

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

In the Matter of)	
)	
Special Access Rates 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
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

Susan M. Gately
SMGately Consulting, LLC
84 Littles Ave.
Pembroke, MA 02359
781-679-0150

Economic Consultant to
Ad Hoc Telecommunications Users
Committee

Colleen Boothby
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
202-857-2550

Counsel for
Ad Hoc Telecommunications Users
Committee

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Summary

The data collected in this docket confirm what the overall record in this docket has indicated consistently since it was opened over a decade ago: the ILECs continue to dominate the market for special access or “BDS” services, be they TDM or packet, and they have used their market power to raise prices above the levels that a competitive market would produce. Accordingly, reform of the Commission’s rules for BDS services is long overdue in order to protect customers from unjust and unreasonable rates.

In earlier filings in this proceeding, Ad Hoc addressed some of the detailed issues regarding reform of the price caps rules that are discussed in the FNPRM. Ad Hoc has not changed its position with respect to those issues and refers the Commission to its earlier pleadings and analyses with respect to them.

The FNPRM also asks whether its reformed regulations for BDS should distinguish between different types of customers, not just different transmission speeds or geographic markets. Ad Hoc urges the FCC to abandon this notion. Categorizing services for purposes of regulation according to the nature and characteristics of the customers that purchase them serves no purpose. The identity of the customer does not play a significant role in determining the costs and available revenues for a competitor deciding whether to deploy facilities nor can it change the economic characteristics associated with competitive supply.

The FNPRM identifies an ambitious agenda of difficult regulatory reforms. Finalizing and implementing those reforms with constrained resources, and in the face of powerful forces arrayed against pro-customer rule changes, will necessarily take

substantial time. Until now, delay has benefitted only the opponents of reform, to the detriment of competition and customers, because the outdated de-regulatory rules in markets with inadequate competition have allowed providers to overcharge for their services. It is past time for the Commission to reverse this status quo and put temporary, interim measures in place that protect customers and competition until it can adopt final rules for the BDS market.

Specifically, the Commission should:

- Adopt temporary, interim measures to reduce prices for both TDM and packet services. Interim relief should be technology-neutral – the Commission should apply the same interim and final rules to TDM services and packet services which are currently subject to forbearance.
- Move TDM services currently subject to the discredited pricing flexibility back under the price caps rules, which will result in rate reductions for customers in those areas.
- Reverse its forbearance from price caps regulation for packet services at speeds of 50 Mbps and below and move those services under the price caps rules.
- Make a one-time “catch up” adjustment to the price caps rules. The Commission failed to replace its temporary CALLS plan with revised price caps rules in 2005. As a result, the price caps rules have not kept pace with the economy for over a decade. The Commission should make a one-time downward adjustment to the price cap in order to catch up with changes in the economy since 2005.

Finally, the FNPRM asks whether the Commission can eliminate tariffs (using its forbearance authority) and still have a price caps system to regulate prices. It cannot. The price caps rules do not dictate what rates the ILECs can charge; they are not a rate prescription. They are merely a tariff review mechanism. They determine when a tariff investigation will be triggered when carriers file rate increases. They do not prohibit increases and they do not set rate levels. Without tariffs, the price caps rules would have no effect on pricing.

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The Ad Hoc Telecommunications Users Committee (“Ad Hoc” or “the Committee”) files these comments in response to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) ¹ in the dockets captioned above. As the Commission recognizes in the FNPRM, the data collected by the Commission in this proceeding confirm what parties other than the incumbent local exchange carriers (“ILECs”) have reported consistently to the Commission over the course of this long-standing proceeding: competition in special access markets is not sufficient to ensure

¹ *Business Data Services in an Internet Protocol Environment Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; 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*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016).

that rates, terms, and conditions for special access services are just and reasonable, including markets that are still regulated under the Commission's pricing flexibility rules (despite the Commission's repudiation of those rules four years ago²) or under the regulatory forbearance granted to ILECs for certain packet-switched services.³

Now that the Commission has collected an evidentiary record which confirms the lack of competition in the market for business data services ("BDS"), the time has come for the Commission to adapt its regulatory regime to actual market conditions and reject carrier arguments that the regulatory status quo is sufficient to protect customers from unjust and unreasonable rates, terms, and conditions.

DISCUSSION

I. AD HOC CONTINUES TO SUPPORT THE REGULATORY REFORMS DETAILED IN ITS EARLIER PLEADINGS IN THIS PROCEEDING

Ad Hoc's earlier pleadings in this proceeding addressed many of the finer details of the Commission's BDS rules on which the FNPRM seeks comment (e.g., the price

² *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*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012) ("Pricing Flexibility Suspension Order").

³ *Petition of the Verizon Telephone Companies for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 04-440, Order, 20 FCC Rcd 20037 (2005); *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, *Petition of the Frontier and Citizens ILECs for Forbearance under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); *Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. § 160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 14-9, Order, 29 FCC Rcd 13746 (2014).

caps “g” factor, sharing, the low-end adjustment, total factor productivity studies and the X-factor, etc.). The Committee’s positions and recommendations have not changed since the filing of those comments nor have the underlying facts on which the Committee’s analysis was based. Accordingly, we direct the Commission to those pleadings as our response to this phase of the proceeding.

The FNPRM raises an important issue that Ad Hoc has not previously addressed, however. At para. 284, the FNPRM asks whether services should be categorized for purposes of regulation according to the nature and characteristics of the customers that purchase them. Specifically, the FNPRM asks whether customer class is a useful distinction for purposes of defining BDS product market, in addition to varying bandwidths; whether regulatory requirements should differ for customers that are small, mid-sized, and “national/enterprise” (large) businesses, based on the number of employees; whether the rules should differentiate between cell site backhaul and other wholesale purchases; and whether “the benefits of using customer classes [are] outweighed by the burdens due to the complexity and practicality of implementing such a framework.”

While Ad Hoc agrees that BDS product markets can be specified according to service bandwidths (or bandwidth ranges), Ad Hoc can see no useful purpose to subdividing the BDS product markets on the basis of customer characteristics. Large companies can have thousands of locations nation-wide that require the lowest capacity connections, like the Ad Hoc member with 18,000 domestic locations served by DS1s and a headquarters campus served by an OC-192. Similarly, small customers may have a single location that requires service at the highest capacity. The identity of the

customer does not play a significant role in determining the costs and available revenues for a competitor deciding whether to deploy facilities nor can it change the economic characteristics associated with competitive supply. Whether a customer has 50 employees or 5000 does not make it any more or less costly to deploy a DS-1 to a specific customer site, nor are the available revenues likely to vary substantially between the two customers. The same criticism applies to the proposed distinction between cell sites and other types of customer locations.

The Commission should abandon, therefore, the customer-based market analysis described in para. 284.

II. THE COMMISSION MUST PROVIDE TEMPORARY, INTERIM RATE RELIEF PENDING FINAL ACTION IN THIS RULEMAKING

The FNPRM identifies an ambitious agenda of difficult regulatory reforms, many of which have been the subject of comment and analysis since this proceeding started over a decade ago. Finalizing and implementing those reforms with constrained resources, and in the face of powerful forces arrayed against reform, will necessarily take additional time. To date, delay has benefitted only the opponents of reform, to the detriment of competition and customers. It is past time for the Commission to reverse this status quo and put temporary, interim measures in place that protect customers and competition until it can adopt final rules for the BDS market.

The Commission has previously (and repeatedly) recognized that public network facilities evolve constantly as providers incorporate the fruits of technological progress and innovation into their transmission facilities. “[P]rogress does not stop once a network is built. Technology continues to evolve, and networks incorporate these

innovations.”⁴ But the Commission has also recognized that “the success of these technology transitions depends upon the technologically-neutral preservation of principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them.”⁵ One of these principles, one of the Act’s “core statutory values as codified by Congress,” which the FCC has declared it must preserve as it facilitates and encourages market-driven technological transitions in network technology, is consumer protection.⁶

Ad Hoc urges the Commission to vindicate that core statutory value by taking the interim measures described in the sections below to protect customers from the ILECs’ market power in the business data services (“BDS”) market, pending the Commission’s adoption of final rules in this proceeding or the emergence of competition in the BDS market. Until one of those events occurs, the Commission can and must to protect customers from unjust and unreasonable rates.

The Commission has already allowed customers to be exploited for too long by unjust and unreasonable rates while this rulemaking has been pending. In January, 2002, Ad Hoc was the first party to sound the alarm when ILECs began taking advantage of the Commission’s flawed pricing flexibility rules by raising their rates for

⁴ See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433 (2014) (“*Technology Transitions Order*”) at 1439, para. 14; Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968 (2014) (“*Technology Transitions Notice*”); Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) (“*Emerging Wireline Order*”).

⁵ *Technology Transitions Notice* at 14969, para. 1.

⁶ *Technology Transitions Order* at 1435, para. 1; *Emerging Wireline Order* at 9373, para. 1.

“special access,” as business data services were then known.⁷ Nine months later, AT&T filed its petition “essentially requesting that the Commission revoke the pricing flexibility rules and revisit the CALLS plan” which had set the rates that price cap ILECs charged for BDS.⁸ Three years and a mandamus petition later,⁹ the Commission finally opened this rulemaking. Now, after more than a decade and 14 years after Ad Hoc first flagged the issue, the Commission is finally committed to implementing regulatory reform for BDS. But reform requires the Commission to develop and implement solutions for some of the most difficult aspects of BDS reform – a painstaking and resource-intensive exercise.

Given the stakes involved for all parties, it should be obvious to even the most optimistic observer that the path to fundamental reform in this market will require substantial additional time and resources, even without taking into account the reconsiderations, further notices of proposed rulemaking, and judicial appeals that fundamental reform inevitably attracts. In the meantime, the status quo continues to conflict with the core statutory value of consumer protection; ILECs remain free to charge higher prices in unregulated pricing flexibility areas – and to raise those prices even higher – despite the Commission’s conclusion that the pricing flexibility rules are fatally flawed.

⁷ Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, CC Docket No. 01-321 (filed January 22, 2002) at 3-6.

⁸ *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*, WC Docket No. 05-25, RM-10593, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (“2005 NPRM”) at 2002, para. 19.

⁹ *AT&T Corp., et al.*, D.C. Circuit Case No. 03-1397, Petition for a Writ of Mandamus (filed Nov. 6, 2003).

Customers have already been waiting too long for relief from excessive rates while the importance of these services to our national economy and to the success of businesses of all types has only increased. In the face of that history and the likely time frame required, as a practical matter, before the Commission will be able to put effective rules in place, the Commission must take interim measures to protect customers and reduce rates immediately.

The Commission itself recognized the need for interim relief eleven years ago when it invited proposals for such relief in the *2005 NPRM*.¹⁰ Specifically, the Commission observed that “[t]his record contains substantial evidence suggesting that productivity has increased and continues to increase in the provision of special access services. Under the CALLS plan, however, there is currently no productivity factor in place to require price cap LECs to share any of their productivity gains with end users.”¹¹ Consequently, the Commission announced its intention to order interim rate relief while this rulemaking was pending: “[W]e anticipate adopting an order prior to July 1, 2005 that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the Commission considers the record in this proceeding.”¹²

But the Commission’s good intentions merely paved the road to a status quo that has allowed price caps LECs to exploit customers with rates that have been excessive for years. The magnitude of the resulting overcharges that purchasers of BDS have been paying is quantifiable and patently unreasonable. In an August 2004 analysis filed

¹⁰ *2005 NPRM* at 2036, para. 131.

¹¹ *Id.*

¹² *Id.*

in this docket, Ad Hoc's economic consultants estimated that special access prices were set at levels that were generating about \$15 million per day beyond what would have been expected in a competitive market.¹³ In the 4,300 days that have lapsed since that analysis, that amount adds up to more than \$64 billion in overcharges imposed on BDS customers.¹⁴

Now that the data collection in this docket has confirmed the yawning gap between marketplace realities and the FCC's assumptions and predictions in the CALLS and broadband forbearance orders,¹⁵ it is clear that interim adjustments to the existing regulatory regime are urgently needed to protect customers and competition pending the implementation of final rules in this proceeding. Given the complexity and scope of the issues in these dockets, the entrenched opposition to reform of any kind, and the strained resources of the FCC, the Commission must take the temporary, interim actions described below to protect customers from unjust and unreasonable rates, terms, and conditions.

The Commission must address, at a minimum, the damage done by the ILECs'

¹³ Susan M. Gately, Helen E. Golding and Lee L. Selwyn, *Competition in Access Markets: Reality or Illusion: A Proposal for Regulating Uncertain Markets*, Ex Parte Submission of the Ad Hoc Telecommunications Users Committee in RM-1059 (filed August 26, 2004) at 7-8.

¹⁴ This figure is a conservative estimate since it assumes that the level of overcharges has remained constant over time since 2003. In fact, the per day overcharge has grown since that time as a result of increased price levels, increased volumes of sales, and efficiency enhancements that have not been captured because of the Commission's failure to reset the price caps X-factor when the CALLS plan expired. In addition, the figure of \$15-million per day was calculated using ILEC year-end 2003 results. Ad Hoc updated the amount to \$17.5-million per day using 2004 year-end data and to \$21-million per day using 2007 year-end data. (The year 2007 was the last year for which accounting data allowing such calculations was collected). See *Ad Hoc 2005 Comments* at 4; Susan Gately, Helen Golding, Lee Selwyn and Colin Weir, *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS*, Attachment B to Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, WC Docket No. 05-25, RM-10593 (filed January 19, 2010), Appendix 1.

¹⁵ FNPRM at 4732-3, para. 19; 4734-5, para. 24.

exploitation of the pricing flexibility rules, which the Commission repudiated nearly four years ago.¹⁶ The data collection demonstrates that the competition which supposedly justified the pricing flexibility rules simply failed to develop. Yet the ILECs were allowed to raise rates with impunity for many years while the rules were left in place by the Commission.¹⁷ Ratepayers need immediate interim relief from these excessive rates, pending more fulsome relief in this rulemaking. Interim relief is justified because the Commission already had sufficient evidence to conclude that the pricing flexibility rules were so fundamentally flawed that it suspended their continued operation.¹⁸ To protect ratepayers from the continuing impact of those rules while the process for revamping them continues, FCC must undo the rate increases imposed by the ILECs while the discredited rules were in effect.

A. Interim relief, like final rules, must be technology neutral

In the FNPRM, the Commission properly emphasizes that its approach to regulating BDS must be “technology neutral.”¹⁹ Indeed, the Commission declares that a technology neutral framework is one of the four “fundamental principles” on which any new regulatory framework for BDS must be based:

Technological distinctions must not be allowed to obscure economic reality or distort future regulatory policy. Business data services are a quintessential form of telecommunications services under the Communications Act..., transmitting data for a fee from user to user without change in the form or content of the information sent or received. Thus, differences in technology between circuit-switched and packet-switched services do not mean that they now exist in different markets.

¹⁶ See n. 2, *supra*.

¹⁷ Productivity-driven rate reductions that occurred in price-caps regulated areas until the end of CALLS were also never applied in pricing flexibility areas.

¹⁸ *Pricing Flexibility Suspension Order*, n. 3, *supra*.

¹⁹ FNPRM at 4762, para. 6.

Where regulation is needed in non-competitive markets, we seek comment on how best to look to economic realities, including market share, size of provider, and the legitimate differences as applicable in the product market, rather than relying on historic regulatory classifications.²⁰

The Commission emphasizes that,

[w]hile a case-by-case adjudication under Section 208 is one option to provide guidance for what is reasonable conduct in light of the market analysis conducted in this proceeding, we find clear rules of the road will be valuable to all broadband data service providers as the market evolves. Accordingly, in this Further Notice, we propose a new regulatory framework for broadband data service that distinguishes between broadband data service providers based on market circumstances, rather than technology or the happenstance of prior Commission action and inaction.”²¹

Inexplicably, the FNPRM then proposes specific rules that would implement the exact opposite of a technology-neutral regulatory approach. Virtually all of Part F of the FNPRM proposes bifurcated treatment of TDM and packet-based services, with the exception of tariffing requirements from which the FNPRM would forbear for both kinds of service. The proposals in Part F for non-competitive markets would apply *ex ante* price cap regulation to TDM services while packet services would be subject to an unspecified *ex post* regime in which regulated TDM prices would be used as a “benchmarking tool” to evaluate whether packet rates set via individual contract negotiations are just and reasonable should the rates be challenged in a complaint.

The FNPRM offers no justification for treating TDM and packet-based services differently based on technology rather than differences in market competition. As the Commission emphasizes throughout the FNPRM, the determinative factor for purposes of protecting competition and customers from the ILECs’ market power is the state of

²⁰ *Id.*

²¹ FNPRM at 4837, para. 259.

competition in a market, not network transmission protocols which come and go with technological change and can be entirely transparent to customers.

The market conditions that the Commission relies upon in proposing to apply price caps rules to non-competitive TDM services are no different from the market conditions for non-competitive packet-based services, which the Commission proposes to forbear from regulating *ex ante*. Indeed, the FNPRM emphasizes more than once that the record in this proceeding has confirmed that competitive conditions vary not by the underlying technology of a service but rather by the capacity (i.e., speed) of the service.²² The Commission has made no finding that TDM and packet-based services fall into separate product markets nor is there any evidence to support such a distinction in this record.

The FNPRM's baffling proposal to exclude non-competitive packet-based service from the Commission's revamped price caps rules appears to be based on the very "happenstance of prior Commission action and inaction" rejected elsewhere in the FNPRM as a valid basis for applying regulation. Specifically, the FNPRM proposes to perpetuate the ill-advised decisions by prior Commissions to grant the ILECs' forbearance petitions for certain packet-based services. Those decisions relied on the state of competition in a market (namely, the interexchange services or "long distance" market) entirely separate from the exchange access service markets at issue in the petitions. The Commission also relied on predictions regarding the emergence of competitive conditions, regardless of customer location or bandwidth requirements, which turned out to be wrong, as the data collection in this docket has revealed. As the

²² See, e.g., FNPRM at 4791, para. 162; 4830, para. 237.

FNPRM also recognizes, the Commission is free to reverse an earlier grant of forbearance “based on changes in market conditions, technical capabilities, or policy approaches to regulation.”²³ That is precisely what the Commission must do here for any packet-based services deemed non-competitive (where the presumptions and predictions underlying the earlier forbearance grant have been found to be wrong).

B. Interim relief for services subject to the pricing flexibility rules

As noted above, the Commission suspended its pricing flexibility rules in 2012 because they failed to accurately distinguish between competitive and non-competitive areas.²⁴ But the Commission took no action to protect customers from unjust and unreasonable rates in areas where the flawed flexibility rules had already removed the protections of price caps. Because the ILECs used their Phase II pricing flexibility to set rates that are higher, sometimes substantially higher, than they would have been had those areas remained under the protection of the price caps rules, too many customers have been, and still are, paying unreasonable rates.

In the FNPRM, the Commission asks what rate changes should be made in Phase II pricing flexibility areas and how such changes should be implemented.²⁵ As an interim measure to protect customers from unjust and unreasonable rates in Phase II pricing flexibility areas pending the implementation of final rules in this proceeding, the Commission must undo the damage done by the unjustified grants of Phase II pricing flexibility. Accordingly, the Commission must require carriers to reduce prices presently

²³ FNPRM at 4909-10, para. 520, *citing Ad Hoc v. FCC*, 572 F. 3d 903 (2007).

²⁴ See n. 2, *supra*.

²⁵ FNPRM at 4880, para. 416.

in effect in Phase II pricing flexibility areas to levels no higher than the rates that would have been in effect had those areas remained subject to price caps.

Mechanically, this change can be made by replacing the prices in the pricing flexibility sections of the ILECs' special access tariffs with the prices for the equivalent price caps regulated service. For example, the price of a DS1 "Channel Termination" sold on a month-to-month basis in Verizon's Tariff FCC No. 1 for Phase II facilities in Maryland would be reset from \$239.17 (PFII Band 4) to the lower price of \$200.08 (PC Rate Zone 1) that Verizon charges in areas of the state that remain subject to price caps.²⁶ The revenues and demand associated with those services would then be included in an ILEC's annual price caps filings until the Commission implements final rules in this docket. (The Commission should make this change, i.e., move pricing flexibility rates back into the price caps system, before making the one-time "catch up" adjustment to the PCI discussed below, so that the pricing flexibility rates are subject to any downward rate adjustment that may result from the "catch up.")

The Commission should make this change as an interim measure pending its development of competitive screens. While this interim step may apply the price caps rules to some services or geographic locations that competitive screens might ultimately categorize as competitive, temporarily subjecting those services to the price caps rules on an interim basis in order to protect customers from unjust and unreasonable rates creates little or no competitive risks for providers. That is because the Commission has proposed in the FNPRM to allow contract pricing to continue in a price caps

²⁶ See Verizon Tariff FCC No. 1, 12th Revised page 7-250.

environment going forward²⁷ and Ad Hoc supports that change. Carriers will thus be free to respond to competition by negotiating more competitive contract prices. Only prices that exceed price caps levels will be affected by a return to a price caps basket under this interim approach; contract prices negotiated in a competitive environment are unlikely to be higher than the carriers' "take it or leave it" tariffed pricing schedules under price caps. By allowing contract pricing in a price caps system while simultaneously resetting Phase II prices to a level no higher than price caps prices, the Commission would not disturb the ILECs' ability to compete for negotiated services in competitive markets and would protect customers from over-pricing in non-competitive markets.²⁸

The Commission's proposal to allow downward pricing under price caps through contracts is consistent with the approach Ad Hoc and its economic consultants first proposed in comments filed in this docket in 2005. Described at the time as a "self-executing plan," Ad Hoc urged the FCC to reset Phases II prices to price caps levels and

replace the existing pricing flexibility rules with a new, self-executing, downward-only pricing flexibility plan, that would relieve the Commission of constantly struggling to evaluate and predict competitive conditions, protect ratepayers from pricing increases in areas where competition is not sufficient to discipline pricing, and afford the ILECs the opportunity to reduce prices as competitive conditions warrant.²⁹

²⁷ FNPRM at 4904, para. 501.

²⁸ Reducing higher Phase II prices to price caps levels will not result in prices that fail to compensate ILECs adequately. The Commission has already pointed out in the NPRM that price cap rates are not set too low (4830-1, para. 239). Should a carrier believe that the resulting rates are so low as to be confiscatory, it is free to make an above-cap filing with the required cost showing pursuant to existing price caps rules rather than exploiting de-regulation (47 CFR 61.49 (d)).

²⁹ Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) ("*Ad Hoc 2005 Comments*") at iv. Ad Hoc further explained that: "By granting the ILECs' flexibility to make only downward price changes, the Commission would protect consumers from exploitive rates while granting ILECs the unfettered ability to compete effectively in areas

Of course, if contract prices were included in price caps baskets, carriers could use downward contract pricing flexibility to generate “head room” in a price caps basket that would enable carriers to impose offsetting price increases on customers of less competitive services. To prevent anti-competitive cross-subsidization between competitive and non-competitive services in the same price caps basket, the Commission must require that carriers choosing to exercise downward contract pricing authority remove contract revenues from the relevant price caps basket for purposes of determining the actual price index (“API”) and price caps index (“PCI”) for the affected basket.

C. Interim relief for services subject to the price caps rules

Interim relief for customers must include a one-time adjustment to the price caps PCI to correct for the Commission’s failure to implement a new, productivity-based X-factor when the CALLS plan expired over a decade ago.

As both the 2005 NPRM and the FNPRM pointed out, the record contains substantial evidence that price caps carriers have achieved significant productivity gains and cost savings since 2005 but, thanks to the CALLS plan and inaction since its expiration, there has been no productivity factor in place to require price cap LECs to

where they deem it necessary, without the burden and delays of any marketplace assessment proceeding by the Commission. Downward-only pricing flexibility thus provides a self-executing regulatory device that will automatically assure the appropriate regulatory treatment of ILEC rates without the need to assess the extent to which actual and effective competition is present with respect to any particular ILEC service. ILECs would be allowed to reduce prices in response to competition but not to impose offsetting increases on other customers since there is no compelling reason why ILECs should be permitted to charge prices above the levels permitted under a price caps regime. Unlike the Commission’s existing pricing flexibility plan, Ad Hoc’s downward-only pricing flexibility plan contemplates that services would always be available to subscribers at no more than the maximum price caps regulated price.” *Id* at 51.

share any of their productivity gains with end users.³⁰

Accordingly, the Commission must reinitialize the PCIs for price caps services (including those services presently subject to Phase II Pricing Flexibility that are moved back under price caps in keeping with the preceding section) on a temporary, interim basis pending its final analysis of the issue and implementation of new rules.

In the FNPRM, the Commission identified three potential methods for calculating an X-factor and re-initialization adjustment.³¹ It is not clear that any one of the three, standing on their own, completely captures the historical productivity of BDS. Ad Hoc has not yet completed a thorough review of the inputs to the methods identified in the FNPRM but believes that all three likely *understate* productivity, either by using too broad a segment of industry (the KLEMS model) and/or failing to capture the tremendous demand growth that ILECs have experienced in the BDS segment of the overall telecom market vis-à-vis other segments. We understand that other parties will be suggesting refinements and/or additional productivity measurements that will be more tightly targeted to BDS³² and merit further analysis.

If the Commission is able to settle upon a final re-initialization level expeditiously, i.e., no later than 60 days after the submission of reply comments, then that level should be used for the interim adjustment. To the extent that vigorous opposition and voluminous challenges stymie the Commission from acting expeditiously, then it cannot

³⁰ 2005 NPRM at 2036, para. 131; FNPRM at 4875-6, paras. 401-403.

³¹ FNPRM at 4867-4871, paras. 369-382.

³² For example, the so-called "EU KLEMS" model uses the same US-based underlying data as the US KLEMS model described as Method One in the FNPRM but eliminates the broadcasting industry segment included in the US KLEMS model to produce results that are more telecom-specific.

simply delay, yet again, any remedy that would protect customers from unjust and unreasonable rates. Instead, the Commission must implement a temporary, interim reduction based on an interim X-factor that can be trued-up when the Commission's rules become final.³³

The Commission interim X-factor could, for example, rely on a more tightly-focused telecom-specific analysis such as the EU KLEMS approach which produces a PCI reduction in the range of 25%. Alternately, the Commission could use the 4.4% X-factor proposed in the Verizon/INCOMPAS joint letter on June 27, 2016,³⁴ and assume an average GDP-PI of 1.9% for the period 2005 through the present, which would result in an adjustment of approximately 25% (assuming recouped lost revenues for annual access filings from July, 2005 to July, 2016). As a third option, the FCC could reasonably assume that a minimum productivity for telecom services (and for BDS in particular) has been at least 1% greater than the productivity of the economy as a whole, and conservatively implement a temporary 11% PCI adjustment (for the period 2005 – 2016).

If the Commission were ordering refunds of the BDS overpricing that has occurred over the past decade – which it is not – then the selection of an X-factor and the adjustment factor might require somewhat more precision. Instead, Ad Hoc's proposal is merely to fix the problem on a temporary, going-forward basis (with the ILECs protected by the ability to come in at any time to make an above-cap filing with

³³ Any temporary adjustment must remain in place until such time as the Commission selects a final adjustment factor. The Commission must avoid another CALLS scenario, where a temporary solution is allowed to sunset and prices are permitted to revert to earlier levels when a permanent adjustment is not developed.

³⁴ *Ex Parte* Submission of Verizon and INCOMPAS in WC Docket No. 05-25 (filed June 27, 2016) (“*Verizon/INCOMPAS Joint Letter*”) at 2.

associated support) in the event the interim PCI adjustment is too large. Because no corresponding “sharing” or refund mechanism remains in the price caps plan to protect customers in the event the final PCI adjustment is delayed, the Commission’s interim adjustment must err on the side of a larger, rather than smaller, adjustment.

D. Interim relief for packet-based services subject to forbearance

To ensure that interim relief is technology-neutral and protects BDS customers from unjust and unreasonable rates, terms, and conditions, the Commission must reverse portions of the flawed forbearance grants for ILEC packet services.³⁵ As an immediate interim step, and in light of the erroneous predictions underlying it, the Commission should reverse its forbearance from price caps regulation for packet services at speeds of 50 Mbps and below.³⁶ Pending resolution of the benchmarking issues discussed below, those services should be brought into price caps at their current rate levels. Final classification of packet product or geographic markets as competitive or non-competitive can occur as a separate, later step when the Commission completes the fulsome analysis described in the FNPRM. If the final classification analysis results in a finding that packet services at speeds of 50 Mbps and below are competitive, the Commission will, as always, be free to forbear from regulation again.

For more than a decade the Commission has chosen to put its faith in the belief that deregulation in advance of competition would foster competition. As the FNPRM

³⁵ See n. 3, *supra*, for the specific forbearance grants at issue.

³⁶ Ad Hoc has selected a cut-off of 50 Mbps and below only for purposes of an interim solution. Ad Hoc believes that valid competitive screens could easily reveal that the competitive conditions for higher bandwidth services may also warrant reversal of forbearance.

documents, that approach has not resulted in competition sufficient to discipline pricing for services at speeds of 50 Mbps or below.³⁷ As a result, customers of those services – regardless of whether they are provisioned via TDM or packet technology – need to be protected by the Commission’s price caps plan from unjust and unreasonable rates. If the Commission finds as it crafts a temporary, interim solution that it must choose whether to prioritize customers’ interests (by including more services within the scope of price caps regulation to protect purchasers) or carrier interests (by forbearing from regulation to preserve the ILECs’ profit levels and revenue streams), then the time has clearly come to prioritize the interests of customers.

Given the data in this record regarding the lack of competition for these services, the Commission can reasonably conclude that the prices for these services, which have not been subject to effective price-constraining competition, are well above just and reasonable levels. The Commission can address those competitive issues and discharge its statutory obligation to protect customers from unjust and unreasonable rates by bringing forborne packet services offered at speeds of 50 Mbps or less into price caps³⁸ at their existing price levels and then subjecting them to the interim re-initialization adjustments proposed above for other price caps services.³⁹ Ad Hoc anticipates that when the Commission ultimately determines the methodology to be

³⁷ NPRM at 4840, para. 271. Even Verizon has agreed to a finding that competitive market conditions do not exist for services at 50 Mbps or below. *Verizon/INCOMPAS Joint Letter* at 2.

³⁸ On an interim basis, these services could be placed in their own basket. Ultimately, the Commission may decide to revamp the baskets and bands in the price caps system based upon capacity rather than technology.

³⁹ Without effective competition, there can be no legitimate expectation that ILECs’ de-regulated rates for 50 Mbps and below packet services reflect the productivity enhancements and cost efficiencies experienced by the ILECs since the services were forborne. Therefore, the same one-time adjustment to capture lost X-factor reductions is appropriate.

used to establish benchmark or anchor prices for all packet services, it will become clear that the PCIs, even as adjusted, are too high and these prices will need to be reset based upon the benchmark/anchor price levels.

III. THE PRICE CAPS SYSTEM IS PREMISED ON TARIFF FILING REQUIREMENTS AND THE “NO SUSPENSION” ZONE

In the FNPRM, the Commission proposes to forbear from enforcing the tariff filing provisions in Section 203 and the tariff investigation authority in Section 204. “The Commission proposes to transition away from tariffing requirements for the last portion of BDS (incumbent LEC TDM), and to establish benchmarked prices for non-TDM services.”⁴⁰ The FNPRM asks whether, if the Commission were to forbear from enforcing the tariff filing requirements of Section 203 for ILEC TDM services, as it has for non-TDM services and the services of competitive LEC (“CLECs”),

could it continue to require price cap filings for incumbent LEC TDM services in non-competitive markets based solely on the statutory authority in section 201(b)? Likewise, could the Commission use benchmarked prices to ensure that non-TDM services in non-competitive markets are offered on just and reasonable prices, as required by section 201? If not, why not, and what additional authority or action would be needed?⁴¹

The Commission’s forbearance proposal would make the price caps rules meaningless and strip the Commission of its current authority to require price caps showings. This is because the price caps rules have no effect outside of the tariff filing process. The rules are not a rate prescription; they do not dictate the rate levels that carriers can charge or define the levels at which rates become unreasonably high or low

⁴⁰ FNPRM at 4838, para. 263.

⁴¹ FNPRM at 4838-9, paras. 263-264.

nor could they, because they are not the product of the kind of evidentiary record the Commission is required to assemble in order to prescribe the rates a carrier may charge.

Instead, the price caps rules are merely a tariff filing mechanism, a standard for determining whether to allow a tariff filing to take effect automatically or to suspend and investigate it. Neither action constitutes a finding regarding the justness and reasonableness of the rates in the tariff. Under the price caps rules, tariff filings with rates that are consistent with the rules are presumed lawful and allowed to take effect. But this is not a final determination of their lawfulness since parties are free to challenge their lawfulness *de novo* in a complaint under Section 208 of the Act. Tariff filings with rates that are not consistent with the rules are suspended and investigated. But this action is not a final determination of lawfulness either, since the Commission is free to allow the filing to take effect at the end of the suspension period or declare it lawful (or not) at the end of the investigation.

As the Commission explained when it adopted the rules,

we are implementing price caps through the establishment of suspension and no-suspension zones and through modifications to our current tariff filing procedures... The price cap plan only affects the procedural treatment of various carrier-initiated tariff filings, i.e., whether they are presumptively suspended or not, and does not determine whether particular rates are just, reasonable, and non-discriminatory.⁴²

The Commission went on to explicitly reject the notion that the price cap rules could determine which rates are just and reasonable or require carriers to charge particular

⁴² *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rec 2873 (1989) (“*AT&T Price Cap Order*”) at 3301, para. 887; 3306-7, para. 895 (emphasis added) (footnotes omitted).

rates:

It is neither the intent nor the effect of this decision to prescribe rates....The essence of a rate prescription is a finding that certain rates are 'just and reasonable,' or that nonconforming rates are 'unlawful and shall not occur.' ... By contrast, our price cap rules neither establish the lawfulness of within-cap rates, nor prohibit the filing of nonconforming tariffs....Far from being an unlawful de facto rate prescription, these rules reflect 'an intelligent and practical exercise of [our] suspension power which is thoroughly in accord with Congress' goal...to strike a fair balance between the needs of the public and the needs of regulated carriers.'⁴³

Moreover, the Commission's "ample authority to adopt" the price caps rules was its "Section 204 suspension powers" and its "Section 203 power to amend tariff filing requirements,"⁴⁴ not its authority under Sections 201 and 202 to set just, reasonable, and non-discriminatory rates. If the Commission forbears from enforcing Sections 203 and 204, as it proposes in the FNPRM, it will give up its authority to require compliance with the price caps rules.

In short, without tariffs, there is no price cap mechanism because the price cap rules do nothing more than classify tariff filings and trigger tariff suspensions.

In addition, without tariffs and the power to suspend and investigate them, the Commission has no enforcement mechanism for ensuring compliance with the price cap rules. It is the threat of a burdensome tariff investigation – like the investigation that makes up paragraphs 86-158 of the FNPRM – that enforces carrier compliance with the rules.

CONCLUSION

The data collected in this docket confirm what the overall record in this docket

⁴³ *AT&T Price Cap Order* at 3305-7, paras. 894-895 (footnotes omitted).

⁴⁴ *AT&T Price Cap Order* at 3300-1, para. 887.

Certificate of Service

I, Amanda Delgado, hereby certify that a version of the preceding Comments of the Ad Hoc Telecommunications Users Committee redacted for public inspection were filed this 28th day of June, 2016 via the FCC's ECFS system.

A handwritten signature in black ink, reading "Amanda Delgado", is written over a horizontal line.

Amanda Delgado
Legal Assistant
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW
Suite 900
Washington, DC 20036