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
	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Steven F. Morris
Jennifer K. McKee
National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431

Michael Pryor
J.G. Harrington
Henry H. Wendel
Cooley LLP
1299 Pennsylvania Avenue, NW – Suite 700
Washington, DC 20004-2400

Counsel to NCTA

June 28, 2016

EXECUTIVE SUMMARY

Cable operators have invested billions of dollars of risk capital to provide a competitive alternative for business customers of all sizes. The Commission's reward to the cable industry for these efforts: a rulemaking suggesting that cable companies may become subject to rate regulation, including potentially sharp price cuts, and forced sharing of their network facilities with well-financed competitors. The direction signaled in the *Further Notice* puts the Commission on a collision course with its own precedent, threatens to undermine the Commission's key goal of fostering facilities-based competition, and sidesteps the mechanisms established in the Communications Act for enhancing competition. The Commission proffers only one reason for its sweeping regulatory proposals – technology neutrality – but that principle is not contained in the statute and it never has been the basis for imposing rate regulation on companies that do not possess market power.

The entire proceeding has an air of unreality. In a stark departure from sound economic and regulatory policy, the Commission proposes to regulate a market that exhibits all of the hallmarks of a well-functioning, highly competitive market. Almost 500 companies reported providing these services throughout the nation in the 2013 data collection and this very likely is an undercounting. Cable operators and other competitive carriers have invested billions of dollars to bring innovative new services to business customers and wireless providers that often are of sufficient size to leverage highly favorable contractual terms. Output is increasing as providers extend BDS facilities to new buildings on a daily basis, replacing rapidly vanishing TDM services with superior Ethernet technology and leading the way in the IP transition. At the same time, businesses all over America are experiencing declining prices due to competitive entry and expansion.

The weight of the evidence does not support the Commission's tentative conclusion that the BDS market is broken. Worse, the Commission appears set on a course that will decrease investment and harm competition by not only imposing significant rate reductions on incumbent providers, but also seeking to require competitive providers to share their networks at those newly regulated rates. The Commission appears particularly keen to lower wholesale prices so that well-financed competing carriers can compete without having to deploy their own connections, even when they have nearby fiber. As NCTA explains in these comments, none of this is consistent with the law, Commission precedent, sound policy making, or the Commission's stated goal of applying regulation in a technology and provider-neutral manner.

The Commission Cannot Impose Price Regulation on Carriers that Lack Market Power.

From NCTA's perspective, the critical question raised in the *Further Notice* is which providers should be regulated in markets the Commission finds to be insufficiently competitive. The answer to this question is straightforward – the Commission should only consider regulating the rates of carriers found to possess market power. Since the beginning of the *Competitive Carrier* proceeding in 1980, the bedrock principal underpinning Title II economic regulation has been to regulate only carriers that have market power, which the Commission defines as the ability to control price. The Commission has long understood that there is never a need to regulate a new entrant because it has no ability to charge unjust and unreasonable prices. The Commission appears ready to sweep this sound economic and policy precedent aside, stating its intent to eliminate the distinction between dominant carriers with market power and non-dominant providers that have no ability to impose unjust and unreasonable rates because the Commission believes that a new, technology neutral approach is warranted. Such an approach ignores that the current regime already is technology neutral, and even if it were not, a preference for technological neutrality provides a wholly insufficient basis for abandoning long-standing

successful policy and replacing it with an economically irrational approach that will harm investment, competition, and consumers.

Cable Companies Do Not Have Market Power with Respect to BDS.

The record shows that cable companies most assuredly do not have market power in any BDS market. The point is succinctly stated in one of the declarations submitted by CLECs: "ILECs are unquestionably the dominant providers of special access, by any measure." Market share analysis also uniformly shows CLEC market shares are well ahead of cable companies. Indeed, the Commission and the CLECs declare that they are the ILECs' "primary competitors."

Yet the Commission asks if cable companies should be subject to rate regulation in the form of benchmarks tied to ILEC TDM-based services. Imposing such regulation on entities demonstrably lacking market power would flatly conflict with the past three decades of Commission Title II jurisprudence. As the Commission once explained: "[W]e can predict with confidence that the rates charged by non-dominant carriers will be 'just and reasonable' within the meaning of the Communications Act." The reasoning is straightforward: "affected customers always ha[ve] the option of taking service from a dominant carrier whose rates, terms and conditions for interstate service remained subject to close scrutiny by the Commission." Hence, close scrutiny of the ILECs' BDS rates to ensure that they are just and reasonable in areas where they are found to have market power, which the Commission has proposed to do here, negates the need to regulate BDS rates charged by cable companies or other competitive carriers.

In the *Further Notice*, the Commission alludes to the notion that there could be a duopoly or jointly held market power that could facilitate collusion. But there is not the slightest bit of evidence that cable companies and ILECs are colluding in setting BDS rates. To the contrary, both economic theory and real world experience confirm that they are fiercely competing to

attract and retain business customers. For competitors to garner market share, they must underprice the ILECs and there is no evidence in the record to suggest that this is not precisely what is taking place.

The Availability of Ethernet over HFC Services Is Not an Excuse to Regulate Cable.

Despite the lack of demonstrable market power, the Commission hints that cable companies' "ubiquitous" HFC networks might support the need for regulation. The Commission should reject this approach. As a policy matter, if Ethernet over HFC could be considered a ubiquitous competitive alternative for ILEC BDS, the appropriate policy response would be to deregulate all BDS. That is the approach the Commission takes in the video marketplace and that is the approach the Commission should take with respect to the BDS marketplace.

But in this case, whether Ethernet over HFC is a *ubiquitous* alternative in the BDS marketplace, or for that matter, an *alternative* for many BDS consumers at all, is a complicated question. Cable company HFC networks, which were designed as shared networks to support primarily downstream services to residential consumers, have different capabilities than ILEC networks and those network differences affect the usefulness of the business services offered over those networks. In light of these differences, the best approach the Commission can take is to promote competition in the BDS marketplace by ensuring providers have the flexibility to price their services in a manner that accounts for these differences and presents business customers with meaningful choices. Regulating the rates of EoHFC services will not achieve that result.

The Commission Cannot Impose Forced Sharing of Cable Company Networks.

Viewed in their totality, the Commission's proposals, if adopted, would amount to forced sharing of cable company networks at regulated rates so as to make them available to competitors, a regime that is virtually indistinguishable from the statutory unbundling framework

that Congress applied only to incumbent LECs. The Commission previously has refused to impose Section 251(c) ILEC obligations on other carriers, declaring that "[n]onincumbent LECs definitionally lack the market power possessed by ILECs and were therefore not made subject to the wholesale pricing obligation of the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary." If the Commission now desires to impose such obligations on non-ILECs, despite the lack of any sound policy reason for doing so, it must follow the Congressionally-established mechanisms for extending such obligations to entities other than ILECs. Section 251(h)(2) for example, establishes a mechanism imposing ILEC obligations on other carriers, which the *Further Notice* wholly ignores but could not be met in any case. Certainly the mere preference of the agency for technology neutrality provides no grounds for imposing ILEC obligations on competitors in violation of clear statutory principles.

Moreover, while considering unbundling-like obligations on cable companies and other competitive providers, the Commission ignores its actual unbundling regime. In that context, the Commission has already determined the circumstances under which CLECs can and cannot economically deploy their own high capacity facilities to locations in order to provide business data services. It would be wholly contrary to the existing unbundling regime to artificially drive down BDS prices to levels at or below the level of UNE prices, as certain CLECs are proposing. Congress adopted the UNE framework to foster true facilities-based competition. If the CLECs or the Commission believe that UNEs are not sufficiently available, the remedy lies in revisiting the UNE rules, not in fostering "synthetic competition" through increased reliance on special access services.

It Would be Unlawful to Tie Cable Company Ethernet Rates to ILEC TDM Price Caps.

The Commission's proposal to benchmark Ethernet rates of competitive providers in "non-competitive" markets to ILECs' price caps for TDM-based services, which in turn would be driven down from current levels through retroactive application of a historical productivity or X factor, is ill-conceived and should not be adopted. The primary infirmity is that current ILEC prices are based on X-factors that have twice been deemed unlawful by the courts. The Commission thus cannot simply take current unlawful rates as the starting point, as it proposes, and it has proposed no reasonable mechanism for otherwise determining appropriate ILEC price caps. Aggravating this problem is the concept of benchmarking BDS rates to wholly different services, with varying capacities and service quality levels, and pricing that is highly dependent on unique factors such as geography, customer requirements, and term and volume commitments. Any attempt to tie competitive BDS rates to ILEC price caps would be inherently arbitrary and capricious.

Competitive BDS Services Do Not Require Regulatory Intervention.

The Commission seeks comment on the appropriate product market definitions and customer class designations. For all of the reasons noted above, it would be unlawful and contrary to sound policy to impose rate regulation on cable companies and other facilities-based competitors that lack market power, regardless of the outcome of any competitive test. To further guide the Commissions' review, however, NCTA provides the following views on the scope of the product market and customer classes that the Commission should employ in regulating the BDS marketplace.

First, there is no evidence of market failure, and therefore no reason to impose *ex ante* price regulation with respect to any Ethernet BDS. The Ethernet market is enormously competitive, as reflected in the massive increase in supply coupled with declining prices.

Regulating this market now would be particularly counterproductive, and the evidence suggests that there are no providers that possess market power with respect to Ethernet services. Similarly, there is no need to regulate any fiber-based services. Here too there is no evidence that any provider has market power. Dr. Rysman's analysis shows that CLECs serve almost as many buildings with fiber as do the ILECs, indicating that competition is already vibrant for fiber-based BDS. Moreover, the Commission has exhaustively reviewed barriers to fiber self-deployment and concluded that CLECs can economically build out fiber.

Nor is there any reason to single out wireless backhaul services for special treatment. To the contrary, the Commission already concluded that "reliance on special access has not posed a barrier that makes entry [by wireless carriers] uneconomic" and that "existing rates outside the compulsion of Section 251(c)(3) [*i.e.*, network elements at special access prices] don't impede [wireless] competition." The Commission appears particularly concerned that "high" BDS prices might undermine the deployment of wireless 5G services. That concern is entirely misplaced.

Companies like Verizon and Sprint have the resources and expertise to build their own backhaul facilities and have already informed their investors that they can profitably roll out 5G without reliance upon other carriers' regulated BDS. Providing large wireless carriers with the right to obtain access to wireline networks built by cable operators and other facilities-based providers at artificially low regulated rates is the very opposite of technology neutral regulation.

Indeed, there is no basis for providing regulatory assistance to any large BDS customers. The Commission has long recognized that large enterprise customers are highly sophisticated purchasers of telecommunications that are perfectly capable of negotiating favorable terms. Indeed, a true technology and provider neutral approach would not only treat all BDS services in

a similar manner by deregulating previously dominant providers where clear evidence of competition exists, but it would not subject competitive providers to new regulations.

As to geographic markets, NCTA agrees that a building-specific market is entirely unworkable and census blocks would not be materially better. NCTA also concurs that nearby fiber constrains pricing and should be considered in determining competitive markets. Court and Commission precedent, however, requires a more expansive view of potential competition. Utilizing the legally compelled definition of potential competition, the Commission must assume that wherever cable companies have found it economical to deploy fiber other carriers can as well. Thus the presence of cable company fiber demonstrates that competition is possible and the Commission should conclude that any area containing nearby fiber is competitive, even if only one carrier currently has fiber nearby.

The Commission Must Carefully Assess Costs and Benefits of its Proposals.

As noted by Commissioners Clyburn and Rosenworcel, one of the biggest challenges in this proceeding is to develop a regime that can be easily administered and that does not overly burden the resources of the industry or the Commission. In weighing costs and benefits, the Commission must bear in mind its findings in the *Competitive Carrier* proceeding that the costs of regulating the rates charged by competitive entrants are not justified. Here, the Commission proposes a series of costly and burdensome requirements, including in-depth periodic market reviews, and also processes to challenge market designations as competitive or non-competitive. The burdens imposed by these requirements come on top of the administrative difficulties cable companies will face if required to benchmark their Ethernet services against ILEC TDM price caps that vary wildly between and within states and that have no relation to cable company services. It is simply inconceivable that the virtually non-existent benefits of regulating new

entrants could somehow outweigh the enormous costs this regulatory proposal would place on the entire industry, its customers, as well as the Commission. In short, the Commission's proposal would essentially serve as a penalty on competitors that have used private capital to enter the market.

The Commission should also ensure that its proposals do not harm competition in rural areas by imposing unnecessary regulation. Any competitive market test that relies on multiple competitors in an area would likely lead to regulation in rural markets. As the Commission is well aware, it is difficult to make a business case for deploying new network facilities in rural areas. Cable companies are often the only facilities-based providers willing and able to offer higher speed services to rural locations. Imposing rate regulation and forced network sharing on rural cable companies will only undermine these competitive efforts harming consumers by extending the urban/rural divide.

Table of Contents

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
	)	
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	

COMMENTS OF THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

Pursuant to the Commission's May 2, 2016 Tariff Investigation Order and Further Notice of Proposed Rulemaking,[1] the National Cable & Telecommunications Association ("NCTA") respectfully submits these comments.

I. Introduction

The Commission correctly notes that cable entry into the BDS market is a "great entry success story."[2] Cable has invested billions of dollars of risk capital to provide a competitive alternative for business customers of all sizes. The Commission's reward to the cable industry for these efforts: a rulemaking suggesting that cable companies may become subject to rate regulation, including potentially sharp price cuts, and forced sharing of their network facilities with well-financed competitors. The Commission's radical new regulatory regime would abandon decades of successful policy and undermine the key goal of the 1996 Act, to promote *facilities-based* competition. The proposal should be rejected.

---

[1] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016) ("*Further Notice*").

[2] *Further Notice* at ¶ 236.

The purported market failure driving this proceeding is that ILECs are abusing their ostensible market power in the BDS market by imposing unreasonably high prices and unfair contract terms on competitors. In the nearly 15-year history of the Commission's review of special access pricing, the **only** entities ever identified as having market power are the ILECs. While we believe the record shows that most areas of the country are experiencing more competition than ever and that no rate regulation is warranted, to the extent the Commission finds competition lacking in certain areas it is clear that any regulation should be focused only on those carriers with market power.

Ignoring 35 years of precedent, the Commission asks whether it should impose rate regulation on the cable companies that by Commission definition have no ability to impose "unjust and unreasonable rates." The Commission may seek to dispense with the dominant/non-dominant terminology, but a mere change in terminology cannot justify imposing rate regulation on carriers demonstrably lacking market power. Simply invoking technology neutrality is inadequate justification for imposing costly economic regulation on entities with no market power that are competing in a market as vibrant, growing, and dynamic as the Ethernet BDS market.

II. Streamlined Regulation Has Created a BDS Market Place That Is Highly Dynamic, with a Diverse Range of Providers and Customers and Increasing Levels of Investment and Competition.

For more than 35 years, the Commission has followed a policy of streamlined regulation of new entrants in services markets. The policy has fostered unimagined levels of competition in telecommunications markets previously dominated by government-sanctioned monopolists, the Bell System and its progeny. This streamlined regulatory regime, particularly as applied to the facilities-based competitors in the BDS market place, has fostered substantial investment and brought the benefits of high quality, innovative services to businesses throughout the country.

Nevertheless, a handful of the country's largest and most-well capitalized CLECs, along with associations representing many of the largest enterprise customers[3] declare that the BDS market place is "broken" and dysfunctional and that such problems can only be solved by the federal government setting prices. The evidence demonstrates otherwise.

A. Cable Companies Are the "Great Entry Success Story" Bringing the Benefits of Competition to Businesses Throughout the Country.

Cable companies have been investing heavily in this market and have collectively deployed fiber to tens of thousands of commercial buildings. As has been well documented, cable companies have evolved from serving residential and very small business customers to now serving larger enterprises, schools and libraries, and other governmental entities. Cable companies view the BDS market as a significant source of new revenue and fully intend, at least in the absence of regulation, to continue vigorously competing in this market.

Cable company entry into the BDS market has brought all of the benefits of facilities-based competition – lower prices, better services, greater output and faster innovation – that one would expect in a functioning market. The Commission should need no convincing of these facts because it has already made this finding. In granting NCTA's petition for forbearance from section 652(b) of the Act, so as to facilitate cable and CLEC mergers, the Commission wrote that

---

[3] *See* Comments of Ad Hoc Telecommunications Users Committee, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WD Docket No. 05-25, RM-10593, WC Docket No. 15-1 at 2 (dated Feb. 5, 2015). Ad Hoc has long been a vociferous advocate for lower BDS rates. Although its membership is not readily available, it reportedly is comprised of companies from a variety of industries and includes Ford Motor Co., Visa, United Parcel Service and Bank of America as some of its members. *See* Bloomberg, *Behind Closed Doors, Ford, UPS, and Visa Push for Net Neutrality*, Nov. 14, 2014, *available at* http://www.bloomberg.com/news/articles/2014-11-14/net-neutrality-ford-ups-visa-and-bofa-lobby-fcc-in-secret#r=hp-ls. *See also* Press Release, INCOMPAS, Facebook Joins INCOMPAS (Apr. 21, 2016), *available at* http://www.incompas.org/Files/filings/2016/04-21-16%20Facebook%20Joins%20INCOMPAS.pdf. (INCOMPAS now represents many of the largest Internet companies such as Google, Amazon, Netflix and Facebook).

such combinations "will likely speed entry of cable operators into the market for telecommunications services provided to business customers and will foster increased facilities-based competition for these services."[4] The Commission concluded that this increased competition coming from cable, the "new entrants" to this market, "will benefit consumers" lowering rates, increasing quality and fostering innovate services.[5]

All of these predictions have borne out. As the *Further Notice* correctly notes "The great entry success story has been that of cable."[6] Cable companies have helped drive ever greater Ethernet penetration and at the same time drive prices lower. Cable companies, for example, installed more new retail Ethernet ports than the large ILECs during the first half of 2013.[7] Vertical Systems Group's U.S. Carrier Ethernet LEADERBOARD for year-end 2015 placed three cable companies, Time Warner Cable, Comcast and Cox (in that order at 5, 6, & 7) in the top nine Ethernet providers. AT&T, Level 3, Verizon and CenturyLink were the top four and XO and Windstream were 8 and 9. To qualify for the top ranking on the LEADERBOARD, carriers must have 4% or more of the Ethernet services market as measured by the number of

---

[4] *See Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators, Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd 11532, 11544 ¶ 27 (2012) ("*NCTA Forbearance Order*").

[5] *NCTA Forbearance Order*, 27 FCC Rcd at 11547-11548 ¶ 32. *See also Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership*, Memorandum Opinion and Order, MB Docket No. 15-149, FCC 16-59 (rel. May 10, 2016) (finding that "to the extent the transaction allows New Charter to compete more effectively for commercial customers, the transaction will add vibrant new competition and output to the market and tend to undermine industry coordination").

[6] *Further Notice* at ¶ 236.

[7] Alan Breznick, Cable Goes on Ethernet Roll, LIGHT READING, Aug. 22, 2013, *available at* http://www.lightreading.com/cable-video/cable-goes-on-ethernet-roll-/d/d-id/705332 ("Cable operators are taking the US Ethernet market by storm, making strong inroads against the big incumbent telcos as they expand further in the business services arena.").

ports.[8] Vertical Systems further found that the Ethernet market grew by 20% in 2015. Ethernet market growth is expected to continue to be strong for the foreseeable future as businesses accelerate their switch from TDM-based service to Ethernet BDS. Despite this success, cable remains far behind the ILECs and CLECs in market share, as described in Section IV.A below.

Ethernet services are superior to legacy TDM services in a number of ways. They are more efficient than TDM services and highly scalable, especially over fiber.[9] This is why Ethernet services are rapidly replacing DS1 and DS3 services and leading the way for the IP-transition. Ethernet growth has been coupled with price declines, precisely what would be expected in a competitive market. A paper by Dr. Hal Singer notes that monthly recurring revenue for Ethernet services in the 10 to 100 Mbps range declined by 7.6%, fractional GigE Ethernet (101 to 1000 Mbps) declined by 17.4% and prices for full 1 GigE declined by 12.1%.[10]

The tremendous growth in cable provided facilities-based competition has occurred despite facing the same types of entry and expansion barriers confronted by CLECs when expanding their networks into new, commercial areas. Cable plant was initially deployed to

---

[8] Vertical Systems Group, *2015 U.S. Carrier Ethernet LEADERBOARD*, Feb. 25, 2016, *available at* http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/. There were five companies in the "Challenge Tier," companies with 1% to 4% market share, including Cogent, Lightpath and Zayo.

[9] Comments of Sprint Corp., PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 at 5 (dated Feb. 5, 2015) ("IP services are less costly and more efficient than the TDM services they are replacing."); *see also* Reply Comments of Full Service Network LP and TruConnect, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 at 2 (dated Mar. 9, 2015) ("Verizon did replace roughly half of its existing copper network with fiber—which is cheaper to build and maintain while providing unlimited, inexpensive bandwidth . . . .").

[10] Dr. Hal Singer, Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Analysis at 14-15, *available at* http://innovatewithus.org/wp-content/uploads/2016/04/Hal-Singer-Report-FCC-Regulation-of-Business-Broadband.pdf ("Singer Study") (citing Pricing Trends Zayo Group Holdings, Inc. Fiscal Year 2015 Q4 *available at* http://investors.zayo.com/~/media/Files/Z/Zayo-IR-V2/earnings-releases/2015/zgh-fy2015q4-pricing-trends.pdf (last visited June 25, 2016)).

provide services in residential areas, so expanding into commercial zones has required cable companies to overcome the costs of construction, the need to obtain rights of way, and the host of operational factors to which CLECs consistently refer in explaining the difficulties in expanding networks.

B. The BDS Market Is Served by Hundreds of Carriers Making Substantial Investments in Facilities and Services.

In addition to cable operators, there are hundreds of CLECs competing in the BDS marketplace. The Rysman Paper identifies 491 different entities reporting that they provide BDS over their own facilities or facilities obtained under an IRU or as UNEs to some 1.2 million unique locations across the country.[11] Granted, many of these are local or regional providers that serve a relatively small number of buildings, but the collective presence of this large number of providers reflects what cable companies consistently find in markets of all sizes: numerous facilities-based providers stand ready to compete in the $45 billion BDS market.[12]

---

[11] Dr. Marc Rysman, Empirics of Business Data Services at 12-14 (Apr. 2016), *attached as* Appendix B of the *Further Notice*. ("Rysman Paper"). The data collection understates the level of competition in significant ways. A variety of companies that operate fiber optic networks and offer services that compete with BDS service are not represented in the data. Moreover, significant investment and expansion has taken place since 2013.

[12] The diversity of providers in the market is also illustrated by data collected by the Vertical Systems Group, which identifies providers of Ethernet services. It identifies 9 providers with market shares (as measured by number of ports) of more than 4%, another five providers with shares between 1% and 4% (two of these are cable companies, Charter and Bright House, which have now merged with Time Warner cable, one of the top nine providers.) Vertical Systems also identifies a host of "Market Players," companies with less than 1% nationally, but still significant. Listed in alphabetical order, they are: Alpheus Communications, American Telesis, Birch Communications, BT Global Services, Cincinnati Bell, Consolidated Communications, Earthlink Business, Expedient, FairPoint, FiberLight, Frontier, Global Cloud Xchange, GTT, Hawaiian Telecom, Integra, Lightower, LS Networks, Lumos Networks, Masergy, MegaPath, NTT America, Orange Business, RCN Business, Sprint, Suddenlink (Altice), Tata, TDS Telecom, TelePacific, Telstra, Unite Private Networks, US Signal, and WOW!Business. Vertical Systems Group, *2015 U.S. Carrier Ethernet LEADERBOARD*, Feb. 25, 2016, *available at* http://www.verticalsystems.com/vsglb/2015-u-s-carrier-ethernet-leaderboard/.

The hundreds of providers in the market have made and continue to make substantial investments in access networks, back office systems and sales and marketing teams to better compete for BDS customers:

- Level 3 reports that it has deployed fiber to 34,000 commercial buildings[13]
- Windstream has invested "billions to operate a fiber network now covering approximately 121,000 miles"[14]
- TDS CLEC has "invested more than $550 million in infrastructure in second and third tier markets in four states."[15]
- XO is in the midst of a $500 million capital expansion project in which "several thousand additional buildings will be connected to XO's network with fiber."[16]
- Just last week Google announced the acquisition of Webpass, a company that, among other products, offers (dedicated bandwidth) Ethernet services at speeds up to 1 Gbps and fixed wireless.[17]

These examples, largely taken from the existing record, likely understate investment and, of course, cannot fully reflect the continuing substantial investment and growth since the 2013 data collection. A recent analysis by Dr. Hal Singer, for example, states that "nearly 30

---

[13] Comments of Birch Communications, BT Americas Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Docket No. 05-25, RM-10593 at 33 (dated Jan. 27, 2016) ("Joint CLEC Comments").

[14] Comments of Windstream Service, LLC, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593 at 36 (dated Jan. 27, 2016) ("Windstream Comments").

[15] Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 at 21 (dated Jan. 27, 2016) ("TDS Metrocom Comments").

[16] Declaration of George Kuzmanovski on Behalf of XO Communications, LLC at 3 (dated Jan. 22, 2016) (attached to Comments of XO Communications, LLC, WC Docket No. 05-25, RM-10593 (dated Jan. 27, 2016) ("XO Communications Comments")). As noted in the *Technology Transitions Order*, XO also provides Ethernet over Copper to approximately 953,000 buildings, almost as many buildings as the total of identified BDS locations in the 2013 data collection. *Technology Transitions*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9445 ¶ 134 (2015) ("*Technology Transitions Order*").

[17] *See, e.g.*, Webpass, Google Fiber agrees to acquire Webpass, WEBPASS BLOG, June 22, 2016, *available at* https://www.webpass.net/blog/google-fiber-agrees-to-acquire-webpass.

competitive broadband providers have lit at least 1,000 buildings *each* with fiber"[18] and "collectively these competitors serve over 267,000 buildings with fiber, laying over 650,000 route miles of fiber." The analysis further notes that from 2010 to 2015, "the four major pure-play fiber service providers – Zayo, Level 3, Lightower, and TW Telecom – lit over 40,000 buildings, laid approximately 60,000 miles of metro fiber, and invested approximately $6 billion in fiber infrastructure."[19] A recent analysis by Anna-Marie Kovacs similarly details investments, based on financial reporting, from competitors such as Cogent Communications, whose network at year-end 2015 spanned "28,158 metro fiber miles, connecting 2,251 buildings" and noted that Birch Communications announced that it "had added 80,000 buildings in 2015, for a total of 400,000 buildings on its U.S. metro-fiber network."[20]

The only conclusion that can be drawn from all of this recent activity is that the marketplace is working to attract new entrants and new investment from a wide variety of companies. Companies do not make investments like this unless they see an opportunity to attract customers and generate sufficient revenue to earn a return on their investments. Any assertion that the marketplace is broken and not meeting consumer needs is difficult to reconcile with this real world evidence.

C. The Business Services Marketplace Consists of a Diverse Customer Base.

In addition to a variety of providers, the business services market, including BDS, is characterized by a varied customer base with differing demands and expectations. Numerous

---

[18] Singer Study at 2.
[19] *Id.* at 17-18.
[20] Anna-Marie Kovacs, Regulation in Financial Translation, Business Broadband: Assessing the Case for Regulation at 8 (March 2016), *available at* http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Regulation%20in%20Financial%20Transaction%20Business%20Broadband%20Assessing%20the%20Case%20for%20Reregulation%20Kovacs%203.14.16.pdf.

providers have noted in the record that they market to distinctly different customer segments, based both on size and sector. The Commission too has long recognized that business customers fall into distinct classes.[21] Many smaller businesses do not need the higher quality dedicated services that drive up costs and they are adequately and efficiently served with best efforts services, which the Commission correctly excludes from the BDS product market definition. These smaller companies, which represent a significant share of the customer base by number, if not by revenue, typically do not even purchase these services for point to point applications, but simply for higher capacity, asymmetric Internet access. A number of these companies have switched from using DS1 services to cable company best efforts services, which are priced well below dedicated services and thus provide substantial value for smaller businesses.[22]

At the other end of the spectrum are larger enterprises, government agencies, health care facilities and school systems that require higher capacity, symmetric throughput and stringent quality controls. In between the small business customers and the larger enterprise customers lies a broad spectrum of business customers with varying needs and demand in terms of capacity and service quality. Many smaller and mid-size businesses are unwilling to pay for services that are not relevant to or necessary for their operations.

Many BDS customers, and certainly those generating a significant share of BDS revenues, are larger enterprise customers that demand relatively high bandwidth and service level guarantees. Wireless carriers seeking backhaul solutions should fall within this category as well. BDS providers compete fiercely for these accounts. The CLECs typically target these

---

[21] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17061 ¶ 124 (2003) (recognizing three customer classes, mass market, small and medium business, and larger enterprise) ("*TRO*").

[22] XO Comments at 18-19; Reply Comments of Windstream Service, LLC, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593 at 7 (dated Feb 19, 2016).

customers because of the revenue opportunities they provide and these customers typically enjoy substantial competitive alternatives, even in smaller markets.[23] Generally, these customers purchase BDS through Requests for Proposals (RFPs) and have sufficient leverage in negotiations to strike reasonable terms and conditions. The Commission has repeatedly found that these customers do not need regulatory protection:

> As noted above, we find, consistent with the Commission's conclusions in the *SBC/AT&T Order* and the *Verizon/MCI Order*, that mid-sized and large enterprise customers tend to be sophisticated purchasers of communications services, whether they are located solely within BellSouth's region, or have locations both inside and outside BellSouth territory. These users tend to make their decisions about communications services by using either communications consultants or employing in-house communications experts. This is significant not only because it demonstrates that these users are aware of the multitude of choices available to them, but also because it shows that these users are likely to make informed choices based on expert advice about service offerings and prices. Thus, so long as competitive choices remain in this market, these classes of customers should seek out best-priced alternatives, and the merged entity should not be able to raise and maintain prices above competitive levels.[24]

The Commission now suggests that medium to large enterprise, should they happen to have multiple locations, may in fact be in need of special protection because some of their locations may only require relatively low capacity connections, such as a DS1, or because some locations may experience less competition than others.[25] This concern appears completely at odds with how customers negotiate their service agreements and the Commission's prior recognition that large enterprises have the ability and leverage to negotiate reasonable BDS arrangements. The same holds true for larger, multi-location customers. They have the ability to

---

[23] *See, e.g., Application Filed for the Transfer of Control of Embarq Corp. to CenturyTel, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 8741, ¶ 19 (2009) (noting that in Chaska Minnesota exchange, applicants compete with Level 3, ITC Deltacom, Paetec, Verizon, AT&T, ALEC, and Bandwidth.com).

[24] *AT&T Inc. and BellSouth Corp. (Application for Transfer of Control)*, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5708-5709 ¶ 82 (2007).

[25] *Further Notice* at ¶ 201.

negotiate reasonable terms and conditions even it means their BDS provider may at times need to purchase wholesale BDS inputs from other carriers. There is no reason to think that there is insufficient competition to protect large enterprise customers.

D. The Commission Must Recognize That the Services at Issue Are Private Carriage Business-to-Business Services and Not Mass-Market Services.

As just described, the market for BDS does not resemble the market for services sold to mass-market customers. BDS services are customized, provided to and from specific locations, with characteristics (including speed, reliability, volume and term) that often are the subject of negotiation with individual customers. This is particularly true for competitive providers, as their services typically are not tariffed and generally are provided via individual customer contracts. These characteristics are typical of private carriage, not common carriage, and as a consequence the Commission has no basis for its blanket assertion that every competitive BDS offering is a common carrier service.

The Commission has long recognized the distinction between common carriage and private carriage. For instance, in *Norlight,* the Commission held that private carrier status "turns on whether [a provider's] practice is to make individualized decisions in each service offering. Pertinent to this analysis are whether service contracts are medium-to-long range, ensuring a relatively stable clientele, and the extent to which contracts are tailored to the needs of particular customers."[26] The Commission's analysis was rooted in the D.C. Circuit's decision in *NARUC I,* which held that a provider is a private carrier when its "practice is to make individualized decisions, in particular cases, whether and on what terms to deal."[27] Later Commission decisions

[26] *Norlight*, Declaratory Ruling, 2 FCC Rcd 132, 134 ¶ 20 (1987), *recon. denied,* 2 FCC Rcd 5167 (1987) ("*Norlight*").

[27] *Nat'l Assoc. of Regulatory Util. Comm'rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*").

confirm this analysis.[28]

Competitive BDS typically is provided as a private carrier service, particularly with respect to higher-bandwidth services. Cable operators, in particular, do not provide posted, publicly-available pricing for Ethernet and dedicated access services; rather, most operators provide a contact form on their websites to facilitate individualized discussions with sales staff. For instance, Comcast requires a consultation with prospective customers to discuss their specific requirements, after which Comcast provides "a free service recommendation and price quote based on your business needs."[29] Similarly, Cox provides a form that prospective customers can complete to schedule a consultation with a business service representative.[30] These processes are typical for cable-provided BDS and are fully consistent with private carriage.

Moreover, competitive BDS providers generally do not offer service "off the rack" because customer requirements are highly specific. This is not just a matter of differing end points of a dedicated facility, but of a wide range of characteristics that are important to individual customers. Customers ask for and expect to obtain different capacities, service configurations, locations, installation intervals, and levels of service quality, among other things. Many customers purchase services through RFPs, where the customer (and not the provider) defines the specific service that will be purchased. As a consequence of the need to customize the service being provided, the final terms for nearly all competitive BDS arrangements are

---

[28] *See, e.g., Federal-State Joint Board on Universal Service*, Order on Remand, 16 FCC Rcd 571, 575-576 ¶14 (2000) (applying individualized negotiation test in determining that Iowa Communications Network was a common carrier) ("*ICN Remand Order*"), *affirmed United States Telecom. Assoc. v. F.C.C.*, 293 F.3d 1326 (D.C. Cir. 2002).

[29] Business Internet, Business Phone Services, Ethernet Service – Comcast Business, https://business.comcast.com/ (last visited June 22, 2016).

[30] Small Business Solutions for Voice, Internet, Cable TV, and Networking – Cox Business, https://www.cox.com/business/solutions/small-business.html (last visited June 22, 2016).

contained not in price lists or tariffs, but in individual contracts negotiated between a provider and its customers. Competitive BDS also generally is provided under medium- to long-term agreements, which is particularly important when a BDS provider has to construct new facilities to reach the customer's service locations. A customer's willingness to commit to a longer term could tip the economic decision of whether to build a new facility the location. All of these characteristics are consistent with private carrier status as delineated in *NARUC I* and *Norlight*.

The status of competitive BDS as private carriage is critical because the Commission cannot impose common carrier regulation on non-common carrier services. Longstanding Commission and court precedent establishes that the Commission has only limited authority over private carrier services. As the D.C. Circuit explained when it examined the Commission's data roaming rules, "If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status," and the Commission lacks the authority to apply such common carrier regulations to private carriers.[31] Similarly, in *Verizon v. FCC*, the D.C. Circuit held that the Commission could not impose common carrier regulation on consumer broadband because it was not classified as a common carrier service.[32] These decisions are grounded in the Supreme Court's conclusion in *Midwest Video* that when Congress gave the Commission jurisdiction over communication by wire in Section 2(a) of the Act "the Commission was not delegated unrestrained authority."[33]

Indeed, *NARUC I* instructs that the Commission does not have "unfettered discretion" to confer or not confer common carrier status "on any given entity, depending upon the regulatory

---

[31] *Cellco Partnership v. F.C.C.*, 700 F.3d 534, 547 (D.C. Cir. 2012).
[32] *Verizon v. F.C.C.*, 740 F.3d 623, 649- 659 (D.C. Cir. 2014) (holding that the FCC could not impose common carrier obligations on information service providers).
[33] *F.C.C. v. Midwest Video Corp.*, 404 U.S. 689, 706 (1979) (holding that the FCC could not impose common carrier obligations on cable operators).

goal it seeks to achieve."[34] The Commission has recognized these limitations and has, for instance, consistently refused to impose a general duty to provide services indiscriminately in the absence of market power.[35]

The *Notice* provides no evidence or analysis that would support a conclusion that competitive BDS is offered as a common carrier service, either in general or by any specific provider. Rather, it simply assumes that competitive BDS is a common carrier service subject to Title II of the Act because, it claims, there are no assertions to the contrary in the record.[36]

This assumption is wholly unwarranted. First, because the issue had never been raised in this proceeding, one would not expect a record on this question. Oddly, having declared there is little in the record, the Commission then proffers two comments that assert private carriage.[37] Indeed, the only conclusion supported by the evidence is that competitive BDS is offered on individualized terms and conditions, that is, as a private carrier service. The Commission must base any classification decision on evidence of how the service is offered.[38] If a provider does not hold itself out as a common carrier, the only other way for a provider to be regulated as a common carrier is for the FCC to compel the company to provide services on a common carriage basis.[39] And again as noted above, such compulsion must be based on a finding of market power, which cable companies must assuredly do not possess.

---

[34] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 ¶ 59 (1981) (.

[35] *Id.* at ¶ 26 ("[U]nder both the common law and our nation's basic economic policies found in the antitrust laws, no duty to deal exists in the absence of monopoly power.") (citing *U.S. v. Colgate*, 250 U.S. 300 (1919) ("*Competitive Carrier FNPRM").*

[36] *Further Notice* at ¶ 257, n. 671.

[37] *Further Notice* at ¶ 257, n. 671.

[38] *See, e.g., United States Telecom Ass'n v. F.C.C.*, No. 15-1063, slip op. at 49-50 (D.C. Cir. June 14, 2016)*; ICN Remand Order,*16 FCC Rcd at 573-574 ¶¶ 7-9; *Norlight*, 2 FCC Rcd at 5167-5168 ¶ 8.

[39] *NARUC I*, 525 F.2d at 640-641 (noting that carriers can hold themselves out to serve indifferently, or be compelled to so by regulation).

Here, however, the Commission has not even asked for comment on the question of whether competitive BDS is a common carrier or private carrier service. This omission prevents the Commission from making a determination concerning the classification of competitive BDS as common carriage service in all instances.[40] The failure to ask for comment is, as the Third Circuit explained in *Prometheus Radio*, a "significant omission[]" that is fatal to a decision.[41] Moreover, notice cannot be provided in the final order, because in that case the "opportunity to comment is meaningless."[42] The Commission also must provide an explanation for its factual conclusions in a notice.[43] Here, in addition to failing to ask for comment, the Commission has not provided any rationale for treating competitive BDS as a common carrier service. In the absence of full and adequate notice that it will consider the classification question, let alone evidence to support a finding that competitive BDS is a common carrier service, the Commission cannot impose common carrier regulation on competitive BDS.

III. The Commission Should Strive to Encourage Facilities-Based Investment Not Increased Reliance on Other Carriers' Networks.

In developing a regulatory regime to govern BDS, the Commission should strive to promote facilities-based investment, not foster further reliance of some carriers on the networks built and maintained by other carriers. As Chairman Wheeler explained in a recent interview,

---

[40] To meet the requirements of the Administrative Procedures Act concerning notice, an agency must "provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." *Honeywell International, Inc. v. E.P.A.*, 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation marks omitted). An agency provides sufficient notice when it "expressly ask[s] for comments on a particular issue or otherwise ma[kes] clear that the agency [is] contemplating a particular change." *CSX Transportation, Inc. v. Surface Transportation* Board, 584 F.3d 1076, 1081 (D.C. Cir. 2009).

[41] *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431, 450 (3rd Cir. 2011).

[42] *HBO, Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977) (per curiam).

[43] *Id.* at 36 (explaining that "an agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible").

"competition is a facilities-based issue . . . You want to create environments where people are going head to head . . . how can you ever win if you have to buy your capacity from your competitor?"[44] Commissioner Rosenworcel also acknowledged that the "need to encourage [infrastructure] deployment" is one of the key principles that must guide this proceeding.[45] As those statements recognize, the primary goal of the 1996 Act is to stimulate *facilities-based competition*, not foster reliance on other carriers' networks at the lowest price the Commission can devise, "[T]he purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee access to ILEC network elements at the lowest price that government may lawfully mandate. Rather its purpose is to stimulate competition – preferably genuine facilities-based competition."[46]

The Commission has repeatedly recognized that facilities-based competition is critical to innovation, the deployment of new technologies and the reduction of regulation.[47] Reliance on other carriers' facilities, on the other hand, simply "spread[s] the disincentive to invest."[48] The same necessarily holds true for cable company facilities. Forcing cable companies to share their networks with competitors at regulated rates creates the same "disincentive to invest" as does the statutory obligation to unbundle ILEC networks.

The Commission's misguided effort here of driving down wholesale BDS prices through regulation contravenes its previous unequivocal conclusion that reliance on ILEC special access

---

[44] Jon Brodkin, Why Tom Wheeler Rejected Broadband Price Caps and Last-Mile Bundling, ARS TECHNICA, *available at* http://arstechnica.com/business/2016/03/why-tom-wheeler-rejected-broadband-price-caps-and-last-mile-unbundling/.

[45] *See* Approving Statement of Commission Jessica Rosenworcel (attached to *Further Notice*).

[46] *United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 576 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313 (2004) ("*USTA II*").

[47] *TRO*, 18 FCC Rcd 17053-17054 ¶ 112. *See also id.* at 17054-17055 ¶ 113 ("One of the goals of the Act, impressed upon us by the courts, is investment in facilities by both incumbent LECs and new entrants.").

[48] *USTA I*, 290 F.3d at 427.

services frustrates this statutory purpose: "[A] primary purpose of the Act – the promotion of facilities-based competition – would be frustrated by an interpretation that would rely to a pervasive extent upon the tariffed sale of incumbent special access services."[49] Facilities-based competition obviously would not be enhanced by cheaper access to ILEC special access services – a form of "completely synthetic competition" according to the D.C. Circuit.[50]

The notion that regulation deters investment was, in fact, a central precept of the *Competitive Carrier* proceeding. The Commission understood that regulation deters investment in vital communications services because "[m]any entrepreneurs may simply choose to invest their funds in other areas of the economy rather than subject themselves to the risks and costs of being regulated."[51] The Commission must remain cognizant of this conclusion when proposing heavy-handed economic regulation on companies with diverse economic opportunities.

Reducing the incentive to invest in new fiber deployments will leave many locations without access to the most efficient form of BDS. One striking finding from the 2013 data collection is how many commercial buildings still do not have fiber. Estimates in the record indicate that there are millions of commercial buildings in the United States, yet according to the 2013 data collection only some 487,085 locations have fiber connections, which are roughly equally distributed between ILEC and CLEC providers. While there are substantial reasons to question the veracity of 2013 data for purposes of reaching firm conclusions regarding the state of competition and its effect on pricing, the results do demonstrate that there is thus substantial opportunity for additional fiber expansion, even if one only counts the relatively small number of buildings housing businesses that employ 20 or more people, which may be the most likely

---

[49] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2563 ¶ 52 (2005) ("*TRRO*").
[50] *USTA I*, 290 F.3d at 424.
[51] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 23.

targets of such expansion.[52] The Commission should be promoting policies to incent fiber deployment to these locations, not adding further roadblocks.

IV. There is No Lawful Basis to Impose Price Regulation on Companies that Lack Market Power.

The Commission seeks comment on whether to impose rate regulation on cable companies and other providers in any BDS market deemed non-competitive, even though these providers lack market power.[53] The answer to that question is no, the Commission should not impose rate regulation on any company that lacks market power, even companies that previously had market power but now face competition. Imposing rate regulation on carriers that lack market power would violate decades of precedent, and would do so without proffering any reasoned basis other than a nebulous desire for "technology neutrality," which, as is explained below, has never been a ground for imposing rate regulation.

More than 35 years ago, the Commission launched the *Competitive Carrier* proceeding and rightfully determined that imposing rate regulation on carriers that do not have market power, *i.e.*, non-dominant providers, was fundamentally at odds with the Communications Act. The Commission has consistently abided by this determination and it should continue to do so. The Commission's proposal to sweep away this precedent and impose rate regulation on carriers without regard to their ability to "control price" is unwarranted, unlawful and counterproductive. Because there is no basis to find that cable companies possess, or are likely to obtain, market power in any BDS market, the suggestion to impose rate regulation and forced network sharing on these companies will not withstand judicial scrutiny.

---

[52] The Singer Study identifies 1.3 million commercial establishments with 20 or more employees across the United States housing a business. Singer Study at 23.

[53] *Further Notice* at ¶ 309.

A. Cable Companies Do Not Have Market Power in Any BDS Market, However Defined.

In all of the many years in which the Commission has analyzed the BDS market, right up to the release of the *Further Notice*, there has not been a single credible suggestion that cable companies can exercise market power in any BDS market. To the contrary, even the most ardent proponents of renewed regulation in the BDS market vociferously and repeatedly identified the ILECs, and only ILECs, as dominating the marketplace for BDS services and abusing their "market power," never once indicating that cable companies have such power. A representative sample of CLEC and business customer comments during the past year makes this point crystal clear:

From Sprint:

- "ILEC abuse of their special access dominance through excessive rates and anticompetitive terms undermines Sprint's ability to compete"[54]
- "As a consequence of the ILECs' hundred-year dominance over last-mile networks, Sprint must rely on its chief broadband competitors to acquire critical inputs."[55]
- "Despite decades of claims that competitive alternatives to special access were just around the corner, the ILECs' dominance remains firmly entrenched."[56]
- "Incumbent LECs are unable to rebut the overwhelming evidence of their dominance". . . "obvious []that the incumbent LECs hold and exploit market power."[57]

From Windstream:

- "ILECs continue to dominate last mile connectivity, even while competitive providers have invested and continue to invest billions in their own networks"[58]

---

[54] Letter from Paul Margie et al., Counsel to Sprint Corp., to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 2 (dated Sept. 23, 2015).
[55] *Id.* at 4.
[56] Reply Comments of Sprint Corp., WC Docket No. 05-25, RM-10593 (dated Feb. 19, 2016) at 2 ("Sprint Reply Comments").
[57] *Id.* at 4.

- "There can be little doubt that the large ILECs maintain hammerlock control over last-mile access to the vast majority of business locations."[59]

- "ILEC market power with respect to dedicated services stems from the fact that they possess the sole dedicated access facility to the vast majority of business locations."[60]

- "Due to ILECs' market power with respect to building access . . . "[61]

From the Joint CLECs (including Level 3, Birch Communications, Inc., and BT Americas Inc.):

- The Commission should use its "market power analysis to identify the relevant special access markets in which incumbent LECs have the ability to set and maintain supracompetitive prices."[62]

From XO:

- "The price cap LECs are the dominant providers of channel terminations"[63]

- "The anticompetitive effects of the ILECs' enduring market power. . . ."[64]

- "The ILECs continue to have market power for the provision of Dedicated Services in virtually all locations around the country."[65]

From Ad Hoc Telecommunications User Committee:

- The "special access market is still dominated by the ILECs."[66]

---

[58] Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, GN Docket No. 12-353, WC Docket No. 05-25, RM-10593, WC Docket No. 15-1 at 5 (dated 8, 2015).
[59] Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 at 2 (dated Sept. 24, 2015).
[60] Windstream Comments at 9.
[61] Windstream Comments at 45.
[62] Letter from Thomas Jones, Counsel for Birch Communications, Inc., BT Americas, & Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 3 (dated Aug. 28, 2015).
[63] Letter from Thomas W. Cohen, et al., Counsel for XO Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 4 (Sept. 23, 2015).
[64] XO Communications Comments at iv.
[65] *Id.* at 4.

- "As the Gately Declaration explains, ILECs are unquestionably the dominant providers of special access, by any measure."[67]

- "The ILECs' share of the special access revenues also demonstrates their overwhelming dominance of this market."[68]

- "ILECs continue to dominate the market for last mile special access facilities, be they TDM or non-TDM."[69]

From INCOMPAS:

- "The Commission's assessment of the market should focus on the extent to which the incumbent LEC has market power. . . ."[70]

- "When the incumbent switches from TDM-based services . . . the incumbent will still have market power."[71]

- "INCOMPAS urge[s] the Commission to act quickly to find that the incumbent local exchange carriers [ ] possess market power in the special access marketplace . . . [the Commission should] "establish a comprehensive rate mechanism to curb the exercise of the ILECs' market power."[72]

- "The Commission should act swiftly in adopting a conclusion as to the ILECs' market power for both TDM and packet-based special access services."[73]

Of course, these sample statements are taken from documents, often voluminous, submitted for the sole purpose of demonstrating in great detail their authors' claims that it is ILEC market power, and only ILEC market power, which is responsible for the "broken" BDS market. To drive the point home, CLECs were equally adamant that cable operators not only lacked market power, but were insubstantial competitors in the BDS market whose products did

---

[66] Comments of the Ad Hoc Telecommunications User Committee, WC Docket No. 05-25, RM-10593 (dated Jan. 28, 2016) at i.
[67] *Id.* at 4.
[68] *Id.* at 6.
[69] *Id.* at 17.
[70] Comments of INCOMPAS, WC Docket No. 05-25, RM-10593 at 12 (dated Jan. 27, 2016).
[71] *Id.*
[72] Letter from Karen Reidy, INCOMPAS, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (dated Mar. 18, 2016).
[73] *Id.* at 2.

not substitute for and could not compete with the ILEC or the CLECs' BDS wholesale or retail services.

In filing after filing, CLECs highlighted the limited nature of cable BDS offerings.[74] As to wholesale services, the CLECs made it clear that they "overwhelmingly" relied upon, or "almost always" had no choice but to rely on, the ILECs for BDS inputs.[75] The CLECs were particularly clear that the cable companies' Ethernet over HFC (EoHFC) product was not an acceptable alternative to ILEC services or a substitute for their services. In comments earlier this year, for example, Level 3 stated it does not view cable HFC service as a competitor to Level 3's

[74] *See, e.g.*, Comments of Sprint Corp., WC Docket No. 05-25, RM-10593 at 33 (Jan. 27, 2016) ("Comcast's dedicated broadband coverage is dwarfed by that of the incumbent LECs . . . all of these companies' special access services would yield only a small fraction of Verizon's market share, and certainly not enough to discipline incumbent LEC behavior.") ("Sprint Comments"); Sprint Reply Comments at 4. ("[M]ore recent offerings by cable providers simply do not presage a new emergence of special access competition."); *id.* at 55 ("Cable's modest inroads into special access highlight the fact that incumbent LECs overwhelmingly dominant the provision of special access due to their broad reach in wireline network infrastructure); Letter from Jennifer Bagg, et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, WC Docket No. 15-247 at 2, 6 (dated Mar. 24, 2016) (cable fiber networks "remain small in size and reach" and "a significant number of buildings located both in and outside the cable footprint continue to lack access to last-mile coaxial facilities."); Windstream Comments at 19 ("To the extent that cable companies are beginning to offer dedicated services, Windstream's experience is that cable offerings are available only in the more limited set of buildings where cable providers have their own last-mile fiber access."); Joint CLEC Comments at 19 ("[W]hile the incumbent LECs are robust competitors at essentially every relevant customer location, traditional competitive LECs and cable companies are often in a significant weaker position than the incumbent LECs as competitors in the provision of dedicated services."); Declaration of Michael Chambless at 20 ¶ 39 (dated Jan. 22, 2016) (*attached to* XO Communications Comments (cable companies "may not have facilities at or near buildings since they primarily service residential customers.")).

[75] *See, e.g.*, Declaration of James A. Anderson at 3 (dated Jan. 22, 2016) (*attached to* XO Communications Comments ("XO still overwhelmingly relies on ILEC wholesale inputs to serve its customers when XO cannot do so with its own facilities.")); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services at 8-9 (dated Jan. 27, 2016) (A CLEC may purchase dedicated connectivity at wholesale (usually from an ILEC) to make a connection within its network); Declaration of Ed Carey at 7 (dated Feb. 3, 2016) (*attached to* Opposition to ILEC Direct Cases of Sprint Corporation, WC Docket No. 15-247 (dated Feb. 5, 2016) (In cases where Sprint does not serve a particular customer, "Sprint must order wholesale special access services from a provider that has already deployed facilities to the location, which is almost always the incumbent LEC.").

BDS offerings, because "HFC services are often subject to high levels of jitter and a relatively low maximum transmission unit. They are not as reliable as the cable companies' Ethernet-over-fiber services or the dedicated services offered by incumbent and competitive LECs."[76] Sprint agreed saying "the majority of services that cable companies offer are not true competitive alternatives, but rather are comprised of Ethernet over coaxial or hybrid fiber coaxial services that are fundamentally different from the special access services provided by the incumbent LECs."[77] CLECs further noted that the service level agreements provided by cable operators often do not provide interoffice networking capabilities or support high-resource applications such as video communication products.[78] Sprint sums up stating that EoHFC services "fall short of providing meaningful competition to ILEC special access services in numerous respects."[79]

As CLECs further point out, it is they, not cable companies, that are the "primary competitors" to the ILECs,[80] – a point echoed by the Commission.[81] That CLECs far outstrip cable in the BDS market point is dramatically illustrated by a series of charts and graphs submitted by Windstream demonstrating the dramatically lower market share of cable companies

[76] Declaration of Chris McReynolds on Behalf of Level 3 Communications, LLC at 10 (dated Jan. 21, 2016) (*attached to* Joint CLEC Comments).
[77] Sprint Reply Comments at 55.
[78] Declaration of Chris McReynolds on Behalf of Level 3 Communications, LLC at 9-10 (dated Jan. 21, 2016) (*attached to* Joint CLEC Comments).
[79] Letter from Jennifer Bagg, et al., to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, WC Docket No. 15-247 at 6 (dated Mar. 24, 2016).
[80] Letter from John T. Nakahata, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-1, GN Docket No. 13-5, GN Docket No. 12-353, WC Docket No. 05-25, RM-10593 at 10 (dated July 20, 2015); Windstream Comments at 20.
[81] *Technology Transitions Order,* 30 FCC Rcd at 9448 ¶ 137 ("[D]ata show that competitive LECs currently are the principle source of competition to incumbent LECs in the enterprise market.').

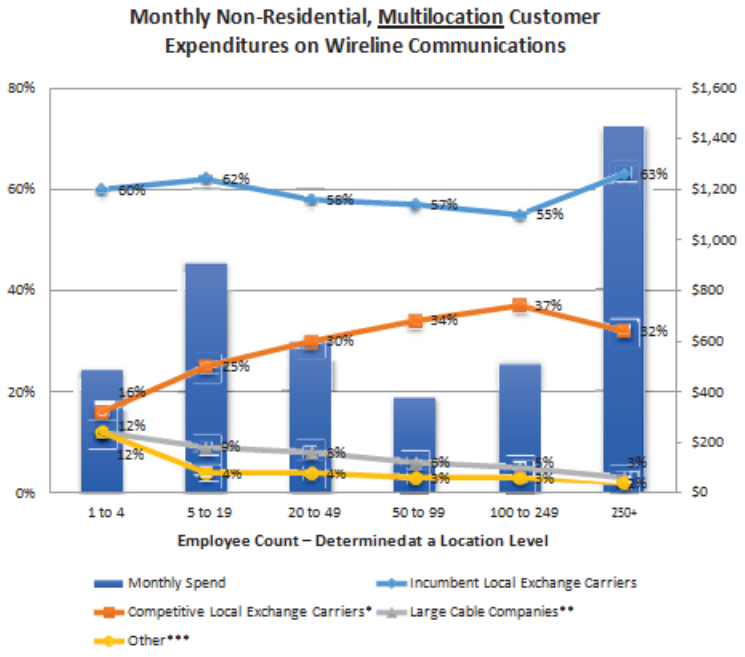
vis-a-vis either the ILEC or the CLECs for virtually all market segments.[82] Windstream presented market shares both by customer size and customer segment, often referred to as "verticals." Windstream's data showed that "large cable company" market shares for government, health care and schools/libraries ranged from a low of 3% for government customers to a high of 10% for the health care vertical.[83] CLECs, on the other hand, served 25% of the market for health care, 23% for schools and libraries, and 17% for government. The ILECs, of course, hold the lion's share in each category, ranging from 78% for government to 60% for health care.

Windstream presented similar results by customer size. Large cable companies, according to Windstream's data, held the largest market shares for small business, 14% for businesses with 1-4 customers (shared almost equally with CLECs and 15%) and 13% for businesses with 5-19 employees. For mid-size to larger customers, large cable company shares declined while CLEC shares rose, demonstrating that CLECs currently are primary competitors to ILECs for these customers.[84] For all customer sizes, ILECs remain the primary provider, holding market shares of 55% or more for each segment.

Windstream also provided market share analysis based on customer spending for multi-location and single-location customers, again dramatically demonstrating the cable companies are the new entrants into the market with by far the lowest market shares. The Commission

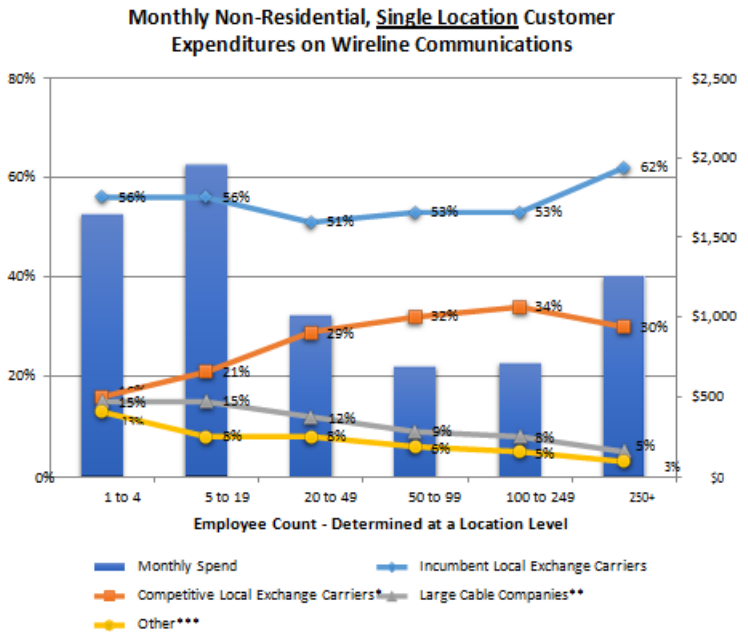
[82] Windstream Comments at 7-8, 21-22.
[83] Windstream defined "large cable companies" as the top 15 cable providers. Smaller cable companies, Windstream recognized, have "de minimis" market shares. *Id.* at 21.
[84] *Id.* at 20.

attaches significant weight to market shares when assessing whether and to regulate companies.[85] Windstream's graphs are reprinted below.[86]



[85] *Qwest Phoenix Forbearance Order*, 25 FCC Rcd at 8646 ¶ 42.

[86] *Id.* at 21-22 (citing Estimated for wireline communications during 3rd Quarter of 2014, as compiled by the independent market research firm GeoResults).



What this evidence unequivocally shows is that cable companies' market shares are small to miniscule across all customer classes and segments, however measured. While other factors, such as fiber deployment, also are relevant in determining the state of competition in the marketplace, this market share data confirms that the Commission could not possibly conclude that cable operators have market power. Cable companies will certainly work to expand these market shares to the extent market conditions, including regulatory treatment, provide appropriate incentives to make such investments, an outcome the Commission should facilitate with continued streamlined regulation, not investment-chilling rate regulation.

B. Cable Companies Do Not Have Ubiquitous BDS Networks.

The Commission asks whether a possible basis for imposing regulation on cable companies despite their small market shares is that they have "ubiquitous" networks. For example, in seeking comment on which providers to regulate in "non-competitive areas," the Commission pointedly asks whether it should regulate any firm "that has a near ubiquitous

network in the local territory and rights of way."[87] The Commission appears to equate cable company HFC networks with the "ubiquitously" deployed networks of the ILECs.[88] The Commission thus inquires whether it should regulate cable companies due solely to their HFC network footprints, notwithstanding that they, like other competitive providers are "new entrants" with "little market share."[89]

For all the reasons discussed below, this approach should be rejected. In the absence of bottleneck facilities, which competitive providers do not possess, the reach of a competitive provider's network does not provide any basis for concluding that competitor has market power sufficient to warrant the imposition of rate regulation. Moreover, cable HFC networks should not be considered ubiquitously deployed for BDS services because: (1) they are provided over a shared network that, in comparison with traditional BDS, limits their capability to provide high speed symmetrical dedicated services with the same level of robust performance commitments; and (2) they are not typically deployed ubiquitously in business districts.

1. There Can Be Significant Differences Between Ethernet Over HFC Services and Traditional BDS.

Many cable operators have started to offer Ethernet services over their HFC networks. These services are being introduced with the hope that they might provide business customers a "middle" alternative between more expensive fiber-based services and best efforts services. In contrast with TDM-based services that have been around for decades and offered in a fairly standard manner across providers, EoHFC services are relatively new and the manner in which they are offered to business customers may vary from one provider to another. Any competitive

[87] *Further Notice* at 126 ¶ 309.
[88] *Further Notice* at 25 ¶ 54 ("Unlike incumbent LECs and cable providers, non-cable operators typically do ubiquitously deploy connections to locations in a local geographic area. . . .").
[89] *Further Notice* at 127 ¶ 309.

analysis of EoHFC thus must account for differences between these services and traditional BDS that may render them unsuitable for many customers, as many CLECs and Sprint have stated.

In particular, Ethernet over HFC may be offered without any performance commitments or guarantees for critical parameters such as latency, jitter or packet loss. Rather, the service level agreements (SLAs) in the EoHFC contracts with customers typically include only performance objectives that are not backed by credits should the performance fall below intended levels. Additionally, these performance objectives for EoHFC services often are well below the performance commitments offered with TDM or fiber-based Ethernet services. The lack of robust performance commitments is a key reason that CLECs do not consider EoHFC services as substitutes for TDM or fiber-based BDS.[90]

There is a serious question as to whether EoHFC services offered without performance guarantees should even be considered BDS as the Commission proposes to define the term. The *Further Notice* suggests BDS be defined as transport "with prescribed performance *requirements* that typically include bandwidth, reliability, latency, jitter and/or packet loss."[91] The Commission states that BDS include "guaranteed speeds and performance levels."[92] Ethernet over HFC services that contain objectives rather than performance "requirements" or

---

[90] *See, e.g.,* Letter from Thomas Jones, Counsel for Level 3 Communications, LLC and Earthlink, Inc., to Marlene H. Dortch, FCC, WC Docket No. 05-25, RM-10593 at 2 (dated Apr. 14, 2016) (declaring that EoHFC is "typically offered with service level objectives for jitter that do not require the cable company to pay customers a penalty if they fail to meet these objectives" and that the objectives are lower than the commitments typically provided by other Ethernet providers);Windstream Comments at 18-19 (explaining the HFC networks were designed for best efforts, commonly are heavily oversubscribed, do not support services with higher levels of network performance, are not suitable for supporting MPLS, and are not acceptable last mile wholesale inputs for Windstream's dedicated VPN services); Declaration of Chris McReynolds on Behalf of Level 3 Communications, LLC at 22 (dated Jan. 21, 2016) (*attached to* Joint CLEC Comments) (stating cable companies generally do not offer robust SLAs for EoHFC services).

[91] *Further Notice* at 19 ¶ 39 (emphasis added).

[92] *Further Notice* at 6 ¶ 12.

"guarantees" do not fit within this definition and thus should not be considered within the BDS product market.

2. Cable Networks Are Not Ubiquitously Deployed in Business Districts.

The Commission's assumption that cable company HFC networks are ubiquitously deployed for BDS purposes reflects a fundamental misunderstanding of how these networks operate. Cable HFC plant is not ubiquitously deployed in areas with highest business demand. As the Commission has recognized, and as clearly in the record to date, cable plant was initially deployed to serve residential areas, not business districts.[93] Although cable companies have expanded into more commercial areas, much of this expansion has been through deployment of new fiber, not the expansion of the HFC network. Moreover, cable companies incur substantial construction costs in expanding their HFC plant to new business locations, just as they do in constructing fiber laterals. In this regard, cable faces many of the same challenges as other competitive providers in building new facilities. Cable HFC simply is not ubiquitously deployed in areas of high BDS demand to the same extent as ILEC networks.

Even where cable HFC networks are deployed in sufficient proximity to business locations, HFC plant is a shared network with limited capacity, particularly upstream capacity, which requires cable companies to carefully allocate bandwidth among their entire customer base, including residential broadband customers, best efforts Internet services sold to businesses,

---

[93] *Further Notice* at 112 ¶ 250; *Special Access for Price Cap Local Exchange Carriers*, Report and Order, 28 FCC Rcd 13189, 13200 ¶ 26 (2013); Letter from Matthew Brill, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 at 2 (dated Mar. 25, 2016) ("Like all cable providers, Comcast historically focused on residential areas, but in recent years the Company has expanded its cable/broadband plant to reach additional commercial customers."); *Qwest Corp. (Petition for Forbearance Pursuant to 47 USC § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area)*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8658 ¶ 69 (2010) ("*Qwest Phoenix Forbearance Order*") ("Cox's non-cable plant facilities are not widely deployed, however, and it apparently provides little, if any, wholesale service over its cable plant, which is deployed primarily in residential areas.").

and "dedicated" symmetrical Ethernet services. What this means in practice is that, notwithstanding an existing HFC network presence, it may well not be feasible to provide BDS-level services in many places due to the limited capabilities of the HFC plant.

C. The Commission's Proposal to Impose *Ex Ante* Price Regulation on Cable Companies Would Constitute a Radical and Unlawful Departure from Precedent.

Without sizeable market share and without ubiquitous BDS facilities, the evidence shows and the Commission agrees that cable companies unquestionably lack market power in any BDS markets.[94] Notwithstanding their strong recent performance, they are the quintessential new entrants seeking to inject facilities-based competition in a market historically dominated by the ILECs and with significant market penetration from CLECs that have chosen to limit their entry to the business market. In the nomenclature of the *Competitive Carrier* framework, cable companies are non-dominant providers. Absent the presence of market power, the Commission lacks authority to impose price regulation on a particular class of BDS provider.

The Commission's proposal to impose *ex ante* price regulation on non-dominant competitors is a radical and unwarranted departure from precedent. The Commission may wish to sweep away the dominant/non-dominant nomenclature, but it merely changing terminology cannot justify imposition of rate regulation on carriers without market power.

The Commission has consistently and repeatedly found that such carriers have no ability to impose unjust and unreasonable rates on consumers. Rate regulation of such carriers, the Commission has found, is wasteful and the costs of such regulation can never be justified. The *Further Notice* proffers no basis to reverse these fundamental principles of rate regulation other than a nebulous and empty incantation of "technology and provider neutrality." As explained

[94] *Further Notice* at ¶¶ 216-218, 231.

more fully below, the concept of technology neutrality provides no reasoned basis for imposing the cost of rate regulation on competitive providers. The type of technology used says nothing about the ability to charge unjust and unreasonable rates.[95]

1. The FCC Has Consistently Refrained from Regulating the Rates of Non-Dominant, Competitive Providers.

Since the onset of the *Competitive Carrier* proceeding in 1980, the Commission has consistently sought to "reduce or eliminate the application of economic regulation of new competitive entrants, since such entrants would improve market performance."[96] As new entrants, they lack market power and hence have no ability to impose "unjust and unreasonable rates."[97] As unequivocally stated by the Commission: "[W]e can predict with confidence that the rates charged by non-dominant carriers will be 'just and reasonable' within the meaning of the Communications Act . . . ."[98] The reasoning was and remains straight-forward: "non-dominant carriers could not charge rates or engage in practices that contravene the requirements of the Communications Act . . . since affected customers always had the option of taking service from a dominant carrier whose rates, terms and conditions for interstate service remained subject to close scrutiny by the Commission."[99] Refraining from imposing economic regulation on non-

---

[95] *See infra* Section V. Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[96] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3274 ¶ 3 (1995) ("*AT&T Domestic Non-Dominant Order*").

[97] *See, e.g., Tariff Filing Requirements for Interstate Common Carriers*, Report and Order, 7 FCC Rcd 8072 (1992); *Competitive Carrier FNPRM*, 84 FC 2d at ¶¶ 28, 39.

[98] *See Competitive Common Carrier Services (Classification of Carriers)*, First Report and Order, 85 FCC 2d 1, ¶ 51 (1980). The Commissioned proffered two definitions of market power. One definition was the "ability to raise prices by restricting output" and the other focused "on the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable." *Competitive Common Carrier Services (Fourth R/O)*, Fourth Report and Order, 95 FCC 2d 554, 558 ¶¶ 7-8 (1983).

[99] *AT&T Domestic Non-Dominant Order*, 11 FCC Rcd at 3274 ¶ 4.

dominant, new entrants has been a cornerstone of the Commission's pro-competitive policies for the past three decades.[100]

The Commission's determination to forbear from applying rate regulation to non-dominant carriers stemmed directly from the limitations on the Commission power conferred by Title II.[101] As the Commission found, Title II was "primarily enacted to constrain the exercise of *substantial* market power possessed by firms providing communications services in 1934."[102] Market power is "the ability of *a firm* to raise and maintain prices above costs, including an allowance of a fair profit."[103] Although there have been alternative formulations of this definition, they all focus on the "the power to control price."[104] The Commission has also found that control of "bottleneck" facilities, *i.e.*, facilities that are uneconomical to duplicate, confers market power.[105] As demonstrated throughout these comments, cable companies do not have the power to control BDS prices and they do not control any bottleneck facilities needed for BDS.[106]

---

[100] *See Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 6 (1981) (noting the Commission has made a "fundamental policy determination that the application of [rate regulation] to all communications carriers is contrary to public policy.").

[101] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 7.

[102] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 6. (emphasis added); *id.* at ¶ 42 (demonstrating that Congress enacted Title II to regulate monopoly providers); *id.* at ¶¶ 37-38 (Title II rate regulation relates to "a congressional concern for curbing monopoly abuse.); *id.* at ¶ 56 ("The regulatory framework of Title II, and its attendant legislative history, reveals an almost unambiguous intent to regulate entities with market power.").

[103] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 15 (emphasis added). The Commission also defined market power as the ability to maintain prices below costs in order to drive competitors out of the market. *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 16.

[104] *Qwest Phoenix Forbearance Order* at 8624-8625 ¶ 5.

[105] *Qwest Phoenix Forbearance Order* at 8639-8641 ¶ 34. *See also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd. 15756, 15803 ¶ 83 (1997) ("[A] carrier may be able to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services.").

[106] As explained *supra* at Section VII.C cable companies are in no better position than CLECs or any other BDS provider in deploying fiber and their HFC facilities have limited ability to

As the Commission has repeatedly recognized, the costs of imposing economic regulation on carriers lacking market power are never justified: "However one perceives the ultimate cost benefit tradeoff in the context of regulating dominant firms, it seems clear that the application of these same regulations to firms that possess insignificant market power imposes costs without *any corresponding benefit.*"[107] Not only does regulating carriers without market power impose unnecessary costs on companies, it wastes the valuable and scarce resources of the regulator because "non-dominant firms are unable to do what the rules are designed to prevent them from doing anyway [*i.e.* impose unjust and unreasonable rates]."[108]

As just noted, new entrants cannot charge excessive rates because consumers always have the option of using the services of the dominant carrier whose rates are supervised by the Commission to ensure that they are just and reasonable. Here, if there is a dominant carrier in any properly defined market, it is the incumbent LEC. The Commission's *Further Notice* proposes to reinitialize the rates of incumbent LECs in non-competitive markets so as to render them just and reasonable. The Commission thus proposes to ensure that the dominant carriers' (*i.e.* the ILECs') BDS rates are "just and reasonable," which, as the *Competitive Carrier* proceeding teaches, alleviates any need to regulate any cable company BDS in any location. If consumers (or wholesale providers) believe that cable company rates are excessive, they have the

---

provide dedicated, point-to-point services at symmetrical rates and with robust service level commitments, which are the hallmarks of BDS as defined by the Commission.

[107] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 22 (emphasis added). *See also Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Opinion, 16 FCC Rcd 9923, 9941 ¶ 45 (2001) ("*CLEC Access Charge Order"*).

[108] *Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 28.

option to take service from the incumbent LEC at the "just and reasonable" rates that the Commission proposes to reestablish as part of this proceeding.[109]

Indeed, as the *Further Notice states*, regulation should be applied only "where it is necessary to protect competition," even under the proposed technology and provider neutral framework.[110] Regulating competitor rates is not necessary to achieve that goal, and in fact would be anticompetitive because it could act to discourage entry into the BDS market. Thus, just as in the *Competitive Carrier* proceeding, the imposition of rate regulation on cable companies here would be wasteful, unnecessary and ultimately at odds with fundamental objectives of the Communications Act.

This is not to suggest that there will always be a carrier with market power that should be subject to rate regulation. To the contrary, the record makes clear that there are competitive options in virtually all areas of BDS demand and that such competition generally will ensure that rates are just and reasonable. But where the Commission finds that competition is insufficient, any regulation of rates should be focused solely on the carrier found to have market power, not those without such power.

2. The Commission's Imposition of Price Regulation on Competitive Carrier's Switched Access Charges Confirms that Such Regulation Is Tied to Market Power.

The only recent instance in which the Commission imposed rate regulation on competitive carriers proves the point that such regulation is limited to carriers that can exercise

---

[109] If cable companies can sustain rates above the incumbents, it is not because cable companies have market power, it either because consumers perceive greater value from the cable companies BDS product, or the Commission's determination that incumbent LECs have market power is itself faulty leading the agency to impose unreasonably low rates on the incumbent. In a competitive market, the Commission should anticipate that new entrants will price their product "at or below the level of the incumbent provider" in the absence of a differentiated or superior product. *CLEC Access Charge Order* at ¶ 45.

[110] *Further Notice* at ¶ 270.

market power. In the *CLEC Access Charge Order*, Commission's imposed rate regulation in the form of benchmarks on CLEC switched access charges. In that circumstance, however, CLECs were found to possess "market power" over terminating access service and the record demonstrated that they were imposing charges "well above the rates that ILECs charge from similar service."[111] In other words, even though the Commission regulated ILEC access rates, CLECs were not constrained by those rates because they separately had market power over access charges.

The Commission identified two additional unique and distinguishing circumstances in the *CLEC Access Charge Order*, neither of which pertains to BDS. One was that the CLEC's end user did not incur the high costs of access (which were imposed on the IXC) and thus had no incentive to reduce access costs by seeking out a lower priced provider. In BDS markets, on the other hand, the consumer directly experiences the cost of BDS and thus has every incentive to seek out lower cost alternatives. Second, the IXCs were required to spread those high access costs over all end users, eliminating their "ability to create incentives for their customers to choose CLECs with low access charges."[112] Again, no such circumstances appear in the BDS market. Competing BDS providers have every incentive to offer lower prices to increase market share.

There is one way, however, in which the *CLEC Access Charge Order* is perfectly in keeping with the policy underlying the *Competitive Carrier Proceeding*. The Commission found it unnecessary to regulate the amounts CLECs could seek to recover from their own end

---

[111] *Id.* at 9931 ¶ 22, 9936 ¶ 34. *See also id*. at 9935 ¶ 30 (terminating access markets consist of a series of "bottleneck monopolies."); *id.* at ¶ 38 ("IXCs are subject to the monopoly power that CLECs wield over access to their end users."). Some of the CLEC rates were many multiples above the ILEC rates.

[112] *Id.* at 9935-36, ¶ 31.

users (as opposed to IXCs). The Commission found regulation unnecessary because, just as in the *Competitive Carrier* proceeding, if the CLEC seeks to impose excessive costs directly on its own end user, the end user always has the choice of at least one other provider, the ILEC.[113]

3. The *Qwest Phoenix Forbearance Order* Does Not Provide A Sound Precedential Basis for Imposing Rate Regulation on Non-Dominant Providers.

There has been some suggestion that the *Qwest Phoenix Forbearance Order* provides a precedent for the Commission's new approach to regulate the BDS market.[114] That order, however, simply applied the Commission's "traditional market power" analysis as originally set out in the *Competitive Carrier* proceeding to assess whether the ILEC (Qwest), alone or jointly, possessed market power.[115] The Commission recognized that "Congress adopted the forbearance statute against the backdrop of the Commission's efforts to limit regulation of nondominant carriers in the *Competitive Carrier* proceeding."[116] The fundamental question addressed in the *Qwest Phoenix Forbearance Order* was whether, if the Commission lifted Qwest's statutory unbundling obligation, Qwest would be able to exercise market power. That determination required the proper delineation of product and geographic markets and the identification of competing providers in order to determine whether there was sufficient

---

[113] *Id.* at 9938 ¶ 39. Of course today, end users have multiple choices for long distance voice services, including cable company-provided VoIP services and wireless services.

[114] The *Qwest Phoenix Forbearance Order*, like the *Omaha Forbearance Proceeding* before it, was primarily concerned with the consequences of eliminating loop and transport unbundling in the residential market. *Qwest Phoenix Forbearance Order*; *Qwest Corp. (Petition for Forbearance in the Omaha Metropolitan Statistical Area)*, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005), *aff'd*, *Qwest Corp. v. F.C.C.*, 482 F3d 471 (D.C. Cir. 2007). The Commission had already eliminated the primary UNE mechanism for residential market entry, the so-called UNE-Platform ("UNEP") combination of ILEC loops and switches. That decision left CLECs seeking to enter the local residential market by deploying their own switches and gaining access to UNE DS0 loops. *TRRO*, 20 FCC Rcd at 2644 ¶ 204.

[115] *Qwest Phoenix Forbearance Order* at 8642-8643 ¶ 37.

[116] *Qwest Phoenix Forbearance Order* at 8629 ¶ 15.

competition to constrain Qwest's pricing. There is no plausible reading of the *Qwest Phoenix Forbearance Order* as suggesting it is reasonable or appropriate to impose *ex ante* price regulation on any entity lacking market power.

The Qwest Phoenix proceeding also must be viewed against the backdrop of the Commission's acknowledgement that UNEs constrain ILEC special access pricing.[117] One of the potential public interest harms confronted by the Commission in the Qwest Phoenix proceeding was whether the elimination of UNEs would create additional opportunities for ILECs to increase special access rates, in the absence of direct rate regulation of those rates. By refusing to lift Qwest's unbundling obligation, the Commission ensured that ILEC special access pricing remained under some pressure from CLECs competing using ILEC unbundled network elements. Thus, one conclusion to derive from the *Qwest Phoenix Order* is that the availability of high capacity unbundled loops from the ILEC (which will be unaffected by anything undertaken in this proceeding) provides a strong deterrent to unjust and unreasonable pricing, alleviating the need to impose further regulation.

The *Qwest Phoenix Forbearance Order* alluded to concerns regarding duopoly or jointly held market power.[118] In this proceeding, some parties have claimed that competition in the BDS is at best limited to a duopoly of ILECs and cable companies and pointed to the *Qwest Phoenix Forbearance Order* as standing for the proposition that duopoly is never sufficient to constrain pricing.[119] It is impossible to reconcile the CLECs' argument that the BDS marketplace is a cable/ILEC duopoly with their position elsewhere that cable is an insignificant

---

[117] *Qwest Phoenix Forbearance Order* at 8639-8640 ¶ 34.
[118] *Qwest Phoenix Forbearance Order* at 8632 ¶ 21.
[119] *See, e.g.,* Sprint Reply Comments at 39-41; *See also Further Notice* at ¶ 294 (seeking comment on whether a market with "only two competitors, a duopoly" is sufficiently competitive).

competitor and that CLECs themselves play a bigger role in the marketplace than cable operators. In addition, this argument ignores the teaching of the *Competitive Carrier* precedent. Even if there is only one new entrant in the market, that new entrant has no ability to "control price" because its prices are thoroughly constrained by the regulated rates of the dominant provider.

Moreover, there is no evidence that ILECs and cable companies somehow jointly exercise market power in any BDS market. To the contrary, the record includes evidence that ILECs account for competition from cable companies by lowering their rates.[120] And there can be no question that ILEC rates constrain cable company rates in any area where cable attempts to compete.

Nor can collusion somehow be inferred from the fact that cable companies and ILECs have competing facilities-based networks. This facilities based competition is precisely what the 1996 Act was designed to accomplish.[121] Any suggestion that facilities-based providers do not have an incentive to compete on price completely misunderstands the nature of competition in the marketplace. Because of the high fixed costs associated with network construction, every provider in the marketplace has a strong incentive to attract and retain as many customers as it can.

---

[120] Letter from Maggie McCready, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593 at 5 (dated Mar. 1, 2016); Attachment B of Letter from Christopher T. Shenk, Attorney for AT&T Inc., to Marlene H. Dortch, Secretary, WC Docket No. 05-25, RM-10593 (dated Mar. 21, 2016).

[121] *See, e.g., TRO*, 18 FCC Rcd at 17054-17055 ¶ 113 (stating that facilities-based investment is a key goal of the 1996 Act).

4. The *Further Notice* Fails to Address Costs Versus Benefits of Rate Regulation.

The *Further Notice* fails to even raise serious questions about the costs of imposing rate regulation on cable companies and other facilities-based competitors (including potential new entrants that own fiber networks but do not use them for BDS) and whether such costs outweigh benefits, let alone engage in any meaningful analysis of those questions. A thorough examination of costs and benefits is particularly crucial where, as here, the Commission inquires whether it should force carriers to share their networks at regulated rates. As the Commission has long recognized, and reiterates in the *Further Notice*, regulation of rates is unnecessary and counterproductive in areas where there is competition.[122] Consequently, the key question in this proceeding is whether the costs of regulating rates in areas found to be noncompetitive outweigh the benefits.

As to carriers that do not possess any market power, the clear answer to this question is that there are no benefits to rate regulation. The Commission has long recognized that each imposition of a new regulatory obligation creates costs and regulation of rates charged by a carrier without market power imposes costs "without any corresponding benefit."[123] It was the Commission's repeated failure to consider the costs imposed by forced sharing in terms of foregone investment in facilities that led the courts to reject what were perceived as excessive unbundling obligations. As noted in *USTA I*, "[e]ach unbundling of an element imposes costs of

---

[122] *Further Notice* at ¶ 270.

[123] *See, e.g., Competitive Carrier FNPRM*, 84 FCC 2d at ¶ 22. *See also, id.* at ¶ 29 ("In our opinion, regulation should be applied only where the benefits of that regulation for consumers outweighs the cost."); Federal Communications Commission, Final Plan for Retrospective Analysis of Existing Rules at 5 (May 18, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0521/DOC-314166A1.pdf. ("Under the Administrative Procedure Act, it is common practice for FCC rulemaking decisions to analyze the costs and benefits of proposed regulations as reflected in the agency record.")

its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."[124] Following the Court's guidance the Commission was especially vigilant in weighing the costs and benefits of forced access to packet-based services. It rightly concluded that "the costs associated with unbundling [] packet based facilities outweigh the potential benefits . . . [and] could have the unintended effect of blunting innovation."[125]

V. Technological Neutrality Cannot Justify Regulation of Non-Dominant Providers.

The *Further Notice* focuses on technological neutrality as a driver for its proposed regulatory paradigm for BDS and implies that the current policy of regulating only dominant carrier rates somehow violates this principle.[126] In fact, regulation of services subject to Title II is not determined by technology. Rather, the nature of regulation is (and should continue to be) determined by the position of a provider in the marketplace, as both the Communications Act and the longstanding precedent implementing the Act establish.

It is neither controversial nor surprising to conclude that the application of regulatory requirements under Title II is not determined by technology, because the Act focuses on other issues – notably market power – in determining whether regulation should apply.[127] Even a cursory examination of the Act shows that the technology used to provide a service, and any desire for technology neutrality across services, is not a consideration in the regulatory scheme.

There are many examples of the primacy of market power and irrelevance of technology and technological neutrality in the Act. For instance, Section 251 bases differential regulation on

---

[124] *U.S. Telecom Ass'n v. F.C.C.*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA I*").
[125] *TRO*, 18 FCC Rcd at 17153 ¶ 295.
[126] *See, e.g., Further Notice* at ¶¶ 392, 435, 497.
[127] Commission and court decisions repeatedly have acknowledged that the Act does not require the Commission to distinguish between technologies. *See, e.g.,* S*outhwestern Bell Telephone Company*, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2589 (1993)*; Integrated Services Digital Networks*, First Report, 98 FCC 2d 249 ¶¶ 31-34 (1984).

the status of providers in the marketplace, with telecommunications carriers, LECs and incumbent LECs subject to different levels of regulation, and a specific provision to permit the Commission to change the status of carriers that dominate a market sufficiently to be treated as incumbent LECs.[128] Section 251(d)(2) bases determinations of whether unbundled elements should be provided on the impact on competitors in the marketplace.[129] Section 10 of the Act permits the Commission to forbear from applying Title II requirements to carriers based on marketplace considerations, including whether regulation is necessary to ensure just and reasonable rates, impact on consumers and impact on competition.[130] All of these provisions are based in a marketplace analysis and not one of them suggests that the Commission should consider technological neutrality as a basis for regulation.

This centrality of the marketplace has extended to the Commission's own actions in implementing the Communications Act. The *Competitive Carrier* decisions all are based entirely on the marketplace distinction between incumbents and competitors.[131] The

---

[128] 47 U.S.C. § 251(a), (b), (c), (h)(2).

[129] 47 U.S.C. § 251(d)(2) (describing "impairment" standard for unbundling).

[130] 47 U.S.C. § 110.

[131] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Notice of Proposed Rulemaking, 77 FCC 2d 308 (1979); *Competitive Common Carrier Services (Classification of Carriers)*, First Report and Order, 85 FCC 2d 1 (1980); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); *Competitive Common Carrier Services*, Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17308 (1982); *Competitive Common Carrier Services (Resale Deregulation)*, Second Report and Order, 91 FCC 2d 59 (1982); *Competitive Common Carrier Services (Reconsideration Order)*, Order on Reconsideration, 93 FCC 2d 54 (1983); *Competitive Common Carrier Services*, Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); *Competitive Common Carrier Services*, Third Report and Order, 48 Fed. Reg. 46791 (1983); *Competitive Common Carrier Services (Fourth R/O)*, Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated by* AT&T v. F.C.C., 978 F2d 727 (D.C. Cir. 1992), *cert. denied*, MCI Telecommunications Corp. v. AT&T, 113 S Ct 3020 (1993); *Competitive Common Carrier Services*, Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); *Competitive Common Carrier Services (Fifth R/O)*, Fifth Report and Order, 98 FCC 2d

Commission further extended this analysis in its order determining that AT&T was no longer a dominant carrier, which was based entirely on marketplace and economic issues, with no discussion of technology or maintaining regulatory parity for companies using similar technologies.[132] Even where the Commission considers technology, it has done so with an eye towards encouraging deployment of new technologies, not in an effort to ensure that all technologies are regulated equally. Most notably, in the 2003 *Triennial Review Order*, the Commission distinguished between fiber-based services and non-fiber services based on economic and marketplace considerations to determine that fiber-based services should not be subject to unbundling.[133]

The inevitable conclusion of all of these proceedings has been that the Commission should apply a light regulatory touch – in particular, no rate regulation (*ex ante* or otherwise) and no tariffing requirements – to all carriers that are not dominant (including those previously treated as dominant but now subject to competition) without regard to technology.[134] The reason the Commission has taken such action is recognition, embodied in the Act and in decades of Commission jurisprudence, that the only regulation necessary to ensure that rates for competitive

---

1191 (1984); *Competitive Common Carrier Services (Sixth R/O),* Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated by* MCI Telecommunications Corp. v. F.C.C., 765 F2d 1186 (D.C. Cir. 1985).

[132] *AT&T Non-Dominance Order.*

[133] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141-17142 ¶ 272, 17168-17170 ¶¶ 315-319 (2003) (eliminating obligation to unbundle new fiber-to-the-home loops and OCn loops, based on determinations that elimination of the requirements would stimulate deployment of fiber by incumbent LECs and competitors and that competitors could economically deploy OCn loops), *aff'd in relevant part United States Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004).

[134] *See, e.g., Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services*, Report and Order, 11 FCC Rcd 18564 (1996) (determining that out-of-region interexchange services should be subject to non-dominant regulation, allowing rate filings to become effective on one day's notice and eliminating cost support requirements); *AT&T Non-Dominance Order.*

providers are just and reasonable is the regulation of the dominant provider, if one exists, in the same market. This conclusion has followed regardless of the technology deployed by a carrier, and reflects the true technological neutrality of the Communications Act, rather than a false neutrality to justify unnecessary regulation.[135]

None of the foregoing should be read to suggest that technological neutrality is not a worthy objective where it can be achieved in a manner that is consistent with the Act and Commission precedent. But in this case an approach that regulates the rates of facilities-based competitors violates this standard. The far better approach is to preserve the Commission's longstanding policy in this area by regulating based on market power not blanket adherence to technological neutrality.

VI. The Commission Has Made Unwarranted Assumptions About the State of the Market Based on Outdated and Faulty Data and Ignores the Contract Remedies It Has Adopted.

Although styled as a notice of proposed rulemaking regarding how it should regulate the BDS market, the Commission has already decided that the market overall is "broken" and that the incumbent LECs possess market power.[136] It assumes that there are a number of markets that are non-competitive and "proposes" a number of "requirements" to reduce prices that it believes to be unjust and unreasonable because ILEC prices seem lower for businesses located in buildings with sufficient demand to support multiple facilities-based providers. Based on its

[135] NCTA also notes that, if the Commission were to apply a technological neutrality analysis to its proposed regulation of BDS, it would be irrational to apply the new regulations to landline services provided by incumbent LECs, competitive LECs and cable operators without also applying the same regulations to high-capacity fixed wireless services, such as those that will become available with the deployment of 5G technology.

[136] *Further Notice* at ¶ 237 ("Our own analysis, the Rysman Paper, and the Baker Declaration, provide direct evidence of market power in the supply of various services.") (citation omitted); *Further Notice* at ¶ 256 ("While the price cap LECs maintain substantial market power in some areas for some services, it is clear the market will continue to evolve and that market power and market positions are likely to shift over the next ten to fifteen years and beyond.").

conviction that the BDS market needs repair, the Commission has embarked on a radical regulatory restructuring.

There is a distinct "cart before the horse" quality to the Commission's analysis. Since the beginning, the primary purpose of this proceeding was to develop a new competitive test so that the Commission could make decisions about where, and for what service, incumbent LECs should have pricing flexibility.[137] Remarkably, while the 288-page *Further Notice* does not actually propose such a competitive test (or rules of any kind), the Commission nevertheless concludes that the entire marketplace – all carriers, all services, all locations – is broken.

The Commission's conclusions about the BDS market are predicated on outdated, faulty and incomplete data. That data cannot form the basis for finding that rate regulation is warranted for particular carriers or services or locations. As a number of parties have already explained, the Commission's 2013 data collection reflects an outdated snapshot of a fast moving, highly dynamic market.[138] Substantial investment by CLECs and cable companies since that time has created additional facilities-based competition. Moreover, the data itself is faulty and incomplete. For one, not all cable companies provided mapping information showing the routes taken by their fiber laterals. The Commission chose not to request such information. Without this data, Dr. Rysman, who acknowledges the importance of "nearby" fiber, is unable to ascertain a complete picture of the extent of fiber deployment.

Additionally, the data does not include important sources of potential competition, including extensive fiber networks deployed by companies using those networks to compete for

[137] AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (filed Oct. 15, 2002).
[138] Motion to Strike of CenturyLink, Inc., WC Docket No. 16-143, WC Docket No. 15-247, WC Docket No. 05-25, RM-10593 (dated June 17, 2016); Reply Comments of Frontier Communications Corp., WC Docket No. 05-25, RM-10593 at 3 (dated Feb. 19, 2016).

BDS. For example, Lightower, which offers dark fiber services that are used for wireless backhaul and other enterprise services,[139] and DQE Communications, which provides metro Ethernet and dark fiber, and do not appear to have provided data in response to the Commission's collection.[140] Similarly, it is well known that Google Fiber has deployed extensive fiber networks in Kansas City and other markets and that it is offering gigabit speeds to small businesses and tech startups, yet none of that information is reflected in the Commission's data.[141] Just last week, Google Fiber increased its presence in the BDS marketplace through its announced acquisition of Webpass, a company that offers business customers both Standard ("best value") Ethernet and Premium ("dedicated bandwidth") Ethernet services at speeds up to 1Gbps using fiber and fixed wireless.[142] In addition, many other companies have deployed fiber to support data centers, cloud services or high volume content.[143] The bottom line is that the Commission cannot possibly make a reasoned determination of the level of competition in a given location if it arbitrarily fails to consider information about known alternative facilities that are, or could be, used to offer competing services.

---

[139] Lightower, Network Service Providers-Lightower Fiber Networks, http://www.lightower.com/network-services/ (last visited June 23, 2016).

[140] DQE Communications, DQE Communications – Fiber Optic Network Services, https://www.dqecom.com/ (last visited June 24, 2016).

[141] Google Fiber, Google Fiber for Small Businesses, https://fiber.google.com/smallbusiness/ (last visited June 23, 2016).

[142] Webpass, Business – Webpass – Gigabit Ethernet, https://www.webpass.net/business (last visited June 25, 2016). These services are currently available in San Francisco, San Diego, Miami, Chicago, and Boston, but the companies anticipate that the acquisition will enable them to "accelerate the deployment of superfast Internet connections for customers across the U.S." and that "Google Fiber's resources will enable Webpass to grow faster and reach many more customers than we could as a standalone company." Webpass, Google Fiber Agrees to Acquire Webpass, WEBPASS BLOG, June 22, 2016, *available at* https://www.webpass.net/blog/google-fiber-agrees-to-acquire-webpass.

[143] Drew Fitzgerald and Spencer E. Ante, Tech Firms Push to Control Web's Pipes, WALL STREET JOURNAL, Dec. 16, 2013, *available at* http://www.wsj.com/articles/SB10001424052702304173704579262361885883936.

Finally the Commission's various proposals do not take into account its rulings in the tariff investigation order. A number of purported market failures driving its regulatory proposals relate to incumbent LEC "lock up" contract provisions without acknowledging that the Commission has remedied those very concerns.[144] The Commission's tariff investigation order eliminates these types of provisions, opening the market to additional competitive wholesale opportunities and freeing the CLECs to deploy more of their own facilities. The Commission appears oblivious to these actions.

VII. The Commission's Proposed Forced Sharing of Cable Facilities Is Contrary to the Statutory Scheme That Imposes Such Obligations Only on ILECs.

The central problem that the Commission seeks to address with this *Further Notice* is the ostensible lack of competition for BDS services at the lower bandwidths (e.g., DS1 to DS3) where claimed barriers to self-deployment preclude economic, facilities-based entry. According to the Commission, these purported entry barriers result in some markets without sufficient competition to constrain ILEC pricing and force CLECs to rely on ILEC BDS wholesale services. In what can only be considered one of the greatest non-sequiturs in Commission history, the Commissions considers as one solution to this problem the forced sharing of cable company networks at regulated rates.

A. The Commission's Proposals Amount to Forced Network Sharing

Assessing the Commission's proposals in their totality, forced sharing is precisely what it appears to have in mind. The Commission assumes that cable companies and other facilities-based competitors are in all instances common carriers in the provision of BDS (an erroneous

[144] *Further Notice* at ¶¶ 95-141; Letter from Sheba Chacko, BT Americas, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 5 (dated Apr. 8, 2016); Reply Comments of Birch Communications, Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Docket No. 05-25, RM-10593 at 2 (dated Feb. 19, 2016). *Further Notice* at ¶¶ 110, 129, 149.

assumption as explained elsewhere), which would require them to offer BDS indiscriminately to all customers, retail or wholesale. The Commission further asks whether to cap rates at which these companies can sell their services to other providers and to publically post their "generally available" rates, terms and conditions on their websites. The Commission further suggests that if wholesale prices are higher than retail prices, further reductions could be required. It appears that the ultimate purpose of this rate setting exercise is to make BDS available to competitors that are unwilling to build their own facilities at prices low enough to enable these companies to better compete with companies that have invested in such facilities.

This effort to impose forced sharing on cable companies so that other competitors have access to their networks at prices that better enable them to compete is not only unwise, for all the reasons discussed in prior sections, but it also is unlawful because it ignores the statutory scheme that limits such obligations to incumbent LECs. Moreover, by seeking to use price capped BDS as the vehicle to facilitate competitive entry, the Commission undermines a fundamental aspect of the unbundling regime, which is to create facilities-based competition through the use of a unique pricing methodology divorced from all previous forms of rate setting. Forcing cable companies (and ILECs) to reduce BDS prices for competitors will only increase their reliance on other providers, "spreading the disincentive to invest."[145] The forced sharing of cable networks is particularly inappropriate for wireless backhaul services, which this Commission has previously found sufficiently competitive to preclude UNE access in light of the availability of special access services.

[145] *USTA I*, 290 F.3d at 427.

B. Congress Limited Forced Sharing to ILECs and Specifically Rejected the Use of Special Access Services As a Vehicle to Foster Competitive Entry.

The 1996 Act established a specific method by which competitors may gain very low-priced access to ILEC facilities in order to provide the very competition the Commission claims is lacking BDS markets. Congress enacted section 251, and the unbundling obligations of 251(c)(3) in particular, to enable competitive entry into local markets consistent with the Acts' overall goal of sustainable, facilities-based competition.[146] To enable such entry, the Commission adopted a pricing regime for unbundled network elements, called TELRIC, which is "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbent's property."[147]

As recounted in considerable detail by the Supreme Court in *Verizon*, the Commission's TELRIC methodology was a radical departure from all previous forms of ratemaking, including price cap regulation, which the Court noted was "the final stage in a century of developing ratesetting methodology."[148] The price cap scheme, like all other ratemaking efforts before it, was ultimately designed "to encourage investment [by the ILECs] in more productive equipment" and strike an appropriate balance between ILECs and its customers. Price capped rates started "with a rate generated by the conventional cost-of-service formula" and were to be

---

[146] *See, e.g., Qwest Phoenix Forbearance Order* at 8638-8639 ¶ 32 (noting that Congress anticipated that cable companies would emerge as facilities-based competitors and enacted the section 251 unbundling regime "to enable entry by multiple competitors through the use of the incumbent LEC's network."); *id.* at ¶ 90 ("Congress enacted and the Commission implemented the UNE framework in an attempt to lower barriers to entry and create a viable platform for entry into the local market.").

[147] *Verizon v. F.C.C.*, 535 U.S. 467, 489 (2002) ("*Verizon*").

[148] *Verizon*, 535 U.S. at 487.

adjusted based on productivity and other factors.[149] Price caps, like rate of return regulation, are based on historic ILEC costs.[150]

Price cap regulation was never designed to facilitate competitive entry. Reliance on special access services in the place of unbundling, the Commission recognized, would frustrate "a primary purpose of the Act – the promotion of facilities-based competition" because special access, or BDS, rates were not established with that objective in mind.[151] If Congress believed access to BDS was sufficient to stimulate competitive entry, it would have had no need to create the UNE pricing regime.[152] As Comptel (now INCOMPAS) previously informed the Commission: "[I]f Congress believed that keeping special access prices and service quality at reasonable levels was sufficient to generate competitive entry, it would have been far easier to establish a rigorous regulatory regime for special access services rather than create an entirely new regime unbundled network element."[153] The whole point of TELRIC, on the other hand, was to create a radically new ratesetting methodology "unlike all previous statutes," by separating rates from ILEC historic costs.[154] As just noted, TELRIC rates are designed to give new entrants "every possible incentive to enter local markets." Driving down rates for BDS to make wholesale access more affordable to competing providers that have chosen not to invest in their own networks would supplant the statutory scheme constructed by Congress.

Rather than rely on the statutory scheme to access the ILEC unbundled high capacity network elements that Commission has identified are needed by CLECs to compete in the BDS

---

149 *Verizon*, 525 U.S. at 487.
150 As explained below the Commission has not adopted a lawfully sanctioned price cap since 1997 and its proposal to tie cable company rates to ILEC price caps is unlawful.
151 *TRRO*, 20 FCC Rcd at 2562-2563 ¶¶ 51-52.
152 *TRRO*, 20 FCC Rcd at 2562-2563 ¶ 51.
153 *TRRO*, 20 FCC Rcd at 2563 n. 147 (quoting Comptel/ASCENT Comments).
154 *Verizon*, 535 U.S. at 489.

market, and which the ILEC must make available at "cost-based" rates, CLECs seek to convert BDS pricing into an unbundling substitute, which the statute does not allow. Worse, the CLECs would impose this new unbundling regime on cable companies, as well as ILECs, which again the statute does not allow.[155] Section 251(h)(2) provides a specific mechanism for imposing ILEC obligations on other carriers and the FCC has not sought comment on that provision, nor could it reasonably meet the requirements of that statutory provision, which requires a finding that a carrier "occupies a position in the market for telephone exchange access service within an area that is comparable to the position" of the ILEC.[156]

In particular, only ILECs are subject to unbundling and wholesale obligations. The Commission has rejected efforts to impose ILEC obligations on competitive providers. In the *Virginia Arbitration Order*, the FCC held that imposing section 251(c)(2) interconnection or section 251(c)(6) collocation obligations on CLECs would be unlawful.[157] The Commission similarly has concluded that section 251(b)(1), which requires all LECs to resell telecommunications services, "does not impose wholesale pricing requirements on nonincumbent LECs."[158] The Commission reached this conclusion on the same grounds that it previously

---

[155] The 1996 Act imposes a cascading series of every increasing regulation culminating in section 251(c) on regulations imposed only on incumbent local exchange carriers. *Compare* § 251(b) ("LEC obligations") *with* § 251(c) ("ILEC obligations").

[156] 47 U.S.C. § 251(h)(2). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16110 ¶ 1248 (1996) (Section 251(h)(2) sets forth the process by which the FCC may decide to treat LECs as ILECs and barring states from imposing section 251 obligations on non-ILECs.) ("*Local Competition Order"*).

[157] *In the Matter of Petition of Worldcom, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27085-27086 ¶¶ 88-90 (2002) ("*Virginia Arbitration Order*").

[158] *Local Competition Order*, 11 FCC Rcd at 15981 ¶ 976. The text of the Act is clear on this point – nonincumbent LECs have only a "duty to provide, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services," while incumbent LECs have a separate duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not

concluded in *Competitive Carrier* that rate regulation of non-dominant carriers was unlawful: "Nonincumbent LECs definitionally lack the market power possessed by ILECs and were therefore not made subject to the wholesale pricing obligation of the 1996 Act. Their wholesale rates will face competition by incumbent LECs, making a wholesale pricing requirement for nonincumbent LECs unnecessary."[159] The Commission, therefore, could not lawfully impose any wholesale pricing requirement on competitors' provision of BDS.

That CLECs seek to convert traditional special access services into an unbundling substitute with forward looking, below TELRIC costs is made clear by recent pricing proposals submitted by Sprint and Windstream. Sprint recently proposed rates, for example, that would require cable companies and ILECs to sell Ethernet services at rates that may be below TELRIC for comparable TDM-based services.[160] It is no surprise that Sprint's "model" produces such absurdly low rates – it excludes all of the cost of a carrier's existing network and a significant portion of the costs incurred in extending the network to a new customer.

Windstream has proposed use of a cost model that would set prices based on "forward-looking economic costs (including a reasonable profit and a share of common costs for other parts of the network)."[161] Windstream's proposal perfectly describes the TELRIC model for

---

telecommunications carriers." *Compare* 47 U.S.C. § 251(b)(1) *with* 47 U.S.C. § 251(c)(4)(A). While the *Further Notice* asks whether the savings clause in Section 251(g) allows it to use its power under Section 201 to regulate competitive BDS, *Further Notice* at ¶ 267, Section 201 does not provide authority to mandate wholesale pricing, but merely to ensure that prices are just and reasonable. The only provision in the Act that gives the authority to mandate wholesale pricing is Section 251(c)(4), which is limited to incumbent LECs. Moreover, the Commission has specifically excluded BDS (then called special access) from Section 251(c)(4). *TRRO*, 20 FCC Rcd at 2563 n. 146.

[159] *Local Competition Order*, 11 FCC Rcd at 15981 ¶ 976.

[160] Letter from Jennifer Bagg and V. Shiva Goel, Counsel to Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (dated May 26, 2016).

[161] Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 2 (dated June 3, 2016).

establishing UNE rates. TELRIC is based on forward looking economic costs plus a "reasonable share of forward looking joint and common costs" and includes a "reasonable profit."[162] Not only is it contrary to the statutory framework to subject non-ILECs to unbundling-type requirements, doing so would spread the disincentive to invest in new fiber and enter new markets that led the Commission to curtail ILEC unbundling obligations for fiber and packet-based services.

C. The Commission's UNE Rules Already Provide a Remedy Where Carriers Are Unable to Compete for Business Customers Using Their Own Facilities or Using Existing BDS Services.

Implementing the scheme adopted by Congress to encourage facilities-based competition, the Commission has already considered the very problem it seeks to remedy here. The Commission thoroughly and exhaustively examined the market for high capacity (DS1 and higher) dedicated services for business customers and developed a mechanism that identifies where competitors can economically compete without unbundled access to the ILECs' network. In developing this mechanism, the Commission assessed exactly the same entry barriers that CLECs have argued in this proceeding preclude their ability economically to self-deploy facilities to provide high capacity data services.[163] One would expect the entry barriers to be identical because unbundled high capacity loops and special access services are functionally

---

[162] *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 15515 ¶ 29, 15844 ¶ 673.

[163] *See, e.g.*, *TRRO*, 20 FCC Rcd at 2615-2619 ¶¶ 149-154 (noting CLECs face "large and fixed costs in deploying competitive fiber as well as substantial operational barriers in constructing their own facilities" and concluding that "LECs do not typically construct fiber loop facilities at lower capacity levels, such as DS1 and DS3, but rather install high-capacity fiber-optic cables and then use electronics to light the fiber at specific capacity levels, often 'channelizing' these higher capacity offerings into multiple lower-capacity streams."). The Commission assumes that a UNE purchaser will be a "reasonably efficient competitor." *TRRO*, 20 FCC Rcd at 2547 ¶ 24. *See generally, Qwest Phoenix Forbearance Order* at 8627-8628 ¶ 11 (noting concept of impairment is tied to entry barriers).

equivalent.[164] The key distinction between the two is price. Prices for unbundled DS1 and DS3 loops are set at levels specifically designed to facilitate entry, whereas prices for special access services, based on the Section 201"unjust and unreasonable" pricing standard, are designed to ensure reasonable and prudent investment and balance the interests of facility owners with their customers.[165]

The result of the Commission's unbundling analysis, following years of excruciating litigation and trial and error by the Commission, is a market test that identifies where and under what circumstances it is reasonable to assume that CLECs can or cannot self-deploy BDS or compete using existing TDM-based BDS. The test is based on a combination of business density and competitive entry using ILEC wire centers as the geographic area.[166]

To the extent CLECs claim that this regime does not accurately reflect where they can economically deploy their own facilities, the remedy is to revisit unbundling rules, not force network sharing at low regulated rates on cable companies or other providers. Revisiting unbundling rules would also be a superior remedy to reducing BDS rates because, as the CLECs have previously pointed out, unbundled access to high capacity UNE loops, "unquestionably ha[s] a constraining influence on the incumbents' exercise of their power over special access price and service quality."[167] Access to UNEs continues to constrain ILEC BDS pricing, as

---

[164] Comments of Sprint Nextel Corporation, WC Docket No. 05-25, RM-10593 at 26 (dated Jan. 19, 2010).

[165] *See Further Notice* at ¶ 56 ("UNE rates ... are based on forward-looking costs and not on the incumbent LECs' historic costs. Intended to facilitate competition through facilities-based entry into local markets, UNE rates are typically lower than the incumbent LEC rates for regulated DS1 and DS3 services.") (citation omitted).

[166] *TRRO*, 20 FCC Rcd at 2577-2586 ¶¶ 69-86.

[167] *TRRO*, 20 FCC Rcd at 2574 ¶ 65 (quoting Comments of Time Warner Telecom, WC Docket No. 04-313, CC Docket No. 01-338 at 14-15 (dated Oct. 4, 2004)). *See also id.* at ¶ 65 (noting that "the record indicates that the availability of UNEs is itself a check on special access pricing"

found by the CLECs' economic expert, [Baker].[168] Leasing ILECs' BDS has no such effect, according to the Commission. Thus, not only does the Commission have available the statutorily specified unbundling regime for facilitating CLEC entry into this market, use of that regime will have the price constraining effect the Commission purports to create.

Competitive LECs have also argued that ILEC tariff and contract terms often gave CLECs no choice but to use special access and precluded or restricted their ability to rely on UNEs.[169] The Commission, however, has remedied that concern by barring such contract terms as part of the tariff investigation order. CLECs now have the ability to replace tariffed DS1 and DS3 service with cost-based UNEs.[170]

The Commission's proposal to facilitate competition by driving down wholesale prices of BDS services unlawfully supplants the statutory scheme and threatens to undermine the statutory goal of facilities-based competition. Congress required ILECs to make their facilities available at very low rates wherever the Commission finds CLECs cannot economically deploy their own facilities. Congress did not contemplate that cable companies or other new entrants would be conscripted by the Commission to fulfill this same purpose. Forcing competitive carriers to provide their BDS at regulated rates and terms directly violates the purpose of the Act and Congress' goals to promote facilities-based competition.

---

and that TELRIC-based UNE rates offer CLECs "substantial bargaining power when negotiating special access rates").

[168] *See* Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593 at 33 ¶ 58, 38 ¶ 67 (executed Jan. 22, 2016). Rysman did not directly assess the effect of UNE-based competition but recommends that the Commission consider such an analysis. Rysman Paper at 5.

[169] *TRRO*, 20 FCC Rcd at 2662-2663 ¶ 231.

[170] *See, e.g.*, *Further Notice* at ¶ 100.

VIII. Tying Cable Ethernet Prices to ILEC Price Caps for DS1 and DS3 TDM Services Would Be Arbitrary and Capricious.

The Commission's primary proposal for regulating cable company Ethernet rates is to benchmark (*i.e.*, cap) those rates at ILEC price capped rates for "comparable" DS1 and DS3 services. At the same time, the Commission proposes to cut those ILEC price cap rates by as much as 20% or more, and then annually reduce those rates by to-be-determined "X" factor.[171] Translated to cable companies, the proposal would necessitate a reduction of 20% or more (much more if recent CLEC proposals are adopted) for "comparable" Ethernet rates and drag them down year after year along with ILEC rates based on "X factor" reductions. The proposal suffers from fatal defects, not the least of which is that the Commission would tie cable company Ethernet prices to ILEC price capped rates that have never been legally sustained. The Commission's proposal is inherently arbitrary and capricious, and doubly so when the Commission attempts to apply illegal price caps to different services, using different technology, and based on different levels of price-sensitive service quality.

A. The Price Caps to Which Cable BDS Rates Would be Tied are Unlawful.

Current DS1 and DS3 price caps were initially set at the 1990 ILEC rate of return-based rates and have then adjusted over the years based on "X-factors" that the Courts have twice found to be arbitrary and capricious. Yet, these are the rates that the Commission now suggests as the starting point to regulate the prices for cutting edge IP-based services like Ethernet offered by cable companies and other competitors.

[171] Depending on which of three proposed methodologies is employed and the time period covered, the FCC proposals indicate an extraordinarily wide range of possible price adjustments, from an actual increase in prices of 0.48%, (suggesting that price caps are too low), to cutting price cap indices by 21.88%. *Further Notice* at ¶¶ 407-411.

The Commission initially adopted price caps for the major incumbent LECs in 1990. The initial price caps simply took the then-existing rate of return developed rates as the starting point,[172] which were predicated on an 11.25% rate of return that had been "developed in 1990 based on estimates of the cost of debt and equity that would have reflected investors' perception of incumbent LEC risks and the conditions of the financial market at the time."[173] Going forward from 1990, the price caps were to be adjusted annually to account for inflation and the extent to which the ILECs' productivity exceeded the productivity of the general economy – the so-called X factor. The initial X-factor was set at 3.3%, which consisted of two components: a 2.8% productivity measure and a 0.5% "consumer productivity dividend," (CPD), which was simply an additional amount by which rates must be reduced on top of productivity gains.[174] The Commission last revised the X factor as part of its 1997 access reforms. It adopted a 6.5% X factor going forward, consisting of 6.0 productivity factor and it retained the 0.5% CPD.

The D.C. Circuit rejected both components. With respect to the 6.0% productivity measure, which was based on historical productivity, the Court held that FCC had "failed to state a coherent theory supporting its choice of 6.0%" and remanded.[175] The Court also rejected

---

[172] The Commission explained that it made no finding that those rate of return rates were "just and reasonable," only that they were a reasonable starting point for price caps. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, 6816 ¶ 241 (1990).

[173] *Connect America Fund*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3210 ¶ 323 (2016).

[174] *Bell Atlantic Telephone Companies v. F.C.C.*, 79 F.3d 1195 (D.C. Cir. 1996) (reviewing the 1995 price cap performance review order, *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961 (1995)).

[175] *U.S. Telephone Ass'n.*, 188 F.3d 521, 525 (D.C. Cir. 1999). The court found that the FCC has offered no rational explanation for discarding years in which productivity was especially low. *Id*. By excluding those years, the productivity factor was set unreasonably high, resulting in steeper price cuts than the Commission was able to justify.

continued use of the 0.5% CDP, thus rejecting the totality of the 6.5% X factor.[176] Despite the Court's rejection of the 6.5% X factor, the Commission readopted this same factor as part of the *CALLS Order*.[177] The Commission, however, converted the X factor from a productivity-based adjustment to simply a rate reduction mechanism.[178] On appeal, the Fifth Circuit held that, even if the X factor was no longer tied to productivity, the Commission still needed to "provide a rational explanation of how it derived the precise percentage" otherwise it could "set the X-Factor arbitrarily and capriciously . . . at say, a .065% or 65% X Factor."[179]

The *Further Notice* acknowledges the failure to have developed a legally sustainable basis for the 6.5% X Factor, but claims that this failure of no moment because, for DS1 and DS3 special access services, the X Factor has simply offset inflation since 2004.[180] This, however, ignores the fact that the *CALLS Order* cut BDS prices based on the "arbitrary and capricious" 6.5% level for straight years, from 2001 to 2003.[181] Price caps for DS1s and DS3s have been frozen at this artificially and unlawfully reduced rate for the past 12 years.[182] These then are the

---

[176] *U.S. Telephone Ass'n.*, 188 F.3d at 527.

[177] *Access Charge Reform (Coalition for Affordable Local and Long Distance Service Proposal)*, Sixth Report and Order, 15 FCC Rcd 12962 (2000).

[178] *Texas Office of Public Utility Counsel v. F.C.C.*, 265 F.3d 313, 320 (5th Cir. 2001) (*TOPUC II Order*).

[179] *TOPUC II Order*, 265 F.3d at 329.

[180] *Further Notice at* ¶ 360 & n. 820. The Commission argues that the 6.5% level was only challenged in the Fifth Circuit with respect to its use for switched access services, not BDS. *Id.* at n. 820. This argument is specious. The point is that the 6.5% level used to reduce rates for three straight years was arbitrary and capricious. That ILEC and IXCs chose not to contest its use in lowering special access services simply reflects that fact that they cut a deal in CALLS process. Their decision not to challenge the 6.5% rate does not undercut the Court's finding that the level was wholly unsupported. The Commission itself notes that the decision to freeze rates after reducing using the 6.5% per year factor was undertaken "without providing any reasoned analysis – or any analysis." *Further Notice* at ¶ 402.

[181] *Further Notice* at ¶ 360.

[182] As a result of this freeze, DS1 and DS3 rates have fallen by either 26.6% or 28.8% in real terms, depending on the inflation measure. *Further Notice* at n. 24.

rates the Commission offers as a starting point to benchmark cable and other CLEC-provided Ethernet services.

B. There is No Rational Basis to Compare Cable Provided BDS with Legacy ILEC-Provided TDM DS1 and DS3 Services, Rendering the Proposed Benchmarking Doubly Irrational.

The Commission queries whether to cap Ethernet rates provided by cable companies and potentially other competitors at the sharply reduced new prices proposed for ILEC-provided DS1 and DS3 TDM services. Ethernet rates would be tied to "comparable" legacy TDM rates on a per-megabit basis. The Commission proffers as an example capping a price for a 5 Mbps Ethernet service at 3.3 times the price for DS1, given that 5 Mbps Ethernet service has 3.3 times the bandwidth of a 1.5 Mbps DS1 (5/1.5=3.3).[183]

As a threshold matter, there is no sound policy rationale for this proposal. In areas where competitors are offering Ethernet services but competition is insufficient to satisfy whatever competitive test the Commission adopts, the Commission's focus should be on taking steps to encourage more competition. But subjecting competitive providers to arbitrary rate caps that mirror those placed on the incumbent LEC will have the opposite effect by making it much harder for competitors to distinguish themselves through pricing.

Moreover, there are serious practical difficulties in implementing the type of benchmark analysis the Commission proposes to use, even if such an approach were only applied to ILECs. For example, an ILEC's rates for TDM services vary from state to state and may vary within different pricing zones within the state making it difficult to develop an appropriate benchmark for Ethernet services.

[183] *Further Notice* at ¶ 430.

Tying the prices of IP-based services like Ethernet offered by cable companies to price caps for legacy TDM services offered by ILECs raises even more concerns. As noted above, many Ethernet services are offered on a private carrier basis and consequently there is no standard price that could be compared to the applicable benchmark. Although price clearly varies by capacity, price is also highly dependent on a host of variables, including by way of example, service quality, available service level agreements, location, and term and volume commitments.[184] Moreover, the Commission proposes a potentially highly granular patchwork of competitive and non-competitive areas with potentially differing prices and these areas likely will not neatly overlap with cable franchise or marketing areas. This checkerboard of prices will make it very difficult to establish rational pricing schemes for multi-location customers.

IX. In Defining Product Markets and Customer Classes for Regulation, the Commission Should Exclude Ethernet Service, Fiber-Based Services, Wireless Backhaul and Large Enterprise Customers as None of These Markets Exhibit Market Failure.

The Commission proposes a number of ways to define the relevant markets for purposes of assessing whether they are sufficiently competitive to preclude rate regulation. For all of the reasons previously discussed, however markets are ultimately defined, the Commission's goal should be to identify those carriers, if any, that possess market power in those markets. The Commission has no lawful or sound policy basis to regulate the rates charged by cable operators and other facilities-based providers of BDS because those providers do not possess market power. Moreover, as we demonstrate below, for many types of services the evidence suggests that there may be sufficient competition that no provider has market power sufficient to warrant rate regulation. For these services, to the extent they are provided on a common carrier basis, the Commission can rely on *ex post* regulation pursuant to Sections 201, 202 and 208, *i.e.*, the

[184] *See, e.g.*, Letter from Matthew Brill, Counsel to Comcast Corp., to Marlene H. Dortch, Secretary FCC, WC Docket No. 05-25 at 3 (dated March 25, 2016) (describing different classes of service quality available to consumers based on differing levels of performance assurances).

regime it has used for decades with respect to wireless carriers and nondominant wireline carriers, rather than the types of *ex ante* regulation that traditionally have been reserved only for dominant carriers.

A. There is No Basis to Regulate Ethernet BDS.

There is no market failure for Ethernet services that justifies the imposition of *ex ante* rate regulation or forced network sharing. The Ethernet market is exhibiting all of the classic indicia of a functioning, competitive market: output is increasing, prices are declining, and investment is growing. The Commission's own data demonstrate that output is increasing, noting for example that cable Ethernet services have been growing at the rate of about 20% a year.[185] Overall, the market is rapidly shifting from TDM services to Ethernet because of Ethernet's enhanced efficiency and seamless scalability.[186] Unless chilled by the unwise policies being proposed in the *Further Notice*, investment in Ethernet services will continue to increase among all providers in the market, extending facilities to more locations and expanding opportunities for all businesses to utilize Ethernet as the underpinning for a host of innovative managed services.[187]

The Commission's proposal to regulate Ethernet BDS notwithstanding any market failure apparently stems from two primary CLEC complaints: (1) ILECs impose excessively high prices for wholesale Ethernet services; and (2) ILECs utilize unfair contract or tariff terms and

---

[185] *See* Mari Silbey, Moffett: Business Services Critical to Cable Growth, LIGHT READING, Dec. 1, 2015, *available at* http://www.lightreading.com/cable/cable-business-services/moffett-business-services-critical-to-cable-growth/d/d-id/719612.

[186] Windstream Comments at 28.

[187] Approving Statement of Chairman Tom Wheeler at 2 (attached to *Technology Transitions Order*) ("[T]oday's actions will ease the transition to modern networks and facilitate the introduction of new and innovative services to consumers and businesses…."); *Technology Transitions*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 14985 ¶ 28, 15011 ¶ 106 (2014).

conditions that lock them into buying these high priced ILEC Ethernet wholesale services.[188] (Notably, there are no such allegations in the record concerning cable operators' BDS.) The latter complaint, of course, can no longer be considered a basis for future regulation because the Commission has thoroughly addressed the CLECs' contract-based concerns in the Tariff Investigation Order.[189] CLECs will now be free to purchase Ethernet based services from any other carrier offering wholesale services, and they can deploy their own services without fear of violating ILEC purchase-based commitments or incurring unreasonable shortfall penalties.[190]

As for pricing, the Commission appears to have been unduly influenced by some previous assertions reflected in the *Technology Transitions Order* regarding a large disparity between ILEC Ethernet rates and comparable ILEC TDM based services. In the *Technology Transitions Order*, for example, the Commission noted CLEC claims that ILEC 2 Mbps Ethernet prices were eight times higher than DS1 rates.[191] It is perhaps on the basis of such information that the Commission there imposed an interim comparability rate benchmarking plan on ILECs planning to retire copper facilities, and proposes in the *Further Notice* to make such benchmarking permanent.

The ILEC pricing for Ethernet services identified in the *Technology Transitions Order* does not appear reflective of the market overall. A review of average Ethernet prices taken from the 2013 data collection shows much lower Ethernet prices than the example from the

---

[188] *See, e.g.*, Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5, WC Docket No. 15-247 at 7-14 (dated Mar. 14, 2016); Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, WC Docket No. 05-25, RM-10593 (executed Jan. 22, 2016).

[189] *Further Notice* at ¶¶ 86-88, 95-158.

[190] *Further Notice* at ¶¶ 115-158.

[191] *Technology Transitions Order*, 30 FCC Rcd at 9446-9447 ¶ 135.

Technology Transitions Order.[192] The record submitted in response to the *Further Notice* will reflect that cable company Ethernet rates are also lower than those reflected in the *Technology Transitions Order* and that they are continuing to decline. This is powerful proof that the market is working as intended and negates any rational basis for rate regulation.

B. The Commission Should Follow Its Precedent and Once Again Conclude that There Is No Need to Require Regulated Access to Fiber-Based Services.

Commission precedent and the data collected by the Commission demonstrate that there is also no basis to regulate fiber-based products. The Rysman Paper "strikingly" finds that "[T]he number of buildings served by [Competitive Providers] CPs is almost equal [to] that of the ILECs. Thus, when looking at fiber-connected buildings, which are presumably buildings with greater demand, whether due to a least one high-bandwidth customer or many small customers, CPs are a much more robust presence."[193]

Dr. Rysman's summary of the pertinent 2013 data show that ILECs solely serve 49% of buildings with fiber while Competitive Providers solely serve 45%, with the remaining six percent of fiber-fed buildings have both ILEC and Competitive Providers. The Rysman analysis strongly supports the conclusion that there is no need to regulate fiber-based BDS services in any geographic market. CLECs are as capable of providing fiber-based BDS services to locations as are the ILECs or cable companies.

---

[192] In the *Technology Transition Order*, the Commission relied on pricing evidence submitted by Windstream showing substantially higher Ethernet prices than for "comparable" DS1 pricing to conclude that wholesale Ethernet rates appeared to be unreasonable. *Technology Transition Order*, 30 FCC Rcd at 9446-47, ¶ 135 & n. 465 (citing AT&T price for 2 Mbps Ethernet service of $1,075.) A review of a sample of 2 Mbps prices submitted by four ILECs in the 2013 data collection showed a range of prices substantially lower than the AT&T price of $1,075. Prices were in the order one-third or one-fourth less than AT&T's price.

[193] Rysman Paper at 14. Dr. Rysman summarizes the 2013 data to show that of the 487,085 buildings with fiber, 237,730, or 49% or served only by ILECs, 221,469 or 45%, are served only by Competitive Providers, and the remaining 6%, or 27,866 buildings, have both ILECs and CPs. *Id.*

The conclusion that competitive providers can self-deploy fiber to buildings, eliminating the need for rate regulation of fiber-based BDS, is also consistent with, if not compelled by, the Commission's finding that CLECs need not have access to ILEC unbundled fiber to compete successfully in local markets. The Commission has found that CLECs are not "impaired" without access to unbundled lit fiber because it is economic for them to self-deploy fiber-based BDS.[194] High capacity unbundled loops, including lit fiber, which the Commission equated to OCn level services,[195] are the functional equivalent of BDS fiber-based services because OCn level services are provided over fiber.[196] The determination that CLECs could economically deploy lit fiber to locations is thus fully applicable to fiber-based BDS. Ease of entry, in itself, also serves to constrain prices for fiber-based BDS.

The Commission identified several factors that make self-deployment of fiber economical: (1) "services offered over [fiber] loops produce revenues [that] can justify the high cost of loop construction;" (2) larger enterprises that purchase fiber-based products typically enter into long term contracts "committing to revenue streams and associated early termination penalties charges that provide the ability of carriers to recover their substantial non-recurring set-

[194] *TRO*, 18 FCC Rcd at 17168 ¶ 315 ("Record evidence reflects competitive deployment of loops at the OCn level and competitive carriers confirm they are often able to economically deploy these facilities to the large enterprise customers which use them.").

[195] OCn services range from OC3, the capacity of 3 DS3s, to OC192. *TRO*, 18 FCC Rcd at 17168 ¶ 315, n. 931.

[196] *See, e.g., TRRO*, 18 FCC Rcd at 2563-2564 ¶ 53 (noting equivalency of high capacity UNEs and BDS). In addition to eliminating the obligation to provide unbundled fiber for high capacity services, the Commission also eliminated unbundling of fiber-to-the-home and hybrid fiber-copper loops for residential broadband services even if competitors might suffer some level of impairment. The Commission determined that the risk that required unbundling "might deter investment in such facilities" and hence undermine the "statutory goal of encouraging prompt deployment of 'advanced telecommunications capability'" outweighed any possible benefit of forced network sharing for those facilities. *See USTA II* at 359 F.3d at 564 (quoting *TRO*, 18 FCC Rcd at 17086-17088 ¶¶ 172-73); *id.* at 579.

up or construction costs;"[197] and (3) enterprise customers either own the building or have "sufficient influence over the landlord/building owner to overcome building access impairments."[198]

To the extent CLECs claim that these findings are no longer relevant because they face entry barriers, such claims are undermined by the fact that cable companies face many of the same barriers. In building out fiber, both CLECs and cable companies undertake the same analysis in assessing whether revenue opportunities create a sufficient rate of return given required capital expenditures. Cable company HFC networks typically do not extend to all commercial locations, a limitation noted by a number of CLECs.[199] Just like CLECs, cable companies often must dig new trenches to connect their HFC or fiber network to commercial buildings. Cable companies thus often incur the cost of trenching to reach the building (generally the largest cost component) and typically must overcome operational barriers such as landlord reluctance, the need to obtain rights of way, egress into the building, and the costs of deploying within the building to reach specific customers. For this reason, cable companies employ the same type of internal rate of return, or hurdle rate, analysis as CLECs and will make the build decision only if expected revenues from the customers (taking into account opportunities that may arise based on the location of lateral extension) exceed the hurdle rate. This is exactly what CLECs do in making their build or buy decisions.[200]

---

[197] *TRO*, 18 FCC Rcd at 17169 ¶ 316.
[198] *TRO*, 18 FCC Rcd at 17169-17170 ¶¶ 317.
[199] *See supra* pp 22-23.
[200] Sprint Reply Comments at 33 ("Potential competitors will deploy new facilities only if they have a reasonable expectation that they will recover their investment within a reasonable time frame"); *TRRO*, 20 FCC Rcd at 2616 ¶ 150 ("The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location.").

In light of both the record evidence in this proceeding, and the Commission's definitive conclusions in the UNE proceedings, there is no basis for imposing rate regulation on any fiber-based BDS, and certainly no reason to single out cable company provision of BDS over fiber.

C. There Is No Basis to Regulate Wireless Backhaul Services.

The Commission asks whether it should treat wireless backhaul as a distinct market or customer class and whether BDS regulation is needed to ensure wireless carriers have lower priced access to BDS. Regardless of whether backhaul is treated as a separate service or considered along with other fiber-based services, the Commission should conclude that rate regulation is not necessary. The Commission has already determined, prodded by the D.C. Circuit, that competition for wireless services has flourished using existing special access rates. The Commission has also expressed concern over the future deployment of the next wireless technology, 5G. But as shown below, wireless carriers have stated that they do not need access to BDS in order profitably to deploy 5G. At any rate, cable companies and others are keen to supply whatever backhaul needs the wireless industry identifies for 5G services, and competition is anticipated to be fierce.

Nor should the Commission favor one type of network or customer (5G providers) over another (cable operators). Wireless companies are large savvy customers that can negotiate favorable terms. To say that these carriers are incapable of obtaining favorable terms from cable operators is to ignore the realities of the marketplace.

1. The Commission Has Already Found that Wireless Companies Can Compete Using BDS Under Existing Rates.

The Commission found in the TRRO that certain markets were sufficiently competitive to preclude the need for any unbundled access to DS1 and DS3 loops, including the wireless market. Noting that competition has evolved in the wireless market without access to UNEs,

including by the use of special access services, the Commission found that it was "unable to justify the imposition of the costs of mandatory unbundling to promote competition."[201] Following the D.C. Circuit's guidance, the Commission concluded that "reliance on special access has not posed a barrier that makes entry [by wireless carriers] uneconomic" and that "existing rates outside the compulsion of §251(c)(3) [*i.e.*, network elements at special access prices] don't impede competition."[202] With respect to wireless, the Commission agreed with the Court that special access services gave wireless companies "access to necessary inputs at rates that allow competition not only survive, but to flourish."[203] The Commission concluded that the costs of providing access at low TELRIC prices, including the creation of "disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities" and difficulties of administering this "especially intrusive form of economic regulation," far outweighed any benefits.[204]

The Commission's determination that wireless backhaul need not be made available at lower TELRIC rates given that the wireless industry has flourished using special access services must inform its current analysis.

2. Wireless Companies Do Not Need Regulated Access to Cable Company Networks for 5G Deployment.

One of the prime rationales for proposals to impose rate regulation and common carrier obligations on cable companies appears to revolve around fears that there will be insufficient supply of backhaul facilities at reasonable prices for the next generation of wireless technology, 5G. The premise that there may be insufficient competition for 5G backhaul services is highly

---

[201] *TRRO*, 20 FCC Rcd at 2551-2552 ¶ 34.
[202] *TRRO*, 20 FCC Rcd at 2552-2553 ¶ 35 (quoting *USTA II*, 359 F.3d at 575-76).
[203] *TRRO*, 20 FCC Rcd at 2560-2561 ¶ 47 (quoting *USTA II*, 359 F.3d at 576).
[204] *TRRO*, 20 FCC Rcd at 2553-2555 ¶ 36.

speculative at best and the proposed remedy, price regulation of the entities already keen to provide these services, would be remarkably counterproductive.

Verizon and others have touted 5G as a fixed wireless alternative to residential wireline services and an essential platform for the "Internet of Things."[205] Verizon announced that its 5G deployment as a fixed platform will be profitable at current BDS pricing. Verizon's CEO Lowell McAdam recently stated that "fixed deployment of 5G technology could be profitable enough to provide the carrier a complete return on its investment in the technology, irrespective of a mobile 5G service."[206] The rest according to Verizon "is going to be gravy."[207] Verizon, a prime mover behind the request to regulate cable BDS, certainly does not appear to be telling investors that it is concerned about having reasonable access to 5G backhaul. Forcing competitive providers to sell Verizon backhaul at lower rates is not solving a marketplace problem, but simply adding to Verizon 5G's "gravy." Indeed, in discussing backhaul, Verizon stated that it planned to reduce backhaul costs by "getting fiber construction within 1,000 meters of a building and then connecting that building to the fiber network via a 5G router on the outside of the building."[208]

---

[205] Comments of Verizon, WC Docket No. 05-25, RM-10593 at 6 (dated Jan. 27, 2016) (stating "[w]ireless carriers have long used microwave facilities for the backhaul in their networks."); Letter from Rebecca Murphy Thompson, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 10-208, GN Docket No. 12-268, AU Docket No. 14-252, GN Docket No. 14-177, WT Docket No. 05-265, WC Docket No. 16-143, WC Docket No. 05-25, WC Docket No. 16-70 at 2 (dated May 20, 2016); Jon Sallet, General Counsel, Federal Communications Commission, Remarks as prepared for Delivery at INCOMPAS 2016 Policy Summit: "20th Anniversary of the Telecom Act" at 8 (Feb. 10, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0210/DOC- 337681A1.pdf.

[206] Mike Dano, Verizon's McAdam on 5G: Fixed Deployment 'Gives You All the Return on Capital That You Need.', FIERCEWIRELESS, May 24, 2016, *available at* http://www.fiercewireless.com/story/verizons-mcadam-5g-fixed-deployment-gives-you-all-return-capital-you-need/2016-05-24.

[207] *Id.*

[208] *Id.*

Similarly, Sprint's CTO John Saw indicated that the company has low cost backhaul options for its 5G and small cell projects that do not include reliance on cable plant: "I am confident that with a backhaul strategy of dark fiber and microwave radio and small cells being surgical and precise, we can have a very low cost and efficient backhaul plan."[209] According to analysts, Sprint will save more than $1 billion per year in backhaul costs by using its own spectrum holdings for small cell backhaul.[210] More recently, Mr. Saw emphasized wireless backhaul opportunities particularly with respect to 5G technology and the company's cell densification plans noting that the company already had "thousands of cell sites" and that "[g]oing forward, we expect that our existing wireless backhaul infrastructure, which already provides Gbps throughput, will be deployed on a greater scale with further enhancements for integrated access into our 5G network."[211]

Nowhere is there any discussion of the need by wireless carriers for access to cable company backhaul and certainly no suggestion that any carrier's deployment plans for 5G are in any way contingent on the results of this proceeding. That is not to say that cable companies are not eager to provide such services. In fact they are and all plan to provide as much backhaul to wireless carriers as they can sell.

---

[209] Sue Marek, Sprint Will Use 2.5 GHz Spectrum, Dark Fiber for Backhaul to Small Cells, FIERCEWIRELESS, Jan. 26, 2016, *available at* http://www.fiercewireless.com/story/sprint-will-use-25-ghz-spectrum-dark-fiber-backhaul-small-cells/2016-01-26.

[210] Martha DeGrasse, Sprint Looks to Wireless Backhaul to Cut Costs, RCRWIRELESSNEWS, Mar. 13, 2016, *available at* http://www.rcrwireless.com/20160313/carriers/sprint-wireless-backhaul-tag4.

[211] Dr. John Saw, Paving the Road to 5G, SPRINT NEWSROOM, June 3, 2016, *available at* http://newsroom.sprint.com/blogs/sprint-perspectives/paving-the-road-to-5g.htm.

The service, however, must be provided by fiber, not the HFC plant, which has capacity and quality of service limitations that renders it largely unusable for wireless backhaul.[212] The explosive increase in wireless data consumption has already forced wireless providers to replace legacy backhaul services with fiber-based Ethernet or high capacity wireless backhaul. The new 5G technology will require greater capacity even as cell site density increases. The backhaul capacity demands for 5G will far outstrip the limited symmetrical bandwidth available over HFC services. That wireless companies generally do not today utilize HFC for backhaul and will not be looking to HFC networks for 5G services undermines a primary rationale for regulating cable networks.

To the extent that wireless companies will be looking fiber-based BDS to satisfy backhaul demand for 5G, forcing cable companies to share their fiber networks with wireless companies at artificially low rates is the most counterproductive policy prescription imaginable. Heavy-handed regulation of cable companies' fiber BDS will only create disincentives for cable operators to expand their backhaul services and constrain their ability to provide a facilities-based alternative to ILEC backhaul for wireless carriers.

D. The Commission Cannot Ignore Potential Competition.

The Commission correctly recognizes that potential competition is an important aspect of its competitive analysis.[213] Nevertheless, advocates of expanding pricing regulation have already

[212] *See, e.g.*, Letter from Thomas Jones, Counsel for Level 3 Communications, LLC and EarthLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 at 4 (dated Apr. 14, 2016) (noting the "fact that Ethernet-over-HFC typically delivers no more than 10 Mbps.").

[213] *Further Notice* at ¶¶ 161, 235.

begun their campaign to limit the Commission's competitive analysis to actual, existing competition.[214] The Commission, however, cannot lawfully ignore potential competition.

As the Commission has concluded, following explicit guidance from the courts, it must take into account not only where existing facilities have been deployed, but where facilities could be deployed. On this point, the guidance by the D.C. Circuit on determining potential competition for high capacity facilities, is unambiguous::

> We do not see how the Commission can simply ignore facilities deployment along similar routes when assessing impairment. Suppose points A, B, and C are all in the same geographic market and are similarly situated with regard to 'barriers to entry' that the Commission says are controlling. Suppose that multiple competitors supply DS1 transport between point A and B, but only the ILEC and one other CLEC have deployed transport between A and C. The Commission cannot ignore the A-B facilities deployment with respect to A-C deployment without good reason. The Commission does explain why competition on the A-B route should not be *sufficient* to establish competition is possible on the A-C route, but this cannot explain the Commission's implicit decision to treat competition on one route as *irrelevant* to the existence of impairment on the other.[215]

Based on this guidance, the Commission adopted a potential competition analysis for high capacity UNEs that relied "on the inferences that can be drawn from one market regarding the prospects for competitive entry in another."[216]

The Commission's proposed potential competition analysis does not fully adhere to the Court's requirements or its precedent. The Commission proposes to limit potential competition to existing nearby fiber providers that have the ability to extend laterals to new locations within a

---

[214] Letter from Phillip Berenbroick, Public Knowledge, to the Honorable Tom Wheeler, Chairman, FCC, WC Docket No. 16-143 at 3 (dated June 16, 2016).
[215] *USTA II*, 359 F.3d at 575.
[216] *TRRO*, 20 FCC Rcd at 2558-2559 ¶ 43. *See also id.* ("[W]e draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics . . . . "[W]e adopt below a regime that accounts for actual and potential deployment by inferring from competitors' deployment in one market the ability of a reasonably efficient competitor to enter another, similar market in an economic manner.").

certain distance.[217] That is too cramped a reading of potential competition. Potential competition cannot refer merely to *existing* nearby fiber, it must assume that additional nearby fiber can be deployed along the same or similar routes where one or more competitors have found it economical to deploy. Under the Commission's proposal it could conclude that if only one competitor had nearby fiber, competition may not be sufficient. Properly defined, a potential competition analysis would conclude that other competitors likely could also deploy nearby fiber. Thus, the presence of one nearby competitive provider should be considered satisfactory to warrant a finding of sufficient competition.

X. The Commission's Regulatory Approach Stands in Stark Contrast with Its "Effective Competition" Framework for Regulating Video Service**s**.

The regulatory scheme suggested in the *Further Notice* stands in stark contrast to the Title VI "effective competition" framework adopted by Congress and administered by the Commission. That framework, which establishes a process for adapting the level of regulation to changing market conditions in a manner that is, relatively speaking, easy to administer, can provide valuable guidance for the Commission.

In brief, the cable effective competition framework provides that rates for certain services offered by cable operators are subject to rate regulation, only in areas where there is no effective competition.[218] The statute contains criteria for determining whether or not effective competition is present and the Commission's rules establish the procedures to govern that process.[219] The

[217] *See, e.g., Further Notice* at ¶ 161.
[218] 47 C.F.R. § 76.905(a) ("Only the rates of cable operators not subject to effective competition may be regulated."). Moreover, only the basic tier of service is potentially subject to regulation. Congress eliminated rate regulation for other tiers of service. 47 U.S.C. § 543(c)(4).
[219] 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905.

effective competition framework has been in place for over two decades and recently was updated by the Commission.[220]

The cable effective competition framework includes a number of attributes that the Commission should incorporate into any regulatory regime for BDS. Although cable services are not governed by the dominant/nondominant framework that the Commission employs for telecommunications services, the regulatory regime established by Congress embraces the same underlying principles. Specifically, only services offered by incumbent "cable operators" are subject to rate regulation – and only when they face no significant competition.[221] The statutory regime does not regulate rates charged by other multichannel video programming distributors (MVPDs) – including new entrants competing with incumbent cable operators – because those entities always face competition from the incumbents.[222] In this way, the effective competition regime is the same as that adopted in *Competitive Carrier*. And it explicitly recognizes that the extent to which rate regulation is warranted for any particular MVPD depends on the extent to which it faces competition from *other* MVPDs.[223]

Another attribute of the cable effective competition regime that should be incorporated into the BDS regime is the use of a limited number of clearly defined metrics. For example, the statute establishes specific thresholds for competitive coverage and the Commission's rules specifically define what constitutes a qualifying offer of competitive service.[224] Interestingly, the effective competition framework recognizes that no coverage threshold is even necessary when

---

[220] *Amendment of the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574 (2015) ("*Effective Competition Order*").
[221] 47 C.F.R. § 76.905(a).
[222] *See* Media Bureau Clarifies Issues Concerning Franchise Authority Certification To Regulate Rates, *Public Notice*, DA 09-68 (rel. Jan. 16, 2009).
[223] 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).
[224] 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905. This is not to suggest that the Commission adopt these same thresholds for BDS purposes.

one type of competitor – a local exchange carrier – is present.[225] Because LECs often have ubiquitous facilities throughout the franchise area at the time they enter the video marketplace, the effective competition framework appropriately treats such entry as a trigger for deregulation of the incumbent (and continued non-regulation of the entering LEC). The Commission's appropriate response to the presence of a significant potential competitor is to level the regulatory field downward by deregulating the incumbent cable company, not imposing economic regulation on the competitor. That is a far more rational approach than the Commission's unprecedented suggestion in the instant proceeding that the presence of a competitor with "ubiquitous facilities" somehow provides a basis for regulating the rates of both providers, rather than deregulating.[226]

Just as the Commission is updating its regulatory framework for BDS in this proceeding, it recently updated the cable effective competition framework and its approach in that context provides sound precedent for its task here. When Congress enacted the "effective competition" rate regulation standard in 1992, few cable systems met that standard. Therefore, the Commission established a presumption that systems were not subject to effective competition and required cable operators to rebut that presumption in order to be relieved of rate regulation. But as the result of competition from direct broadcast satellite (DBS) services, telephone companies, and others, it's now the case that most cable systems do meet the test.[227] To reflect that change, the Commission reversed the presumption, shifting the burden of proof from cable

[225] 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4).
[226] *Further Notice* at ¶¶ 280-296. As explained *infra* at Section IV.A to the extent the Commission believes that the cable companies HFC plant can provide ubiquitous coverage for BDS, it is wrong.
[227] *Effective Competition Order* at 6577-6582 ¶¶ 6-9.

operators that seek deregulation to franchising authorities that seek to regulate.[228] That was a wholly appropriate response to the finding of increased competition, in marked contrast to the Commission's nonsensical suggestion in the *Further Notice* that increased BDS competition somehow warrants new regulation of both incumbent providers and competitive providers.[229] And it is a response wholly consistent with the statute's overriding deregulatory policy goal.[230]

The cable effective competition regime has proven to be a durable, effective regulatory tool for adjusting regulatory obligations in a market experiencing significant intermodal competition. As such, it provides substantial guidance for potential BDS regulation that is much more faithful to Commission precedent of light touch regulation of competitive carriers than are the Commission's proposals in the *Further Notice.*

XI. The Commission Should Ensure that Its Regulatory Regime Is Readily Administrable, Does Not Impose Undue Burdens on Industry or the Agency, and Appropriately Seeks Only Necessary Data.

As both Commissioners Rosenworcel and Clyburn correctly note in their statements, any proposal resulting from this proceeding must be administrable, both by the agency and by industry participants.[231] Taken as a whole, the proposal in the *Further Notice* would create substantial burdens on the industry, tax the limited resources of the Commission, and lead to

---

[228] *Id*. at ¶ 10. In doing so, the Commission specifically noted that changing the presumption would reduce the significant administrative costs the original approach placed on cable operators, particularly smaller cable operators. *Id*. at ¶ 25.

[229] *Further Notice* at ¶¶ 280-296.

[230] Congress created a "pro-competitive, deregulatory national policy framework designed to make available to all Americans advanced telecommunications and information technologies and service." *USTA Pet. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd 2605, 2608 ¶ 7 (2013).

[231] *See* Approving Statement of Commission Jessica Rosenworcel (attached to *Further Notice*) (noting "our policies must be capable of administration"); s*ee also* Approving Statement of Commissioner Mignon L. Clyburn at 1 (attached to *Further Notice*) (calling for a regime that is "simple and easy to administer" and expressing concern about the complexity of some proposals).

frequent and continuing disputes regarding the lawfulness of posted, regulated rates and the veracity of Commission determinations regarding the proper delineation of "competitive" and "non-competitive areas." The Commission should very carefully consider the costs that these requirements will impose in light of potential benefits.

A. Given Their Enormous Burden, The Commission Must Carefully Calibrate Any Future Data Collection to Only the Most Vital Information While Also Ensuring All Significant Competitive Alternatives Are Captured.

To ascertain conditions in whatever markets the Commission defines, the Commission proposes that BDS providers submit periodic data on "market structure, pricing, demand and responses to competitive pressures," similar to that imposed on the industry for the 2013 data collection.[232] Cable companies and others were required to devote enormous resources, both in terms of time and money, to respond to that collection. Many companies, and not just small companies, were forced to hire outside consultants to assist in collecting and conforming data to the Commission's specifications.

The Commission's proposed periodic (*e.g.*, every three years) data collections will be even worse than the 2013 data collection. The Commission would require companies to once again submit the most data intensive, and highly sensitive portions of the previous data collection, such as information on all locations served; monthly billing by circuit elements tied to specific locations, revenues by technology and customer; fiber network maps and nodes; and recent RFPs. The Commission proposes to add a lengthy list of equally if not more burdensome requirements, including: reporting on different categories of BDS, including different speeds and performance level guarantees; customer churn data; internal business documents assessing competitive pressures in the marketplace; information that would somehow help the Commission

[232] *Further Notice* at ¶ 524.

follow customers as they change from one carrier to another; information on the managed services customers buy; and information on wholesale leased lines. [233]

While it is important for the Commission to use current data in assessing the state of competition, the Commission must carefully assess whether this flood of highly particularized data is really needed, given the obvious burdens it will impose, and whether the Commission in fact will have the resources needed effectively to review the information deluge. It is worth noting that there is no other service regulated by the Commission where the agency collects information at anywhere near this level of granularity. For example, in other contexts, the Commission has been able to collect all the pricing information it needs through periodic surveys that are far less burdensome than the process proposed in this proceeding. While an annual Ethernet price survey would no doubt be more complex than the cable, voice, and broadband surveys the Commission currently employs, it would be far less burdensome on providers than the Commission's proposed BDS collection.

The Commission must also make sure that its future data collections actually collect data on all significant competitive alternatives. There is evidence that many providers, including providers of dark fiber, governmental agencies (or government-owned utilities) that self-deploy their own fiber networks and sometimes sell excess capacity, and other providers of fiber infrastructure did not submit data in response to the last data collection. The result is substantial undercounting of competitive alternatives in many markets.

[233] The Commission also suggests that not requiring purchasers to provide data will substantially lessen the burden from the 2013 collection, but the OMB had already required the FCC to significantly reduce the amount of data from purchasers. The elimination of purchaser data does not come close to offsetting the additional data collections proposed by the Commission.

B. Benchmarking and Public Posting Obligations Will Also Be Highly Burdensome and Expose BDS Providers to Potential Liability and Hinder Price Discounting.

As noted above, the Commission's proposal to benchmark cable company BDS Ethernet rates to "comparable" ILEC price capped TDM rates in noncompetitive markets creates a host of administrative challenges that would make such a regime extremely burdensome from a compliance perspective. The Commission does not indicate, for example, to which DS1 or DS3 rates cable companies are expected to benchmark – the lowest possible rate, a discounted rate based on volume or term discounts, the lowest rate found in a contract? Moreover, ILEC DS1 and DS3 price caps vary state by state and often zone by zone within the state. And with even more granular competitive or non-competitive geographic areas, pricing fragmentation will likely be even more pronounced. Benchmarking to ILEC rates would require cable companies to ascertain the precise geographic overlap with a specific ILEC DS1 or DS3 price capped service to ensure that they are benchmarking to the correct rate.

Cable companies will then have to determine the appropriate comparability rate, which the Commission suggests should be based on a per-megabit multiple of the ILEC DS1 or DS3 price capped rate. Cable companies would have to continually monitor ILEC websites to determine if the ILEC has changed any price that would necessitate revising the benchmark. Moreover, the Commission proposes to lower ILEC TDM price caps annually based on productivity and other factors, again necessitating revision of the cable companies' "comparable" Ethernet service rates. One result of this regime is that multi-location customers would be faced with a dizzying array of fragmented pricing potentially increasing transaction costs and likely

rendering most-favored nation clauses unworkable.[234] Should the cable company inadvertently fail to appropriately benchmark one of its rates, which must be made publicly available on the cable company's website (see below), the Commission invites customers to file section 208 complaints.[235]

The proposed pricing scheme is thus fraught with the potential for costly litigation. The Commission's other effort at benchmarking, the *CLEC Access Charge Order,*[236] provides a cautionary tale. Even though the benchmarking in that context theoretically would be more straightforward – the CLEC benchmarked to tariffed ILEC rates for exact same access service – the Commission's scheme there spawned substantial litigation as carriers disputed whether CLEC services were the equivalent of ILEC services.[237]

The Commission also asks whether BDS providers should publicly disclose their generally available rates, terms and conditions on their websites so that customers can help police compliance with benchmarked pricing requirements.[238] The Commission spends all of one short paragraph proposing this obligation wholly ignoring substantial agency precedent holding that such public disclosures can lead to anticompetitive results. As the Commission

---

[234] Most favored nation clauses often require the seller to match best available rates, terms or conditions.

[235] *Further Notice* at ¶ 440.

[236] *See supra* at Section IV.C.2.

[237] *See, e.g., PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, 712 F. Supp. 2d 405 (E.D. Pa. 2010), *subsequently determined by PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, 784 F. Supp. 2d 542 (E.D. Pa. 2011) (determining that MCI was not entitled to a refund for LEC's switched access service charges where those charges, although either unreasonable or above benchmark or both were nevertheless protected by their "deemed lawful" status); *Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd. of Puerto Rico*, 665 F.3d 309 (1st Cir. 2011) (finding that the local loop rate benchmark was not unjust or unreasonable); *Great Lakes Comnet, Inc. v. F.C.C.*, No. 15-1064, slip. op., (D.C. Cir. May 24, 2016) (concluding that an intermediate carrier's expectation that it was not subject to FCC regulations governing benchmark rates that ILECs may be charged by CLECs was not reasonable).

[238] *Further Notice* at ¶ 436.

previously noted, public posting of prices "provides an excellent mechanism for inducing noncompetitive pricing, since all prices are public, they can be quickly matched by competitors, [which] reduces the incentive to engage in price cutting" and severely hampers the ability of providers to "bargain with their customers" and the type of "price discounting that often occurs in a workably competitive market cannot take place."[239] That public disclosure of pricing information facilitates tacit collusion was one of the key bases for the mandatory detariffing of non-dominant interexchange carriers.[240] Yet the Commission now asks whether it should impose the very same requirement in a market it claims is in jeopardy of tacit collusion.

C. The Commission's Proposed Challenge Process Would Mire the Agency and Industry in Lengthy and Costly Disputes.

In crafting a possible post-determination challenge process, the Commission states that it is trying to "build upon lessons learned from the Connect America Fund challenge process."[241] From the perspective of the cable industry, which was forced to expend significant time, resources, and money on the CAF challenge process just to avoid being overbuilt by government-subsidized networks, the primary "lesson learned" is that a similar process should be avoided to the greatest extent possible.[242] That is, the Commission should design the

---

[239] *Competitive Carrier FNPRM*, 84 FCC 2d 445 at ¶ 26.

[240] *Policy and Rules Concerning the Interstate, Interexchange Marketplac*e, Second Report and Order, 11 FCC Rcd 20730, 20761 ¶ 53, 20766 ¶ 61 (1996) (subsequent history omitted). Although the Commission ultimately required nondominant IXCs to publicly post prices on their website, the Commission noted that concerns about tacit price collusion were alleviated by the large number of providers and low entry barriers, exactly the opposite circumstance here where the Commission proposes to mandate public disclosure only in "non-competitive areas." *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Order on Reconsideration and Erratum, 14 FCC Rcd 6004, 6013-14 ¶ 16 (1999).

[241] Further Notice at ¶ 302.

[242] The CAF Phase II challenge process took more than nine months, and required participants to identify census blocks that were erroneously designated as served or unserved and to respond to claims of served or unserved status. *See Connect America Fund, Connect America Phase II Challenge Process*, Order, 30 FCC Rcd 2718 (2015). Approximately 50 cable operators made or

competitive test in a manner that reduces the need for, and the significance of, any post-decision challenge process.

One important step in reducing the likelihood of post-decision challenges is to establish very clear standards based on data that is readily accessible. In the CAF challenge process, the focus was on the availability of broadband service from an unsubsidized provider, typically either a cable operator or wireless ISP. There were three problems that caused this to be an administrative nightmare for affected companies. First, there is no standard, industrywide agreement on what constitutes availability, and different companies have different approaches to determining where service is available. Although the Commission defined the standard for availability, it used different definitions for different phases of the program, and those definitions did not always match with the internal definitions used by companies.

The second problem, which is related to the first, is that many companies do not have a recordkeeping system that enables them to quickly determine the exact boundaries of where service is available. The way that individual companies determine whether service is available from a business perspective often is a function of their recordkeeping system, but if that internal definition of availability does not match the Commission's definition, significant additional work may be needed.

Finally, all of these challenges were compounded by the fact that this analysis was required to take place at the census block level. Census blocks are very granular geographic

---

were named in challenges and they were compelled to provide data regarding more than 25,000 disputed census blocks. Replies Sought in Connect America Phase II Challenge Process, *Public Notice*, 29 FCC Rcd 11497, 11497-11501 (2014) (linking to lists of challenges meeting prima facie standards). Each of these challenges required individual review by the affected cable operator.

units that are not used for any business purpose, and in rural areas the boundaries between census blocks may not be easy to identify.

As a result of these three issues, companies had to invest substantial effort in documenting the scope of their networks, with no clear sense as to whether the information they were providing would be sufficient. The lesson here is that the Commission should use relevant, easily-identified geographic areas to the extent possible, adopt a crystal clear standard, including identifying what type of offering "counts" in achieving that standard, and specify the data it anticipates relying upon in that inquiry.

XII. Rate Regulation Is Particularly Inappropriate For Competitive Providers in Rural Areas.

Under the Commission's previous approach to special access pricing flexibility, the use of very large geographic areas that typically included one or more urban areas meant that the unique issues presented in rural areas were not specifically considered. But now that the Commission will be making regulatory decisions based on far more granular information, rural areas will be considered on their own merit.

As the Commission has found time and time again, rural areas present special considerations when trying to encourage deployment of new facilities. Fewer customers spread over a greater area means that costs, and ultimately prices, generally will be higher than in urban areas.[243] Although costs per mile to construct new facilities may be lower in rural areas than in denser urban zones, the need to cover greater distances creates challenges for competitive entry. These same economic considerations apply in the BDS context, where the higher costs and lower revenues available in rural areas generally do not present an attractive business case for most

[243] Indeed, the fundamental policy behind the high-cost universal service program is to offset these higher costs with federal subsidies to ensure that prices in rural areas are reasonably comparable to prices in urban areas.

competitive LECs to invest in the BDS marketplace. Consequently, as compared to urban areas, there generally will be fewer BDS competitors in rural areas.

As a result, any test that requires the presence of multiple competitive providers likely would result in a significant portion of rural areas being deemed non-competitive, potentially subjecting the non-incumbent LEC competitor in that market to ex ante rate regulation and other regulatory obligations under consideration. Such regulation, however, is unlikely to result in net consumer benefits because it surely will dampen the prospect of facilities-based competition in areas where such competition has is feasible.

The Commission obviously should be attempting to design a BDS regulatory regime that encourages this sort of facilities-based competition, rather than hindering it. To do so, the Commission should ensure that any competitive test is applied in such a way that it does not lead to the imposition of rate regulation on competitive providers in rural areas. As the Commission has acknowledged repeatedly in the universal service context, companies will not invest in advanced facilities in rural areas unless there is a business case that justifies such investments.[244] Given that most of the Commission's efforts have been focused on *improving the business case* for rural investment (e.g., by making subsidies available), it should be obvious that any policy that *imposes new costs* and *artificially constrains revenues* for companies that do not receive subsidies will be a significant deterrent to future investment.

Furthermore, there are other negative consequences associated with rate regulation that are particularly problematic in the rural context. As the Commission stated in the *Further Notice*, it "must account for limitations in our ability to establish what a competitive price is, the harms of unintended consequences from regulatory action (for example, to the extent regulatory

[244] *Connect America Fund*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3111 ¶ 59 (2016).

action encourages waste through rent-seeking), as well as its administrative costs."[245] All of these concerns counsel against regulation of competitive providers in rural areas.

XIII. CONCLUSION

For all the reasons explained in these comments, the Commission should reject any and all proposals that would result in the imposition of rate regulation on cable operators and other facilities based competitors that do not possess market power.

Respectfully submitted,

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

By: /s/ Michael Pryor

Steven F. Morris
Jennifer K. McKee
National Cable & Telecommunications Association
25 Massachusetts Avenue, NW – Suite 100
Washington, D.C. 20001-1431

Michael Pryor
J.G. Harrington
Henry H. Wendel
Cooley LLP
1299 Pennsylvania Avenue, NW – Suite 700
Washington, DC 20004-2400

Counsel to NCTA

June 28, 2016

[245] *Further Notice* at ¶ 428.