

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Regulation of Business Data Services for Rate-of-)	WC Docket No. 17-144
Return Local Exchange Carriers)	

REPLY COMMENTS OF AT&T

I. INTRODUCTION

AT&T Services, Inc., on behalf of itself and its affiliates (collectively, “AT&T”), submits these reply comments pursuant to the comments cycle established by the Commission.¹ The Comments filed by those that support allowing “model-based” rate-of-return carriers² to opt into the Commission’s rules for price cap carriers’ business data services (BDS)³ do little to ameliorate the concerns highlighted in AT&T’s Comments.⁴ In fact, some of the commenters’ exuberant push for the Commission to grant them *even more* regulatory freedom than was encompassed by the original petition that formed the basis of the NPRM⁵ illustrates why the Commission should proceed with caution. As such, the Commission should reaffirm that, pursuant to its long-standing price cap rules, an A-CAM carrier’s choice to move from rate-of-return to price cap regulation must apply to *all* of its interstate services.⁶ But in all events, if the

¹ *In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 17-144 (rel. April 18, 2018) (“NPRM”).

² These “model-based” rate-of-return carriers as those either electing to receive broadband-only universal service support pursuant to amounts specified in the Alternative-Connect America Fund Cost Model (A-CAM) to support broadband and voice services or are otherwise affiliated with price cap carriers and receive support based on the Connect America Cost Model (CACM) or reverse auctions. (hereinafter “A-CAM Carriers”).

³ *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al.*, Report & Order, FCC 17-43 (rel. April 28, 2017) (“BDS Order”).

⁴ Comments of AT&T, *In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, WC Docket No. 17-144 (June 18, 2018) (“AT&T Comments”).

⁵ Petition of ITTA and USTelecom (filed May 25, 2017) (“Petition”).

⁶ See §61.41(a)(3) and §61.41(b) referred to as to as the “all-or-nothing rule.”

Commission grants A-CAM carriers the option to be price cap carriers when providing BDS and remain rate-of-return when providing switched access services, the Commission must ensure that the carriers' initial price cap rates are set fairly and reflect all ongoing switched access and rate-of-return pricing reforms. Additionally, any competitive market test the Commission adopts to determine whether a county should be deemed "competitive" or "non-competitive" under the contours of the Commission's *BDS Order* must be A-CAM carrier specific and centered upon the competitive landscape *for BDS* in the A-CAM carriers' study areas

II. DISCUSSION

- A. There is nothing precluding A-CAM carriers from electing incentive regulation for all of their services.

Commenters argue that the rate-of-return rules impose unnecessary cost burdens on their BDS that are not borne by competing CLECs and cable companies and limit their flexibility to respond to consumer needs.⁷ The claim is that the Commission needs to *act* to provide A-CAM carriers the ability to opt out of this 'burdensome' rate-of-return regulatory regime.⁸ The fact that carriers have remained under rate-of-return up until now (despite the ability for over two decades to opt into the price cap regime) – and that they seek to remain rate of return for their other services even if they get the relief requested to move their BDS to price cap – suggests that that the Commission's rate-of-return regulatory regime brought them more financial benefits

⁷ See e.g., Comments of ITTA and USTelecom, In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, WC Docket No. 17-144 (June 18, 2018) ("ITTA/USTelecom Comments") at 4, 6; Comments of WTA – Advocates for Rural Broadband, In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, WC Docket No. 17-144 (June 18, 2018) ("WTA Comments") at 3; Comments of NTCA – The Rural Broadband Association, In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, WC Docket No. 17-144 (June 18, 2018) ("NTCA Comments") at 2; Comments of TDS Telecommunications Corp., In the Matter of Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, WC Docket No. 17-144 (June 18, 2018) ("TDS Comments") at 3.

⁸ See TDS Comments at 3 ("providing A-CAM carriers the ability to opt in to a more modern regulatory framework to adapt to a changing marketplace, would provide substantial benefits to those carriers and the BDS ecosystem as a whole.").

than costs. However, even if one were to accept the notion that there is “undue cost” associated with being a rate-of-return carrier, the fact is that rate-of-return carriers, today, have the ability to opt out of rate-of-return regulation, in favor of incentive regulation – they have had that ability for nearly 27 years – as long as the election of incentive regulation applies to all their study areas.⁹

The reason for this restriction is well-founded, as our initial comments detail.¹⁰ Carriers under rate-of-return regulation set their prices based on reported costs, while carriers under price cap regulation set their prices based on a formula that accounts for general price inflation and expected carrier productivity. Thus, under price cap regulation, if a carrier’s costs rise faster than the formula, its profits will fall. Under rate-of-return regulation, however, a carrier experiencing cost increases would seek – and typically be granted within a year – a compensating price rise, so its profit level would be preserved. Because of these differences, if a holding company has both rate-of-return and price cap study areas, it may have incentives for internal cost shifting across study areas (price cap vs. rate-of-return), or even among services (e.g., switched access vs. special access) within the same study area – mitigating any diminution in the holding company’s profits that price cap formulas may produce.¹¹ Because the

⁹ The Commission’s rules explicitly allow rate-of-return carriers to convert to price cap regulation on an elective basis as long as that election applies to all their study areas. See Section 61.41(a)(3) Section 61.41(b). See ITTA/USTelecom Comments at 10-11 (“Currently, in order to convert to price cap regulation, all of the company’s study areas and rates would have to be converted to price caps, except for affiliates that are regulated as average schedule rate-of-return carriers.”). In addition, any carriers that participate in the National Exchange Carrier Association (NECA) pooling arrangements must remove themselves from the pools before entering price caps. See *Policy and Rules Concerning Rates for Dominant Carriers*, 55 FR 42375-01 ¶ 29 (Oct. 19, 1990).

¹⁰ See AT&T Comments at 4-9.

¹¹ See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*; *Federal-State Joint Board on Universal Service*, 69 FR 25325-01 ¶ 4 (May 6, 2004) (*MAG Plan Order*) (citing the two problems the Commission sought to avoid by adopting the all-or-nothing rule: 1) to prevent a carrier from shifting costs from its price cap affiliate to its rate-of-return affiliate so as to recover those costs through the higher cost-based rates of the rate-of-return carrier and thereby increasing the price cap carrier’s profits and 2) to prevent carriers from gaming the system by switching back and forth between the price cap and rate-of-return regimes). See also *Policy and Rules Concerning Rates for Dominant Carriers*, 55 FR 42375-01 ¶ 29 (Oct. 19, 1990) (“Our ‘all or nothing’ rule is intended to prevent cost

Commission could not be assured that its Part 32 and other cost allocation rules would provide an ironclad bulwark against such shifts across study areas within a holding company, it instituted the “all-or-nothing rule.”¹² While the Commission has granted certain carriers waivers from the “all-or-nothing rule,” it has done so only at the study area level, where it could rely on its Part 32 and other accounting rules (that require all costs to be identified and separated at the study area level) to prevent inappropriate cost shifting.¹³

But these safeguards do not exist if, as commenters request, different regulatory regimes are allowed to apply to different interstate services within the same study.¹⁴ Part 32 is not service-specific within a study area, and state regulator visibility is similarly impaired. Allowing an electing carrier to offer BDS on a price cap basis and still have its remaining interstate services stay subject to the rate-of-return regulatory regime *within the same study area* would both skew incentives and may likely involve separate accounting mechanisms for different services sold within the same study area¹⁵ which would further complicate the annual review process.

shifting to affiliates that are regulated under rate of return from affiliates that are subject to price caps.”). *See also* ITTA/USTelecom Comments at 11 (“The all-or-nothing rule was adopted initially to prevent gaming, where a carrier might be motivated to reduce costs allocated to its price cap-regulated study areas and then increase costs in its rate-of-return study areas where it could recover those costs pursuant to rate-of-return formulas.”).

¹² *See infra* Footnote 11.

¹³ In addition, because study areas are specific to states, the Commission also could rely on the vigilance of state regulatory commissions to take steps to ensure that cost-shifting across state jurisdictions did not occur.

¹⁴ *See* ITTA/USTelecom Comments at 10 (The *NPRM* recognizes that adopting the rules as proposed would also require adoption of an exception to the price cap all-or-nothing rule to allow the electing rate-of-return carrier to remain a rate-of-return carrier for all purposes other than BDS regulation.”). WTA actually proposes that the Commission establish a *new* price cap regime for A-CAM carriers under which the 2% productivity factor would not apply. WTA Comments at 5. But see ITTA/USTelecom Comments at 9 (“the Commission should establish a new 2 percent X-factor”). The Commission should reject WTA’s request outright.

¹⁵ While ITTA/USTelecom are correct that rates for originating interstate switched access for rate-of-return carriers have been capped and that their terminating switched access end office services are transitioning to “bill and keep,” (*see* ITTA/USTelecom Comments at 11), rate-of-return carriers’ terminating tandem switching and transport are not reformed and remain under the rate-of-return regime.

In this regard, commenters are incorrect in their claims that Part 32, cost studies and other protections are no longer needed.¹⁶ Given that these electing carriers would continue to have certain of their interstate services under rate-of-return, converting to GAAP accounting is unwarranted. All the Commission's rate-of-return rules operate off of Part 32-defined accounts. Getting price caps for BDS is not the same as getting price caps for all interstate services. GAAP is not a substitute for Part 32 rules until all of their rate-of-return services are gone.¹⁷ Part 32 remains necessary.

Therefore, AT&T requests that the Commission decline to waive the "all-or-nothing" rule for these carriers and require that any A-CAM carrier that elects incentive regulation have that election apply across all its study areas and, even more critically, across all of its interstate services within a study area.¹⁸ In all events, should the Commission grant its *per se* waiver of the all-or-nothing rule, AT&T requests, as detailed in our Comments, the Commission require that any electing carrier's initial price cap BDS rates should be adjusted downward by 75 basis points to reflect the appropriate rate-of-return that that carrier would have transitioned to under the Commission's rate-of-return framework,¹⁹ its terminating end office access rates be immediately adjusted to bill and keep²⁰ and that the Commission not forbear from Part 32 cost assignment rules and separations requirements.

¹⁶ See WTA Comments at 3; TDS Comments at 7; ITTA/USTelecom Comments at 13-14.

¹⁷ The assertion that the elimination of Part 32 accounting in favor of GAAP accounting (*see e.g.*, USTelecom Comments at 13) and forbearing from application of the Commission's cost assignment rules and separations requirements (*see e.g.*, USTelecom Comments at 11) would be appropriate because that is the same relief the Commission granted price cap carriers misses the key distinction that in getting that relief all of the price cap carriers' interstate services were subject to the same price cap regime.

¹⁸ For similar reasons, any electing A-CAM carrier that participates in the NECA pools should be required to exit the NECA pool for both its switched and special access services to avoid additional complexities in the annual review process and to avoid potential gaming. *See* AT&T Comments at 11.

¹⁹ *In the Matter of Connect America Fund*, WC Docket No. 10-90, et al., Report and Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, ¶¶ 325-326 (rel. Mar. 30, 2016) ("2016 Rate-of-return Reform Order").

²⁰ *See* AT&T Comments at 4-13.

- B. Any CMT adopted for the A-CAM carriers must be based on a review of BDS competition that impacts the A-CAM carrier, and not by merely imputing the competitive/non-competitive status of a price cap carrier in a county to an A-CAM carrier's study area within that same county.

The NPRM seeks comment on creating a competitive market test (CMT) to assess the availability of competitive options for last-mile BDS services in areas served by A-CAM carriers and whether to relieve A-CAM carriers' lower-speed TDM BDS offerings of *ex ante* pricing regulation in areas deemed competitive by the CMT.²¹ Commenters suggest the Commission apply the results of the price cap carriers' *BDS Order's* CMT to the A-CAM carriers.²² The Commission should reject that request for several reasons.

First, as the Commission notes, the CMT that resulted from the price cap BDS proceeding was based on the analysis of competitive BDS facilities within the price cap carriers' study areas. If a county included both price cap and rate-of-return study areas, the county's competitive or non-competitive status was determined *solely* based on the presence of competitive facilities within a certain distance of the price cap carriers' facilities. The resulting county-based CMT results reflect only competition within the price cap carriers' portion of the county. The existing CMT from the *BDS Order* cannot be used to gauge competition in A-CAM serving areas.

Second, unless and until the A-CAM carriers provide data on competitive fiber deployments in their own territories in a particular county, there is no reason to presume that deployments in a price cap carrier's territory in that county provide a competitive backstop.

²¹ *Id.* ¶ 35. The NPRM questions whether this CMT should be (1) the same CMT the Commission adopted in the *BDS Order* relieving A-CAM carriers of *ex ante* pricing in those counties already deemed competitive for price cap carriers' service areas; (2) a variation of the existing CMT – using just the second prong (477 data) for A-CAM areas; (3) a CMT similar to the existing CMT but using data specific to areas served by electing A-CAM providers; or (4) a whole new CMT specific to BDS in areas served by A-CAM providers. *Id.* ¶¶ 36-41.

²² See e.g., ITTA/USTelecom Comments at 18-21; WTA Comments at 6; NTCA Comments at 2-3; and TDS Comments at 4-5.

While ITTA/USTelecom attach to their comments a study²³ purporting to show that rural areas served by price caps are similar to the rural areas served by rate-of-return carriers, the study raises more questions than answers:²⁴

- It is not clear that the major points of comparison (e.g., population and housing densities) used in this study are the critical drivers of competitive BDS deployment. The study contains no evaluation of the density of business lines provided. Rather, it is residential based.²⁵ A residential demographic analysis is not meaningful as an indicator of competition in BDS. Therefore, the fact that the study areas (SAs) may be similar on their residential profile provides little confidence that their business profiles are similar.²⁶
- The study looks at the rate-of-return SAs for one company – Consolidated Communications.²⁷ There is no demonstration that these examined SAs are representative of the typical A-CAM carrier SA. Unless the study is comprehensive across all A-CAM carrier SAs (like the FCC’s data collection was across all price cap carrier SAs), it has little inferential value or confidence.

Therefore, the Commission should reject the commenters’ request that the CMT adopted in the *BDS Order*, based on data from price cap carriers’ service areas, be assumed to be applicable to A-CAM carriers’ service areas. There are no facts in the record that would support a predictive judgement that the circumstances are the same. Rather, any CMT for A-CAM BDS must rely on A-CAM study-area-specific facilities data to determine a county’s status.

²³ See ITTA/USTelecom Comments at 20 and Exhibit D (“Study”).

²⁴ The Study was not submitted prior to the start of the comment cycle. Although a quick analysis reveals several significant issues, the two-weeks provided to assemble reply comments was inadequate to properly review the Study’s underlying assumptions. If, despite the above- identified deficiencies, the FCC intends to rely on this study, it is essential that it be more fully vetted, and parties are provided adequate time and opportunity to better analyze the underlying assumptions.

²⁵ See e.g., Study at 8, 10.

²⁶ For example, it could be that an A-CAM carrier serves bedroom community residential developments that abut a price cap carrier’s service area. Thus, while the residential densities of the two carriers may be quite similar, demand for BDS may be far more sparse in the A-CAM carrier’s area than in the price cap carrier’s area.

²⁷ Study at 3.

Considering that initiating a new data collection would be a time-consuming and burdensome exercise, AT&T supports use of the Form 477 data as a surrogate basis for a A-CAM BDS CMT.

CONCLUSION

For the foregoing reasons, AT&T requests that any BDS regulatory relief ordered by the Commission require that electing A-CAM carriers accept incentive regulation for all their study areas and for all of their interstate services within a study area; their initial BDS price cap rates be based on the Commission's prescribed rate-of-return of 9.75%; and any CMT be based on data that are specific to the BDS competitive conditions that exist in A-CAM carriers' serving areas.

Respectfully submitted,

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