’s findings that “the ILEC is the only provider with a facilities-based dedicated connection (special access) at roughly 3 out of every 4 building/cell tower locations with special access demand”); *id.* ¶ 181 (discussing Dr. Stanley Besen and Dr. Bridger Mitchell’s findings that “approximately 73 percent of special access purchaser locations are served by a single ILEC with no other facilities-based supplier reported present” and that “almost all purchaser locations, 97 percent, are served by only one or two suppliers . . .”).

widely accepted measure of market concentration, “exceeds 5,000 in approximately 99 percent of census blocks” where BDS is provided by an incumbent LEC.<sup>17</sup> By comparison, the Horizontal Merger Guidelines “characterize a market with an HHI above 2500 as ‘Highly Concentrated.’”<sup>18</sup> It follows that the Commission must adopt appropriate regulations to constrain incumbent providers’ market power and ensure just and reasonable rates, terms, and conditions for BDS, as required by Section 201(b) of the Act.

**B. The Commission’s Regulatory Framework for BDS Should Be Technology Neutral and Provider Neutral.**

The FCC’s new regulatory framework for BDS should be technology neutral.<sup>19</sup> The Commission is entirely correct that “[t]echnological distinctions must not be allowed to obscure economic reality.”<sup>20</sup> In other words, a change in technology from legacy TDM services to packet-based services does not somehow lower the extremely high financial and operational barriers to competitive deployment of the facilities needed to provide BDS.<sup>21</sup> Nor does the

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<sup>17</sup> *FNPRM* ¶ 183 (quoting Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Dkt. No. 05-25, at 20-21) (originally filed Jan. 27, 2016 and revised consistent with protective orders Apr. 11, 2016)).

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

<sup>19</sup> *FNPRM* ¶ 6.

<sup>20</sup> *Id.*

<sup>21</sup> *See, e.g.*, Comments of Time Warner Telecom and One Communications, WC Dkt. No. 05-25, at 13 (filed Aug. 8, 2007) (“The economics of loop deployment do not magically improve when a different protocol is used to transmit the signal.”); Comments of the Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, at 15 (filed Jan. 28, 2016) (“Ad Hoc Jan. 28, 2016 Comments”) (“Regardless of the packet or TDM electronics at the end of a loop, last mile access service remains non-competitive because it requires high levels of sunk investment in transmission facilities, whether they are fiber or copper and whether the service running on them is analog or digital, packet or TDM.”).

transition from TDM to Ethernet technology somehow eliminate incumbent LECs' market power in the provision of BDS.<sup>22</sup> Accordingly, the Commission should reject claims that regulations to ensure just and reasonable rates, terms, and conditions for packet-based BDS are unnecessary.

Moreover, as INCOMPAS and Verizon have proposed, the Commission's regulatory framework should be provider neutral.<sup>23</sup> If the FCC finds that multiple providers in a market it deems to be non-competitive have market power, the agency should apply its regulatory regime to all such providers, regardless of whether they are incumbent LECs, cable companies, or competitive LECs. There is no reason to regulate two providers in a non-competitive market differently if they both have the power to control price.

**C. The Commission's Regulatory Framework Should Be Based on Actual, Not Potential, Competition.**

As Public Knowledge has recently explained, given that the Commission's predictive judgments regarding competition in the markets for BDS and similar services have been wrong, the agency should refrain from making similar predictive judgments in this proceeding.<sup>24</sup> In particular, in determining whether a given market is competitive, the agency should focus on actual competition and existing competitors, not potential competition.

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<sup>22</sup> See, e.g., Comments of INCOMPAS, WC Dkt. No. 05-25, at 11-12 (filed Jan. 27, 2016) (describing the sources of incumbent LECs' market power in the provision of Ethernet services); Ad Hoc Jan. 28, 2016 Comments at iii ("The data collection confirms that the ILEC claims of underdog status compared to new Ethernet competitors are specious and do not justify Ethernet forbearance.").

<sup>23</sup> See INCOMPAS/Verizon Principles at 2 ("All providers offering the same or similar services should be subject to the same overall regulatory framework. That includes not only incumbent providers, but also cable companies and other wireline competitive providers that now compete in this marketplace.").

<sup>24</sup> See Letter from Phillip Berenbroick, Public Knowledge, to Chairman Tom Wheeler, FCC, WC Dkt. No. 05-25, at 3-4 (filed June 16, 2016) ("Public Knowledge June 16, 2016 Letter").

More specifically, the Commission should reject incumbent LECs' claims that the mere presence of competitive fiber in a census block is sufficient to constrain prices. There is ample record evidence demonstrating that "the presence of competitive carrier fiber near a location does not constitute the type of potential competition that will discipline incumbent LEC prices."<sup>25</sup> If that were not the case, then this proceeding would be largely unnecessary because potential competition would have already prevented incumbent LECs from offering their BDS at supra-competitive rates and on anticompetitive terms and conditions.<sup>26</sup>

Furthermore, the Commission has already recognized that "the existence of significant barriers to entry . . . indicates that potential competition poses no significant competitive constraint" on incumbents' market power.<sup>27</sup> There is no basis for departing from that precedent here. As Sprint has explained, the incumbents' argument boils down to using the presence of

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<sup>25</sup> Reply Comments of Birch, EarthLink, and Level 3, WC Dkt. No. 05-25, at 16 (filed Feb. 19, 2016) ("Birch *et al.* Feb. 19, 2016 Reply Comments"); *see id.* at 14-16 (discussing economists' findings); Reply Comments of Windstream, WC Dkt. No. 05-25, at 12-21 (filed Feb. 19, 2016) (demonstrating that even when competitors have fiber in a census block, substantial entry barriers and costs relative to revenues prevent widespread entry to other buildings); Reply Comments of Sprint Corporation, WC Dkt. No. 05-25, at 20-39 (filed Feb. 19, 2016) ("Sprint Feb. 19, 2016 Reply Comments").

<sup>26</sup> *See, e.g.*, Reply Comments of INCOMPAS, WC Dkt. No. 05-25, at 10 (filed Feb. 19, 2016) ("[T]he incumbents' claim that potential competition curbs the exercise of market power is nonsensical. If this were true, we would see their anti-competitive practices being constrained *today*, but the record shows otherwise.") (emphasis in original); Birch *et al.* Feb. 19, 2016 Reply Comments at 13 ("[I]f competitive carriers could simply deploy connections to most locations in the vicinity of their fiber transport facilities, competitive carriers would have deployed connections to a large percentage of the locations by now. But this is not the case.").

<sup>27</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶ 72 (2010) ("*Phoenix Forbearance Order*").

competitive fiber as an “evidentiary proxy” for effective BDS competition.<sup>28</sup> But the Commission already tried that approach when it adopted its flawed pricing flexibility triggers. As Sprint puts it, the Commission “should not make the same mistake twice by freeing the incumbents from proper pricing regulations in wide swaths of the country based on an unfounded prediction that ‘potential competitors’ will *eventually* extend last-mile facilities from their fiber rings in volumes sufficient to provide effective competition.”<sup>29</sup>

**D. The Commission Should Adhere to Sound Economic Principles When Developing and Applying Its Competitive Market Test.**

In crafting the Competitive Market Test proposed in the *FNPRM*, the Commission should follow well established principles of economics. *First*, the Commission should use the general approach set forth in the Horizontal Merger Guidelines to define the relevant geographic market for the Competitive Market Test.<sup>30</sup> Consistent with this approach, the Commission should define the relevant geographic market as the customer’s location (*i.e.*, building or cell site). The FCC has consistently held that the relevant geographic market for special access services “is a particular customer’s location, since it would be prohibitively expensive for an enterprise customer to move its office location in order to avoid a ‘small but significant and nontransitory’

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<sup>28</sup> Sprint Feb. 19, 2016 Reply Comments at 38 (internal citation omitted).

<sup>29</sup> *Id.* at 38-39 (emphasis in original).

<sup>30</sup> See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, § 4 (rel. Aug. 19, 2010) (focusing on demand substitution factors, *i.e.*, a customer’s ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change).

increase in the price of special access service.”<sup>31</sup> For ease of administrability, the agency can aggregate customer locations subject to similar levels of competition.<sup>32</sup>

*Second*, the Commission must refrain from deeming markets with only two facilities-based competitors as competitive.<sup>33</sup> The FCC has already recognized that both economic theory and empirical evidence demonstrate that duopoly markets generally yield supra-competitive prices.<sup>34</sup> Therefore, the Commission must protect purchasers of BDS by finding duopoly markets to be non-competitive and applying appropriate regulation to ensure just and reasonable rates, terms, and conditions for BDS in those markets.

Furthermore, the Commission should adopt its proposal to re-apply the Competitive Market Test every three years based on updated data.<sup>35</sup> Doing so will help the agency ensure just and reasonable rates, terms, and conditions in areas initially deemed competitive but where competition backslides over time. By the same token, re-applying the Competitive Market Test will enable the Commission to refrain from applying regulation in areas initially deemed non-competitive but where effective competition has developed.

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<sup>31</sup> *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶ 28 (2005) (“*Verizon-MCI Merger Order*”); see also *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 28 (2005) (“*SBC-AT&T Merger Order*”).

<sup>32</sup> See *Verizon-MCI Merger Order* ¶ 28 (“In order to simplify its analysis, . . . the Commission has traditionally aggregated or grouped customers facing similar competitive choices.”); *SBC-AT&T Merger Order* ¶ 28 (same).

<sup>33</sup> See *FNPRM* ¶ 294 (“Should we require more than two facilities-based competitors in any area for a competitive trigger?”).

<sup>34</sup> See *Phoenix Forbearance Order* ¶¶ 30-31.

<sup>35</sup> *FNPRM* ¶ 298.

**E. The Commission Should Establish a Benchmark for Packet-Based BDS That Reflects Competitive Market Pricing.**

As Public Knowledge explained in its recent *ex parte* filing, the Commission should establish benchmark prices for BDS that reflect a truly competitive market.<sup>36</sup> A new regulatory framework that allows incumbent providers to continue charging unjust and unreasonable rates, albeit to a lesser degree, is unacceptable. For this reason, the Commission should reconsider or modify its proposal to establish just and reasonable rates for Ethernet and other packet-based BDS in non-competitive markets by “benchmarking them against the incumbent LEC’s TDM price for the most comparable level of service available.”<sup>37</sup> Given the Commission’s own suggestions in the *FNPRM* that incumbent LEC TDM rates are often above competitive levels,<sup>38</sup> using unreasonable TDM rates as the benchmark for reasonable Ethernet rates makes little sense. As Windstream has explained, the Commission’s proposed approach for Ethernet BDS would anchor “reforms on BDS rates that currently include monopoly or oligopoly profits.”<sup>39</sup> Therefore, the Commission should make downward adjustments to incumbent LEC TDM rates

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<sup>36</sup> See Public Knowledge June 16, 2016 Letter at 2-3.

<sup>37</sup> See *FNPRM* ¶ 430; see also *id.* ¶ 427.

<sup>38</sup> See, e.g., *id.* ¶ 239 (expressing the “view that the fact that the price capped incumbent LECs have kept their prices at the top of the cap is additional evidence of market power”); *id.* ¶ 401 (seeking comment on whether baseline price cap levels should be adjusted given that price cap incumbent LECs have achieved significant productivity gains over the last decade but their prices for TDM BDS have not decreased).

<sup>39</sup> Letter from John T. Nakahata, Counsel for Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 2 (filed June 3, 2016).

before using them as the benchmarks for reasonable Ethernet rates. Alternatively, the Commission should consider other benchmarking approaches.<sup>40</sup>

**F. The Commission Should Ensure That Terms and Conditions for BDS Do Not Impede Competition.**

The Commission was correct in taking action in the *Tariff Investigation Order* to prohibit certain types of unjust and unreasonable terms and conditions in incumbent LEC tariff pricing plans for TDM BDS.<sup>41</sup> However, as the Commission recognizes in the *FNPRM*, more must be done.<sup>42</sup> In particular, the FCC should prohibit loyalty provisions that lock up demand and impede competition in the BDS market. These provisions require purchasers to commit a high percentage (often 80 to 95 percent) of their historical or existing purchases when they enter into an incumbent LEC tariff pricing plan.<sup>43</sup> As the record makes clear, these percentage commitments are not the same as traditional volume discounts that have rational business

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<sup>40</sup> See, e.g., *id.* at 1 (proposing “a cost-based approach to developing wholesale last-mile input price benchmarks for packet-based [BDS]”); Letter from Thomas Jones, Counsel for Birch Communications, Inc. *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 7 (filed Aug. 28, 2015) (“[T]he Commission could use existing packet-based special access prices charged by competitive LECs or existing packet-based special access prices charges by incumbent LECs in relevant markets (if any) in which they face effective competition.”).

<sup>41</sup> See *Tariff Investigation Order and FNPRM* ¶¶ 86-158 (prohibiting so-called “all-or-nothing” provisions and certain shortfall and early termination penalties in the plans under investigation).

<sup>42</sup> See *id.* ¶¶ 447-491 (seeking comment on additional actions the Commission should take with respect to terms and conditions for BDS).

<sup>43</sup> *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, 30 FCC Rcd 11417, ¶ 12 (2015) (“*Tariff Investigation Designation Order*”).

justifications and can benefit both providers and purchasers.<sup>44</sup> Nor is participation in plans containing these percentage commitments truly voluntary as incumbent LECs have claimed.<sup>45</sup>

These percentage commitments are designed to lock up demand and stifle competition by preventing competitive carriers from purchasing from non-incumbent LEC suppliers of BDS or from deploying their own facilities to business customer locations.<sup>46</sup> Percentage commitments also inhibit the transition from TDM to Ethernet technology by forcing competitive carriers to continue purchasing TDM BDS from the incumbent LEC and/or precluding them from deploying their own facilities to serve customers.<sup>47</sup> Loyalty provisions also harm mobile wireless carriers.<sup>48</sup> These provisions lead to higher prices for American businesses, anchor

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<sup>44</sup> *See, e.g., id.* ¶ 38 (“A volume discount would typically be based on an absolute number of services purchased or dollars spent, not on a percentage of a customer’s purchase levels and would therefore reflect scale economies.”); Reply Comments of Sprint, WC Dkt. No. 05-25, at 19 (filed Mar. 12, 2013) (“Volume discounts are discounts for purchasing a higher *volume* of product – independent of the customer’s past purchases. They reflect real efficiencies associated with selling a larger bundle of goods to a single customer.”) (emphasis in original).

<sup>45</sup> *See, e.g.,* Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 4-5 (filed June 5, 2012) (explaining that competitive carriers often have no choice but to purchase from these incumbent LEC plans because (1) they control the only last-mile connection to the vast majority of business customer locations in the country; (2) incumbent LECs have set their undiscounted month-to-month rates for TDM BDS prohibitively high, thereby steering competitive carriers into the “discount” plans; and (3) competitive carriers cannot practically serve the downstream retail business market without a benefit known as “circuit portability,” but incumbents often only provide circuit portability as part of these plans).

<sup>46</sup> *See Tariff Investigation Designation Order* ¶ 6 (summarizing competitive carrier arguments).

<sup>47</sup> *Id.* ¶ 10.

<sup>48</sup> *See, e.g.,* Sprint Jan. 27, 2016 Comments at 55 (explaining that because so much demand for BDS remains committed to incumbent LECs, “ultimately the majority of [Sprint’s] backhaul circuits and expense remain with the incumbent LEC, despite designing a huge, new program to avoid that result”).

institutions, and consumers in the downstream retail business and mobile wireless markets. Therefore, the Commission should find that the percentage commitments in incumbent LEC tariff pricing plans are unjust and unreasonable and it should prohibit them in both competitive and non-competitive markets.

### III. CONCLUSION

The Commission must act now to reform the broken BDS market. The market power that incumbent BDS providers possess in the vast majority of geographic markets allows them to charge exorbitant prices for this essential connectivity and impose billions of dollars in unnecessary costs on American businesses, anchor institutions, and consumers. This longstanding tax on economic growth, investment, employment and innovation must end. The Commission must overcome its decade-long delay in ensuring just and reasonable rates, terms, and conditions in the provision of BDS and act now to reform its BDS regime.

Respectfully submitted,

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