REDACTED - FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 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 LIGHTOWER FIBER NETWORKS I, LLC, LIGHTOWER FIBER NETWORKS II, LLC, AND FIBER TECHNOLOGIES NETWORKS, LLC

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I. Introduction and Summary

Lightower Fiber Networks I, LLC, Lightower Fiber Networks II, LLC, and Fiber Technologies Networks, LLC (collectively, "Lightower") is a competitive provider of all-fiber network services serving enterprise, government, carrier and data center customers, Lightower's network consists of approximately 30,000 route miles providing access to over 15,000 service locations in the Northeast, Mid-Atlantic and Midwest.

The Commission has made its position clear in this Docket that "competition is best" and

that regulation is appropriate only where competition is not operative.[1] Lightower and other competitive fiber providers ("CFPs") like it are in fact bringing competition to the Business Data Services ("BDS") market wherever they operate. Lightower and the other CFPs are the competitive solution to the problem perceived by the Commission of excessive ILEC market power in BDS markets. Lightower currently operates under a light regulatory scheme in which the rates, terms and conditions pursuant to which it serves its customers are determined by market forces, rather than FCC regulation.

Should the Commission apply proposed price cap regulations to Lightower and other CFPs, the result would be a reduction, rather than an increase in competition. The proposed regulations, including but not limited to burdensome reporting and disclosure, would dramatically increase a CFP's cost of doing business and force it to cut back on the investments it is making in constructing new network that creates a more competitive market. Because Lightower's rate structure does not parallel that of the ILECs, Lightower's sales representatives would be uncertain about the prices they can quote customers, and this would slow the spread of competition. In addition, CFPs are in a very capital-intensive business, and new construction by CFPs is constrained by their capital. The uncertainty generated by the proposed introduction of price regulation of CFPs would increase CFPs' cost of capital, further reducing CFP network expansion and competition by CFPs.

The proposed rate regulation regime, if applied to CFPs, would create a level of

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[1] *In the Matter of Business Data Services in an Internet Protocol Environment,* WC Docket No. 16-143, *Investigation of Certain Business Data Services in 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, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4725, ¶ 5 (2016) ("*Business Data Services FNPRM*").

uncertainty, cost, and administrative burden that would be enormously disruptive to CFPs. CFPs do not manage their businesses in a way that lends itself to rate regulation and would have to learn, from scratch and at great expense, how a new set of regulations developed for a very different type of business applies to their business, and how to deal with an ever-shifting set of business rules. CFPs currently have no idea how to distill their often complex solutions into the rate elements that would be subject to regulation. CFPs sell across ILEC and census block borders, and they sell solutions and not service elements, so what is now a straightforward attempt to meet a customer's needs would become a complex, costly and time-consuming effort to fit the customer's needs into an ill-fitting regulatory scheme. Rate regulation would force CFPs to contort their business plans and services into a set of parameters that cannot rationally be applied to their offerings. The additional regulatory burden might even induce CFPs to consolidate—hardly the result the Commission intends. In the best case, the result would be a substantial reduction in capital spending and a concomitant reduction in competition—exactly the opposite of the Commission's stated goals.

The proposed scheme, if applied to CFPs, would also give ILECs power over both CFPs' prices and CFPs' price structure, further impeding CFPs' ability to compete. The proposed regulatory scheme would thus reduce CFPs' ability and willingness to build out their networks, thereby harming the very customers that the Commission seeks to help in this proceeding. A regulatory regime that forces CFPs to operate more like the ILEC will also undermine CFP efforts to differentiate themselves and to bring innovation to the market.

In addition to being counterproductive, regulation of CFP prices is unnecessary. Wherever CFPs operate, they are subject to competition from the ILEC, and often from the cable company and from other CFPs. Price regulation of CFPs is a solution looking for a nonexistent

problem. Lightower does not dictate the prices that its customers pay. Rather, Lightower is forced to try to meet or beat prices of other providers. In the rare geographic market where the only two providers are Lightower and the ILEC, regulation of the ILECs' price will operate as *de facto* regulation of Lightower's price, because Lightower cannot sell at a price higher than the ILEC's price--unless it provides additional value that the customer perceives to at least offset any price differential. Imposing on Lightower the same rate caps that are applied to the ILEC would prevent Lightower from offering the higher service quality for which such a customer is willing to pay.

In the vast majority of new services that Lightower provides, it incurs capital costs for construction, engineering, make-ready and building entry rights not incurred by the ILEC (which already has network to every location and has already recovered the cost of that network many times over in a monopoly situation in which its rate of return was guaranteed). So CFPs already start at a material disadvantage to the ILEC. The additional burden of rate regulation would only tip the scales further against CFPs and seriously impede competition.

The Commission's suggestion that price caps that were based on the ILEC's costs be applied to CFPs is also unfair, and arbitrary and capricious. Price cap regulation is based on the premise that a price in excess of the cap is unjust and unreasonable relative to the carrier's costs. But CFPs incur costs, including building access and franchise fees, that are not incurred by ILECs. In addition, CFPs' cost of capital is higher than ILECs' and because ILECs have greater purchasing power, ILECs may pay less for certain inputs than do CFPs. So a price that may unreasonably exceed the ILEC's cost may not unreasonably exceed a CFP's cost.

Finally, Lightower offers suggestions regarding two of the issues relating to terms and conditions that are raised in the *Business Data Services FNPRM*. First, Lightower recommends

that early termination fees should be permitted to the extent that the recover expectation damages. Second, Lightower recommends that automatic renewal clauses should be permitted as long as they do not result in an increase in the rates that prevailed during the original term of the contract.

II. Regulation of Competitive Fiber Providers Is Unnecessary and Would Be Counterproductive and Extremely Difficult to Administer

Lightower's principal interest in these Comments is in addressing the questions raised in paragraphs 308-311 and 429 of the *Business Data Services FNRPM* regarding which providers in non-competitive markets should be subject to the regulation discussed in the *Business Data Services FNPRM*. Lightower believes that regulation of CFPs is both unnecessary and counterproductive. As discussed below, regulation of CFP rates would be counterproductive because CFPs are a key part of the solution to the problems that the Commission seeks to remedy, and imposing the type of regulation contemplated in the *Business Data Services FNPRM* would reduce, rather than increase, the very competition that the Commission is seeking to encourage. Regulation of CFPs in non-competitive markets is unnecessary because the ILEC is present in all or virtually all non-competitive markets and if the ILEC's rates are regulated, CFPs will be unable to exploit any supposed market power to force customers to pay for service at prices higher than the ILEC's rates. Moreover, the type of regulation contemplated in the *Business Data Services FNPRM*, in which the rates of a competitive provider would be regulated on the basis of the ILEC's costs and rates, would be both unfair to competitive providers and would be arbitrary and capricious.

A. Competitive Fiber Provider Entry and Deployment is an Important Part of the Solution to the Problem the Commission Addresses

The problem that the Commission seeks to address in these proceedings is that in the

Commission's view, because of inadequate competition in some markets, ILECs have excessive pricing power and impose excessive prices and anti-competitive terms and conditions. As the Commission's consultant, Dr. Marc Rysman, observed, "competition reduces prices" and "markets without competition exhibit market power."[2] Further, the Commission observed in paragraph 3 of the *Business Data Services FNPRM* that in those markets where competition and potential competition exist, they "are bringing material competitive benefits . . . but competition remains stubbornly absent from other places." Thus, the Commission is attempting through its actions in these proceedings to promote entry into geographic markets by CFPs such as Lightower.

The Commission has historically concluded that competitive entry benefits customers because based on prevalent economic theory, in businesses with high sunk costs, such as facilities-based telecom services, "[w]here the cost of adding additional subscribers is low and the fixed costs necessary to enter the market are incurred up front, a firm has an incentive to lower prices in response to competition, expanding output in order to lower unit costs."[3]

As reflected in the Declaration of Drs. Besen and Mitchell, the economic literature clearly supports the proposition that as competition is increased, prices are reduced.[4] Moreover, the empirical studies in the record of these proceedings show that competitive entry reduces BDS prices. Dr. Rysman's white paper concludes that "Regressions of ILEC rates for DS1 and DS3 lines show that competition in the building, and in the census block, consistently lowers prices in

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[2] *Business Data Services FNPRM*, 31 FCC Rcd. at 4193, ¶ 165.

[3] *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd. 9712, 9732, ¶ 50 (1995); *see id.* at n. 98 *citing* Jean Tirole, The Theory of Industrial Organization, 305-60 (1988).

[4] Comments of Sprint Corp., WC Docket No. 05-25 et al, (filed Jan 27, 2016), at Attachment, Declaration of Stanley Besen and Bridger Mitchell, ¶¶ 43-44.

economically and statistically significant ways."[5] The Commission also noted that Dr. Baker's empirical regression analysis found that "ILEC prices to end users tend to decline as the number of rivals selling dedicated services increase."[6] The Commission further noted that its analysis "shows that the competitive effect on pricing increases as the number of competitors in the area increases."[7] As stated in the January 27, 2016 Declaration of Matthew Loch of TDS, his company "has been charged higher rates by an RBOC for the same basic offering when there were no viable competitors in the same building." Viable competitors force ILEC rates down.

The Commission's observation in these proceedings that increasing the amount of competition reduces prices is consistent with the Commission's findings in prior cases.[8] Thus, the Commission has made clear that it prefers competition to regulation. As it stated succinctly in paragraph 5 of the *Business Data Services FNPRM*: "competition is best. Where competition

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[5] *Business Data Services FNPRM*, 31 FCC Rcd. at 4792, 4830, ¶¶ 165, 238.

[6] *Id.* at ¶ 176; *see* Declaration of Jonathan Baker, on behalf of Level 3 Communications, LLC, Windstream Services, LLC and XO Communications, LLC, WC Docket No. 05-25 *et al*, ¶ 58 (filed Jan. 27, 2016) ("Baker Decl.").

[7] *Business Data Services FNPRM*, 31 FCC Rcd. at 4846, ¶ 294.

[8] *See Transport Rate Structure and Pricing, Fourth Order on Reconsideration*, 11 FCC Rcd. 12979, ¶ 1 (1995) ("Greater …competition …benefit[s] consumers by …producing a broader range of service options at lower prices, and encouraging the rapid development of innovative technologies.") *Common Carrier Competition*, 1995 FCC LEXIS 6688 (Com. Car. Bur. rel. Oct. 11, 1995) ("increasing competition in the long distance market has resulted in lower prices …for consumers.") *Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses*, 19 FCC Rcd. 3034, 3107, ¶ 227 (2004) ("increased competition … leads to lower prices for interstate, domestic, and interexchange services."); Connecting America: The National Broadband Plan, ("Since the Telecommunications Act of 1996, U.S. policy has embraced competition as the best means to bring the fruits of investment and innovation--including lower prices, new *services* and features, higher service quality and choice--to the American people"). *See also Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 21 FCC Rcd. 15087, 15101, ¶ 32 (2006) (finding that cable prices were lower where FCC found effective competition).

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."

For precisely this reason, the Commission has long refrained from regulating new entrants to the same extent as incumbents. Prior to 1980, the Commission required competitors to submit cost support, just as it required cost support of incumbents. In 1980, the FCC recognized that this regulation was burdensome and unnecessary as "[o]ur experience over the past decade with competition . . . has demonstrated that the tariffs of competitive non-dominant carriers are to a large extent determined by marketplace forces. This experience has shown also that we can rely upon competition to meet the service needs of the public at prices and under terms and conditions which do not contravene the requirements of the Act and can be presumed to be lawful."[9]

The FCC further found that requiring competitors to comply with dominant carrier regulations is counterproductive because it:

> nullifies many consumer benefits that competition produces. Because the cost of developing this information is relatively great for a non-dominant carrier, the rates paid by its ultimate users are likely to be higher than if all competitive carriers were free from this unnecessary regulatory burden. Further, the required submission of these data forces a carrier to reveal to its competitors in advance the fruits of its own analysis and initiative, thereby discouraging the introduction of new innovative service offerings. And, even when a carrier decides to experiment with new service or rate changes, these existing regulations provide a vehicle for competitive harassment and delay by permitting challenges not to the merits of the filing but to the technical details of the accompanying cost support materials.[10]

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[9] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 FCC 2d 1, ¶ 97 (1980).

[10] *Id.*, ¶ 99.

Lightower heartily endorses these sentiments.

The FCC further noted that:

> The economic underpinning of our proposal to streamline the regulatory procedures for non-dominant carriers flows from the fact that firms lacking market power simply cannot rationally price their services in ways which, or impose terms and conditions which, would contravene Sections 201(b) and 202(a) of the Act. . . . a non-dominant competitive firm, for example, will be incapable of violating the just and reasonable standard of 201(b). If it charges unreasonably high rates or imposes unreasonable terms or conditions in conjunction with the offering, it would lose its market share as its customers sought out competitors whose prices and terms are more reasonable.[11]

B. Regulation of Competitive Fiber Providers is Unnecessary

Lightower sells exclusively to business, carrier and government customers (Lightower does not serve the residential market) and generally connects business locations (which may include cell sites) to other business locations or to data centers or carrier hotels. In essentially every case, the business location is also served by the ILEC and in most cases the cable company, and in the vast majority of cases is also served by one or more other CFPs. This is an extremely competitive business and Lightower's customers are sophisticated buyers who are well aware of alternative providers (including the ILEC) and aggressively seek the lowest price. Lightower is never in the position of dictating rates.

Regulation of CFPs' rates is unnecessary for the simple reason that ILECs are able to provide service everywhere and if ILECs' rates are capped, CFPs will be unable, as a practical matter, to sell at prices above the ILEC rates, unless they provide a commensurate increase in

[11] *Id.*, ¶ 88.

value.[12] To begin, the *Business Data Services FNPRM* recognizes that ILECs in their home territories "remain a ubiquitous presence, easily able to provide BDS to virtually all enterprise locations . . .."[13] Because of the ubiquitous presence of the ILEC, a CFP is never a monopolist. Even in the extremely rare instance where the CFP may be the only carrier providing service today, for example, to a relatively isolated cell tower, because of the ILEC's ubiquitous network, the CFP is never free from the potential competition posed by the ILEC. In addition, it had to beat the ILEC's bid (and probably the bid of several other CFPs) to win the contract to serve the tower in the first place.[14] It must meet or beat the ILEC's rates to obtain business. And in the overwhelming majority of locations, Lightower faces competition from other providers. At *****BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***** of Lightower's locations, the customer has 4 or more broadband choices and at more than *****BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL*****of the locations the customer has 3 or more broadband choices.[15] This underscores the fact that CFPs generally build networks where there is a large enough concentration of customers to justify the construction expense, and where there are a large number of potential customers there are almost always a large number of providers. This is another reason that applying price regulation to CFPs is unnecessary.

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[12] In the infrequent cases in which Lightower is able to win the business of a customer at a price that exceeds the ILEC's, it is because Lightower has offered a quality of service that exceeds the ILEC's service quality, and the customer places enough value on Lightower's superior quality of service to induce it to pay a higher price. *See* Sandman Decl., ¶ 8. The fact that customers take into account quality of service is one of many reasons why the Commission should not blindly cap CFPs' rates at the same level as the ILEC. *See also* Section D, below.

[13] *Business Data Services FNPRM*, 31 FCC Rcd at 4725, ¶ 2; at 4746-47, ¶¶ 52, 54.

[14] Sandman Decl., ¶ 6.

[15] *Id.*, ¶ 7.

The fact that wherever it seeks to sell BDS, a CFP must face competition from the ILEC is of great significance. Once the Commission imposes a cap on the ILEC's rates for a particular service, that cap, together with the operation of market forces, will constrain the CLEC's ability to sell at a price higher than that which the Commission has set as the upper bound of the ILEC's price, unless the CLEC provides an increase in value that at least offsets the increased price. Direct regulation of CFPs' prices in non-competitive markets is therefore unnecessary.

C. Regulation of Competitive Fiber Provider Prices on the Basis of ILEC Costs and Rates Would be Arbitrary and Capricious and Unfair

The *Business Data Services FNPRM* suggests that the Commission may decide to cap a competitive provider's rates for packet-based BDS in non-competitive markets on the basis of ILEC rates. In paragraph 430, it states that the FCC proposes "to evaluate the reasonableness of rates for packet-based BDS by benchmarking them against the incumbent LEC's TDM price for the most comparable level of service available . . .." Since this discussion does not limit the carriers whose rates will be evaluated this way to ILECs, Lightower infers that the Commission intended this benchmarking of packet-based BDS to ILEC TDM prices to apply to competitive providers as well, to the extent that competitive providers' rates are to be regulated at all.[16] This approach would be unfair to competitive providers and would be arbitrary and capricious.

The *Business Data Services FNPRM* recognizes and articulates that at least since 2002, when AT&T filed its petition that led to these proceedings, the rationale for regulating special

[16] The discussion in the *Business Data Services FNRPM* regarding price caps for TDM BDS in non-competitive markets is somewhat more ambiguous as to whether applicability of price caps will be limited to service provided by ILECs. Paragraphs 351-54 appear to apply broadly to all providers of TDM BDS, but paragraph 355 references "extending price cap regulation to business data services presently subject to Phase II pricing flexibility" in non-competitive markets. Since TDM BDS provided by competitive providers is not subject to Phase II pricing flexibility, this reference could be read to exclude from regulation TDM BDS provided by competitive providers.

access rates has been that they are unjust and unreasonable in violation of Section 201(b).[17] Plainly, then, there is no need for the Commission to regulate competitive LECs' BDS rates unless there is a risk that they may be unjust and unreasonable.

Moreover, the price caps in effect today were based on the costs of the price cap carrier, so if the rates of competitive LECs were subjected to the same rate caps, they would likewise be based on the costs of the price cap carrier.[18] This is consistent with the principle that a rate is too high and therefore unjust and unreasonable, in violation of Section 201(b) on the basis of a comparison of the rate for the service with the specific provider's cost of providing the service. The "Commission typically focuses on the costs of providing the underlying service when ensuring that rates for service are just and reasonable under section 201(b)."[19]

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[17] *See Business Data Services FNPRM,* 31 FCC Rcd at 4733, 4836-39, 4861, ¶¶ 20, 257-58, 261-67, 353. *See Access Charge Reform Order*, 12 FCC Rcd. at 16099, ¶ 273 (FCC's "price cap rules are designed to ensure that access charges remain within the "zone of reasonableness" defining rates that are "just and reasonable"); *see also Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 2883 ¶ 17 (1989) (FCC price cap rules adopted under framework that "rates be just and reasonable and not unreasonably discriminatory").

[18] The FCC has recognized that the price cap regime did not wholly separate the link between "accounting costs and prices" that exists under rate of return regulation. That is the case because the rates to which the price cap formulae were originally applied resulted from rate of return regulation, and therefore overall price cap revenue levels continued generally to reflect the accounting and cost allocation rules used in rate of return regulation. *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005) ("*Special Access NPRM*").

[19] *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd. 14107, 14133 ¶ 50 (2013) *pets. for stay granted sub nom Securus Techs. v. FCC*, No. 13-1280 (D.C. Cir. Jan 13, 2014). *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd. 5235-36, ¶¶ 2-3, (1992); *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Report and Order, and Order on Further Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd. 4524, 4531 ¶ 38 (1991) (adopting "flexible cost-based approach" for evaluating whether rates for new services offered by price cap ILECs companies were just and reasonable).

Apart from the fact that capping competitive providers' rates is unnecessary, following this approach of capping one carrier's rates on the basis of another carrier's costs would be arbitrary and capricious and inconsistent with the law under Section 201(b), since, as shown below, competitive providers incur higher costs than ILECs. As the Commission has recognized previously in connection with establishing rate caps for these services, rate methodologies are evaluated by determining "whether they produce rates that fall within a 'zone of reasonableness,' an area bounded at the lower end by investor interests in maintaining financial integrity and access to capital markets and at the upper end by consumer interests against non-exploitative rates."[20] Because an investment in a competitive carrier involved more risk than an investment in an ILEC, even if the non-capital costs of the competitive carrier were identical to the non-capital costs of the ILEC, the return on an investment in the competitive carrier might not be "commensurate with returns on investments in other enterprises having corresponding risks."[21]

Further, it would be arbitrary for the FCC to establish a compensation regime in which regulated carriers are effectively guaranteed an economic loss because they are subjected to rate caps that are lower than the carrier's cost.[22] In *AT&T*, the D.C. Circuit rejected the FCC's rate of

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[20] *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. at 2883-84, ¶ 17 (1989). *See FPC v. Hope Nat. Gas*, 320 U.S. 591, 603 (1944) (The "investor …has a legitimate concern with the financial integrity of the company whose rates are being regulated … including that "there be enough revenue … for operating expenses …[and] the capital costs of the business." The return should be "commensurate with returns on investments in other enterprises having corresponding risks" and "should be sufficient to assure confidence in the financial integrity of the enterprise so as to maintain …credit and attract capital").

[21] *Hope Nat. Gas*, 320 U.S. at 603.

[22] *See AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988).

return refund rule, which required carriers to refund any actual returns in excess of the threshold established by the agency, because the FCC's refund rule did not allow carriers to offset gains against periods where their actual rate of return was lower than the threshold, and therefore seemed to "guarantee the regulated company an economic loss."[23]

As the Commission recognized in footnote 590 and paragraph 233 of the *Business Data Services FNPRM*, citing the *Qwest Phoenix Order*, the *TRRO*, the *2005 Special Access NPRM*[24] and evidence recently submitted by carriers that operate both ILECs and CLECs, such as TDS and Windstream, competitors' costs of construction of outside plant, including the costs of franchise fees, building access, and construction permits, are higher than those of the ILEC.[25]

As reflected in the attached Declaration of Eric Sandman, Lightower's Chief Financial Officer ("Sandman Decl."), Lightower's experience confirms that competitive carriers constructing fiber networks incur costs that are not typically incurred by ILECs under similar circumstances, including franchise fees and building access fees. These are substantial costs, comprising approximately *****BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***** percent of Lightower's total cost of providing service.[26]

Moreover, Lightower has performed a comparison of the percentage of revenues that ILECs devote to capital expenditures to the percentage of revenues that competitive fiber

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[23] *Id*. at 1391.

[24] *Special Access NPRM*, 20 FCC Rcd. at 2005, ¶ 26.

[25] *See also Business Data Services FNPRM*, 31 FCC RCD at 4824, ¶ 226; Baker Decl. at ¶ 40; Comments of Garland Connect, LLC, WC Docket No. 05-25, at Attachment A, ¶ 4(a) (filed Feb. 5, 2015) (Declaration of AT&T attorney asserts that AT&T expert witness will testify as to "the industry custom of not charging [ILECs] . . . for the cost of space and power associated with their facilities used to provide service within a building").

[26] Sandman Decl., ¶ 10.

providers devote to capital expenditures. This study, presented in the Sandman Declaration, shows that competitive fiber providers spend a significantly larger percentage of their revenues on capital expenditures than do ILECs. After reviewing publicly available data, Lightower estimates that in 2015, AT&T, CenturyLink, Frontier and Verizon, in their wireline businesses, spend between 13% and 16% of revenue on capital expenses, while Lumos and Zayo, two other publicly traded CFPs, spent approximately 57% and 39% of revenues on capital expenses, respectively. Lightower spends approximately *****BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***** of its revenues on capital expenses. Finally, because ILECs have greater purchasing power than do CLECs, they may pay less for certain inputs than do CLECs.[27]

Thus, the Commission has no basis to conclude that capping competitive carriers' rates by using the ILEC's rates as a benchmark will produce rates that are consistent with "investor interests in maintaining financial integrity."[28] If the rates of competitive carriers are to be capped, to be sustainable, they must be capped at rates reflective of the costs of the competitive carrier, not the costs of the ILEC. Performing a study of the competitive carrier's costs would, however, impose a substantial and unnecessary burden on both the competitive carrier and the Commission. The wiser course is not to regulate the competitive carrier's rates at all.

D. Regulation of CFPs Would be Counterproductive and Would Exacerbate the Problem the Commission is Trying to Solve

Regulation of the prices charged by CFPs, together with the reporting obligations contemplated by the *Business Data Services FNPRM*, would also be counterproductive. The

[27] Sandman Decl., ¶ 13.

[28] *FCC Price Cap Order*, 4 FCC Rcd. at 2883-84, ¶ 17.

proposed regulation would inhibit and reduce competition, rather than promoting competition, which is the Commission's stated goal. It would disproportionately increase the costs of competitive providers and arm ILECs with the power, by manipulating prices and rate structure within the baskets of regulated services, to gain a competitive advantage over their smaller rivals.

To begin, CFPs are not organized so as to establish their prices based on price caps.[29] Their pricing systems would have to be modified if they were required to comply with price caps.[30] This would impose new costs that for the most part do not fall on price cap LECs, all of which have been subject to price caps for many years.

Moreover, the nature of the package of services that CFPs sell would make it impossible in most circumstances for the CFP to determine by reference to ILEC rates for TDM service what the applicable rate cap is for the CFP's service. For example, Lightower, like other CFP's, often sells a package of service that may include, for example, Ethernet virtual LAN and Internet access, with diverse paths at some locations and not others.[31] Lightower sells <u>solutions, not service elements.</u> And it prices the solutions as a whole and not element by element.[32] Parts of the package, such as Internet access and enhanced quality of service, are simply not listed in the ILEC's access tariff. Further, in many instances, Lightower currently sells its customer a package of services that serve numerous customer locations at a single price.[33] Some of the locations may be deemed "competitive" and others "non-competitive." Presumably, Lightower would be required to determine a separate price for the services in the non-competitive locations and

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[29] Sandman Decl., ¶¶ 17-18.

[30] *Id*.

[31] *Id*., ¶ 22.

[32] *Id*., ¶ 19.

[33] *Id*., ¶ 21.

demonstrate that it complied with the price cap.

Thus, it would radically and adversely impact Lightower's pricing and operations (and the ability to meet customer needs) if it were required to price element by element and location by location according to the ILEC's prices. Lightower would face increased transaction costs, including retraining of sales personnel and hiring of personnel devoted to ensuring that Lightower's prices in non-competitive areas complied with the newly imposed price caps.[34]

Moreover, Lightower would be unable to determine with certainty what rate caps should apply to its various packages.[35] In addition to adding the costs of personnel devoted to ensuring that its prices complied with the FCC's price caps, the competitive provider would therefore be saddled with increased regulatory uncertainty. The regulatory uncertainty would, in turn, increase the competitive provider's cost of capital, further increasing the competitive provider's costs.[36] All of these increased costs, which would fall on CFPs to a greater extent than they fall on ILECs, would have the effect of further disrupting the competitive balance and impeding competition.

In addition, the benchmarking (or anchor price) approach suggested in the *Business Data Services FNPRM*[37] further disadvantages CFPs. Under price caps, ILECs can establish rates for numerous services at levels that suit the ILEC, so long as the aggregate pricing of the services in the basket stays below a specified level.[38]

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[34] *Id.*, ¶ 24.

[35] *Id.*, ¶ 22.

[36] *Id.*, ¶ 23.

[37] *See Business Data Services FNPRM*, 31 FCC Rcd. 4881, 4884-85, ¶¶ 422, 430-432.

[38] *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 15994 at n.26. (1997).

> The price cap regulations also give incumbent LECs greater flexibility in determining the amount of revenues that may be recovered from a given access service. The price cap rules group services together into different baskets, service categories, and service subcategories. The rules then identify the total permitted revenues for each basket or category of services. Within these baskets or categories, incumbent LECs are given some discretion to determine the portion of revenue that may be recovered from specific services. Subject to certain restrictions, this flexibility allows incumbent LECs to alter the access charge rate level associated with a given service.[39]

It is quite possible that ILECs might use this flexibility to disadvantage competitors. The rate for each service within the basket that the ILEC chooses to establish would control not only the ILEC's rate for that service, but also the CFP's rates for that service. This gives the ILEC the ability to game the system by allocating pricing in a manner that is most favorable to the ILEC and least favorable to the CFP, further disrupting the competitive balance in the ILEC's favor. Such a result is likely, as there have been many complaints that ILECs are gaming the system to disadvantage customers.[40]

Even worse, the ILEC would not only control the CFP's rates, it would control the CFP's rate structure. For example, approximately *****BEGIN HIGHLY CONFIDENTIAL** [redacted] **END HIGHLY CONFIDENTIAL***** percent of services installed by Lightower involve a material amount of special construction.[41] Lightower frequently elects to embed the special construction costs in the monthly recurring charge, rather than assessing them as a nonrecurring charge at the

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[39] *See Special Access NPRM*, 20 FCC Rcd. at 2013, ¶ 53 (Commission recognized ability of price cap LECs to manipulate pricing within the basket by raising prices on some services and reducing prices on other services in order to impede competition).

[40] *See 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, 11420, ¶ 6 (WCB 2015); *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd. 16318, 16355, ¶ 92 (2012).

[41] Sandman Decl., ¶ 25.

time of installation. CFPs would lose that flexibility under the proposed regulatory scheme. If the ILEC recovered the cost of special construction in the form of an NRC, the CFP would be required to do likewise. If the ILEC recovered the cost of special construction as an MRC, once again the CFP would be forced to follow the ILEC's lead. Special construction charges are only one of many types of charges that ILECs typically recover in NRCs, but Lightower typically recovers in MRCs. Other examples include service order charges and access service requests.[42] Some customers appear to prefer Lightower's rate structure.[43] That is what competition and innovation are all about.

Yet, the regulatory scheme would stifle competitors' efforts to adopt innovative rate structures. This elimination of innovation cannot benefit customers. In addition, a CFP such as Lightower that operates in the territory of several ILECs, would be required to utilize multiple rate structures, one for each ILEC territory. In fact, in preparing a bid for a wireless carrier or other customer with multiple locations that are in the territories of more than one ILEC, the CFP would have to structure the bid differently for each ILEC territory encompassed within the bid. This would place another difficult and costly administrative burden on the CFP.

Moreover, under the FCC's proposed approach, every time the ILEC changed the price of a TDM service that serves as an anchor for the Ethernet service that the CFP sells, the CFP would be required to adjust its own pricing. When it comes to pricing its service, the CFP would be a puppet, with its largest competitor in each location, the ILEC, pulling the strings and forcing the CFP to change both rates and rate structure at the ILEC's whim. This is antithetical to the nature of the competition that Lightower and other CFPs have been bringing to the market. A

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[42] *Id.*, ¶ 26.

[43] *Id*.

CFP's success is dependent on differentiating itself from the ILEC in order to induce the customer to switch providers. A regulatory regime that forces CFPs to operate more like the ILEC will undermine CFP efforts to differentiate themselves and to bring innovation to the market.

As noted above, the Commission's entire rationale for rate caps is that rates that exceed the caps are unjust and unreasonable, in violation of § 201(b). Finding that a CFP's rates for a particular service are unjust, unreasonable and in violation of § 201(b) merely because they exceed ILEC rates for that service, when the basket approach allows ILECs to game the system by adjusting rates and rate structure for services within the basket to gain competitive advantage, would be arbitrary and capricious. It would be possible to avoid this arbitrariness by using an alternative approach that would base price caps on cost studies for each CFP, rather than establishing the CFP's rates on the basis of the ILEC's costs. As noted above, however, such an approach would be costly and burdensome, both for the Commission and the CFP. The additional cost and burden for the CFP would also disturb the competitive balance between CFP and ILEC, and reduce a CFP's ability to provide customers with the benefits of competition.

E. Regulation of CFPs would Impair Competition

In paragraph 311 of the *Business Data Services FNPRM*, the Commission calls for input on potential impacts of its proposed regulation on infrastructure investment and innovation, among other things. As the foregoing discussion shows, imposing the proposed regulations on CFPs would generate additional regulatory costs and would inhibit competitive construction. The vast majority of new services installed by Lightower require some construction.[44] As noted, Lightower spends a large percentage of its revenue on capital expenditures, which are largely

[44] *Id.*, ¶ 25.

construction to bring service (and thus competition) to a new location.[45] Before undertaking new construction, Lightower performs a detailed analysis of the potential payback period and return on investment. Lightower will proceed to bid on a service and incur the capital cost only if the expected return on investment meets or exceeds a threshold (i.e., only if the anticipated return exceeds its cost of capital, which is much higher than an ILEC's or a cable company's cost of capital). In many cases, the expected return just barely meets the threshold.[46] In these cases, regulations that impose additional costs (including the cost of uncertainty), reduce anticipated revenues, or both, would turn a project that meets the investment threshold into one that no longer meets the threshold.[47] In those cases, Lightower would not construct facilities, infrastructure investment would be reduced, and customers would lose the competitive benefits that Lightower's construction would have provided. Thus, imposing rate regulation on CFP's would almost certainly have an impact that is diametrically opposed to the Commission's stated goal of encouraging competition.

In addition, as discussed above, subjecting CFPs to regulation, as proposed, would inhibit innovation. Not only would CFPs be forced to follow the ILEC's rate structure, as discussed above, if a CFP generated an innovative packet-based service, it would be forced to grapple with questions regarding what the most analogous ILEC TDM service is. Furthermore, it is quite likely that there could be controversy over the selection made by the CFP. This could burden the Commission and the parties with disputes.

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[45] *Id.*, ¶ 12.

[46] *Id.*, ¶ 16.

[47] *Id.*

III. The Commission's Proposed Reporting Requirements are Unduly Burdensome for CFPs

The FCC's proposal of requiring public disclosure[48] would also impose more costs on CFPs than on ILECs. ILECs are administratively organized to provide public disclosure. Lightower (and we believe other CFPs) are not organized that way administratively, so new systems would need to be established to provide public disclosure.[49] In addition, the cost of disclosure is largely insensitive to the dollar volume of services sold and would fall more heavily on a smaller carrier, which has a smaller volume of service over which to spread the cost.[50]

Regulation of carriers without ubiquitous networks would also be counterproductive in that data reporting, as outlined in paragraphs 528-31 of the *Business Data Services FNPRM*, would, if required of smaller carriers, impose a disproportionate cost and manpower burden on such competitors. The burden of the 2013 data collection on Lightower was substantial, and the additional categories of information that paragraph 530 of the *Business Data Services FNPRM* suggests be added will only increase that burden.[51] The Commission noted in paragraph 526[52] that "smaller providers were often challenged to respond to the collection and lacked internal personnel to allocate to the project and the necessary technical expertise to assemble and submit responses." This is certainly true and if extensive periodic data collections are imposed on smaller providers, this challenge will repeatedly serve as an obstacle to competition.

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[48] *Business Data Services FNPRM,* 31 FCC Rcd. at 4844, ¶¶ 435-36.

[49] Sandman Decl., ¶ 28.

[50] *Id.*

[51] *Id.*, ¶ 29.

[52] *Business Data Services FNPRM,* 31 FCC Rcd. at 4912, ¶ 526.

IV. If Competitive Fiber Providers Are Regulated, Regulation Should Not Extend to Fiber to the Tower or Fiber to the Small Cell

The Commission also inquired whether service to cell sites should be treated as a separate product market.[53] Lightower believes that it should, and that the Commission should find that this is a highly competitive market in which regulation of competitive carriers is not needed, with the possible exception of extremely rural areas where no carrier other than the ILEC or cable company is likely to be capable of providing service. In addition to ILECs and cable companies that have a large share of this business and actively compete for additional business, there are several national and many regional carriers that actively pursue this market, including several companies whose primary focus is connectivity to cell sites and small cells.

National competitive carriers actively seeking to serve wireless carriers include Zayo, Crown Castle, Extenet and Mobilitie. Regional CLECs and backhaul-focused companies seeking to provide fiber based connectivity to towers and small cells include Lightower, Lumos, Fiberlight, FirstLight, FPL FiberNet, Wilcon, Zenfi, ACD.NET, Tower Cloud, PEG Bandwidth and many more, including BTOP's, have a strong interest in this business and are willing to expend substantial capital to provide this service. Lightower therefore concurs in the suggestion proposed by CenturyLink that "cell-site backhaul should constitute a separate market not subject to price regulation, given the sophistication and resources available to mobile service providers."[54]

V. Lightower Comments on Terms and Conditions for Business Data Services

The Commission asks a number of questions about allowable terms and conditions for

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[53] *Business Data Services FNPRM*, 31 FCC Rcd. at 4844, ¶ 284.

[54] *See Ex Parte* Letter from Melissa E. Newman, CenturyLink to Marlene H. Dortch, Secretary FCC, WC Docket No. 16-143 *et al.* at p. 1, (filed June 15, 2016).

BDS.[55] While, as stated above, Lightower believes that the regulation of BDS should not extend to competitive carriers, Lightower's concern about the restrictions on terms and conditions for BDS is quite limited.

A. Early Termination Fees Should Be Permitted to the Extent they Recover Expectation Damages

Lightower notes that the Order allows early termination fees to the extent that they amount to "expectation damages" that allow the provider to recover the "benefit of the bargain."[56] Lightower believes that such an approach is quite appropriate. When Lightower constructs facilities for a customer, it operates on the assumption that it will have the opportunity to recover the cost of construction through monthly recurring charges over the entire duration of the contract to which the customer commits. If the customer terminates prior to the full duration of the contractual commitment, the customer deprives Lightower of the opportunity to recover those fixed costs though monthly recurring charges. Regulation that prevents Lightower and other CFPs from recovering these costs would increase the risk that they take when constructing new network and thereby discourage new competitive construction. It is therefore just and reasonable to allow CFPs to recover the contract costs as an early termination fee. Lightower does not suggest that an early termination fee should be permitted even if it results in the provider recovering more money than it would have had the purchaser complied with the contract.

B. Automatic Renewal Clauses Not Increasing Rates Should Be Allowed

The Commission's discussion of automatic renewal clauses seems to focus principally on

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[55] *Business Data Services FNPRM*, 31 FCC Rcd. at 4852-58, ¶¶ 321-343.

[56] *Id.* at 4788-89, ¶¶ 152-54.

their use by ILECs.[57] The Commission does, however, ask about CLECs' use of such clauses.[58] The Commission's concern seems to be with agreements that incorporate discounted rates for the term of the agreement, but then automatically renew on the basis of undiscounted, month-to-month rates.[59] Lightower's agreements do not include such provisions; rather, they typically contain automatic renewals at the same rates as are provided for the term of the agreement. Lightower views such a clause as beneficial to the customer because in the absence of action to terminate the agreement, the customer is able to keep its existing rate until the parties negotiate a new agreement. Such a provision is pro-competitive and should not be prohibited.

VI. Conclusion

For the reasons set forth above, the Commission should not impose rate regulation on competitive carriers offering BDS Services. Such carriers benefit from competition today, and any regulation would diminish these benefits, rather than increasing or enhancing them.

Respectfully submitted,

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[57] *See id*. at 4899-4900, ¶¶ 482-86.

[58] *See id.* at 4899, 4900-01,¶¶ 484, 487-88.

[59] *See Id.*