Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)	WC Docket No. 15-247
	)	
Special Access Rates for Price Cap Local Exchange Carrier	)	WC Docket No. 05-25
	)	
AT&T Corp. Petition for Rulemaking to Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF INCOMPAS

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REPLY COMMENTS OF INCOMPAS

INCOMPAS respectfully submits these reply comments pursuant to the Commission's Further Notice of Proposed Rulemaking ("Further Notice") in the above referenced proceedings.[1]

Introduction and Summary

On June 27 INCOMPAS and Verizon proposed a broad framework for reform of the Commission's regulatory framework for Business Data Services.[2] The proposed framework

[1] *Business Data services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, rel. May 2, 2016 ("Order and Further Notice" or "Further Notice").

[2] Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch,

builds upon the principles proposed by Verizon and INCOMPAS in April[3] and represents a rare achievement that is a culmination of years of hard work and recent compromise from diverse interests—wireless providers, backhaul providers, competitive providers, incumbent providers, and international providers—working together to provide a balanced solution to an issue that has plagued the industry for numerous years. Today, Verizon and INCOMPAS set forth a supplemental proposal for implementing our suggested framework.[4] This latest proposal, continues to reflect a middle ground and would result in an administratively simple mechanism that can help guide the Commission towards pro-competitive reform. It is a balanced approach that reflects many sides of the policy debate, is supported by the record, and should be adopted by the Commission. In these comments we address the competitive test and price reform proposed by INCOMPAS and Verizon, the appropriate relationship between retail and wholesale pricing, and the unsupported claims by cable providers that their business data services are private carrier services.

The overall beneficial effects such reform would have on wireless and wireline investments; affordable, innovative service for business customers of all sizes and anchor institutions; and the economy in general are substantial and echoed by leading industry and community entities:

Secretary, FCC, WC Docket No. 16-143 and WC Docket No. 05-25 (filed Jun. 27, 2016) ("June 27 Letter").

[3] Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Apr. 7, 2016).

[4] Letter from Kathleen Grillo, Senior Vice President, Public Policy and Government Affairs, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed August 9, 2016) ("August 9 Letter")

Schools, Health & Libraries Broadband (SHLB) Coalition:
Schools, healthcare providers, libraries and other anchor institutions are the gateway to the community. These non-profit and governmental organizations increasingly provide essential Internet services to students, patients, patrons and underprivileged people. But their ability to meet these community needs depends on *being able to obtain affordable, high-capacity broadband connections* that often do not exist, especially in rural and non-competitive markets.[5]

Engine:
[It is] vital that we have policies in place that support this explosion of IoT devices when that number doubles and triples. . . . [T]h**e *n**eed for competitively-priced BDS is a key piece*** of powering this rapid technological revolution. Advancements in the wireless ecosystem have fueled innovations in everything from text messaging to the gig economy. No one can predict what the businesses of the future will look like, but with forward looking policies, we can ensure the startups of tomorrow will have the tools to grow, thrive, and create incredible new technologies.[6]

New America's Open Technology Group:
Consumer, school, and library advocates . . . have generally supported price caps in locations lacking multiple BDS providers. . . . Without BDS reform, data plans for smartphones will remain more expensive than they should be, the benefits of high-capacity internet connections will be unaffordable for too many start-ups and small firms, and consumers will have access to less innovative service offerings.[7]

Community Broadband Networks Initiative, at the Institute for Local Self-Reliance, and Next Century Cities:
The FCC has undergone a proceeding that can make an immediate difference, requiring that the big monopolies *charge reasonable rates for the connections* that libraries, schools, and even smaller Internet Service Providers need to keep their

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[5] John Windhausen, Jr. "Why we need affordable broadband for anchor institutions and communities," (July 11, 2016), http://about.bgov.com/blog/affordable-broadband-anchor-institutions-communities/. The SHLB Coalition, a non-profit advocacy organization that supports open, affordable, high-capacity broadband connections for anchor institutions and their surrounding communities.

[6] Evan Engstrom, "Investing in the Internet economy of tomorrow" (July 13, 2016), http://thehill.com/blogs/congress-blog/technology/287470-investing-in-the-internet-economy-of-tomorrow. Engine is nonprofit that supports the growth of technology entrepreneurship through economic research, policy analysis and advocacy on local and national issues.

[7] Michael Calabrese, "The FCC Needs to Make Broadband Affordable for Schools, Hospitals, and Businesses" (Aug. 8, 2016) http://www.slate.com/blogs/future_tense/2016/08/08/the_fcc_needs_to_make_broadband_affordable_for_schools_hospitals_and_businesses.html

> doors open. In many small communities, the only path out to the greater Internet is via the big telephone companies' networks.[8]
>
> *Wireless Providers and Associations*:
> The Commission [should] adopt policies to ensure reasonable access to high capacity Business Data Services ("BDS"), also known as special access services, including high bandwidth Ethernet services. *Access to high capacity BDS at reasonable prices*—as Chairman Wheeler says "fast and fair"[9]—is vital for wireless providers to meet the current demand for wireless broadband services and to build next generation mobile broadband networks. This access is critical throughout the country, including in rural areas.[10]
>
> *Public Knowledge*:
> [A] regulatory regime that continues to permit unjust and unreasonable rates to flourish, albeit to a lesser degree, will nonetheless continue to allow dominant providers to harm customers and consumers.[11]

And, of course, adding to the list above are the names of many individual INCOMPAS members – including traditional competitive carriers like EarthLink and BT Americas, as well as incumbent carriers like TDS and Windstream that also have competitive operations.

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[8] Christopher Mitchell, "Building a competitive broadband marketplace for rural American" (Aug., 4, 2016) http://thehill.com/blogs/congress-blog/economy-budget/290318-building-a-competitive-broadband-marketplace-for-rural

[9] Remarks of FCC Chairman Tom Wheeler INCOMPAS Policy Summit, April 11, 2016, Gaylord National Hotel & Convention Center, National Harbor, Md., available at: https://www.fcc.gov/document/remarks-chairman-wheeler-incompas-policy-summit

[10] Letter from Steven Berry, President and CEO, Competitive Carriers Assoc., Chip Pickering, CEO, INCOMPAS, Vonya McCann, Senior VP, Govt. Affairs, Sprint, Kathleen O'Brien Ham, Senior VP, Govt. Affairs, T-Mobile, and Grant Spellmeyer, VP, Fed. Affairs and Public Policy, U.S. Cellular to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Apr. 21, 2016).

[11] Letter of Phillip Berenbroick, Counsel, Government Affairs, Public Knowledge, WC Docket No. 16-143 *et al*, at p. 3, filed Jun. 16, 2016.

I. The Competition Test

As the Commission has recognized, the business data services markets remain highly concentrated as "costs and conditions exist in the [business data services] market with enough significance in any measure of a geographic market to deter rapid competitive entry or expansion, including high capital expenditures, large sunk costs, long lead times, scale economies, and cost disadvantages."[12] Despite this fact, the Commission previously relied on forbearance grants and price flexibility that was intended to spur new entry. Unfortunately, these policies have had the opposite result: Prices for business data services are now far in excess of those that would exist in a competitive milieu; to get some relief from the exorbitant prices, purchasers of the service have been forced into incumbent-offered plans that lock-up demand; economically viable builds by new entrants are curbed by the inability of new entrants to obtain reasonably priced access at locations of multi-location customers where the economics do not support building a new connection; and lack of competition has provided the incumbents little to no incentive to build or compete out-of-region or to sufficiently upgrade existing facilities.

As a result, while there has been significant innovation in the communications industry generally, the business data service markets—despite having a user base that should attract competition[13]—have been constrained to the point that more than 99 percent of commercial buildings have only one or two providers (the vast majority only one),[14] purchasers of business

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[12] *Further Notice* at ¶ 224.

[13] Wireless carriers, banks, enterprises, schools, libraries, hospitals, educational institutions, as well as small mom and pop stores, small start-up businesses, doctors' offices, medical clinics, etc., rely on these vital services in the operation of their services.

[14] *Further Notice* ¶ 220.

data services pay unreasonably high rates,[15] and most purchasers opt for lower-bandwidth services.[16] Prices for business data services that are well in excess of the prices that would exist in a competitive market have resulted in "deadweight loss" (*i.e.*, loss of consumption that should have taken place) and a considerable reduction in social welfare.[17] It is time for a new policy approach that truly spurs competition, innovation, and a virtuous cycle of investment, not only in infrastructure but also in the technology that rides over that infrastructure.

The competition test proposed by INCOMPAS and Verizon in the June 27 Letter, and further refined by the August 9 Letter, is a reasoned approach that recognizes the absence of existing competition in the vast majority of commercial locations and the significant economic challenges to new facilities-based deployment, while at the same time encouraging new entry, innovation and, where economically feasible, network deployment. Its three-tiered approach to a competitive market test not only ensures competitive options for customers at every bandwidth,

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[15] As evidence of unjust and unreasonable rates and market failure for a core enterprise broadband service (Ethernet), INCOMPAS (then COMPTEL) commissioned an analysis that compared Ethernet prices of AT&T and CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in the NECA Access Service FCC Tariff #5 (NECA Tariff #5). Both AT&T and CenturyLink are far larger and operate in more dense areas than the carriers concurring in NECA Tariff #5 and, accordingly, should enjoy significantly greater economies of scale and scope. Consequently, the cost experienced by AT&T and CenturyLink should be *less* than the NECA Tariff #5 carriers. Yet, prices charged by AT&T and CenturyLink were often greater *by an order of magnitude*. Comments of COMPTEL, WC Docket No. 05-25, at 10-11 and Attachment (filed Apr. 16, 2013). Recently, the Consumer Federation of American found that the overcharges resulting from the market failure in the Business Data Services markets have costs consumers over $150 billion over the past five years. Mark Cooper, "The Special Problem of Special Access: Consumer Overcharges and Corporate Excess Profits," at 33-35, Consumer Federation of America (Apr. 2016), http://consumerfed.org/wp-content/uploads/2016/04/4-16-The-Special-Problem-of-Special-Access.pdf.

[16] *Further Notice* ¶ 189.

[17] J. Scott Marcus, "Welfare Effects of Reductions in the Price of Leased Line Equivalents in the U.S.," at 8, WIK-Consult (July 2016) ("WIK-Consult Report").

it encourages providers to quickly improve their services (*e.g.*, to offer service at bandwidths above one Gbps). In particular, the following approach balances precision and commercial practicality with administrative ease for determining the likelihood, at the various levels of bandwidth, that a reasonably efficient competitor could deploy connections to serve customers, while encouraging facilities construction where economically feasible. Specifically,

- business data services at or below a specified threshold should be deemed non-competitive in all census blocks. The specified threshold should be no lower than 50 Mbps;[18]
- business data services above 1 Gbps should be deemed competitive; and
- business data services between the thresholds specified above should be subject to a competition test.

For this competitive market test, INCOMPAS and Verizon propose that the Commission should define a facilities-based provider as one that has an actual customer or connection in a census block served by facilities owned (not leased) by that provider. In measuring the number of such providers needed to demonstrate that a census block is competitive, we agreed that it would be reasonable for the Commission to measure the number of providers in either the census block or any adjacent census block.

INCOMPAS believes the number of providers necessary to deem a census block competitive is four. Requiring the presence of four competitors as a proxy for the presence of competition is consistent with sound principles of competition policy and decisions of the Commission.[19] Requiring four competitors with connections is also a conservative test, in that it

[18] As discussed further below, INCOMPAS believes the threshold should be 100 Mbps and below.

[19] *See, e.g.*, Comments of Birch, EarthLink, and Level 3, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 42-45 (filed June 28, 2016) ("Joint CLEC FNPRM Comments").

does not account for the myriad impediments documented in this proceeding that prevent competitive LECs from connecting a new customer even when they have previously established connections to customers in the relevant area. For purposes of applying this test, the ILEC, including its affiliates, should be deemed to be a single facilities-based provider in all census blocks within the ILEC's service area, and a provider only using UNEs or offering only best-efforts services should not.

The Commission should initially use the recent data collection to determine whether a census block is competitive for business data services between the thresholds specified above, and schedule periodic updates of these data. For business data services with bandwidths of 100 Mbps or below, the Commission should find that there is no meaningful competition, and therefore that no further test for the presence of competition need be applied. Record evidence from competitive LECs demonstrates that deploying last-mile connections to provide such services is almost never economically justified. For example, TDS CLEC states that it is unable to "build economically to connect customers to its network at 100 Mbps and below,"[20] further noting that "a fiber lateral build to a customer located 100 to 1,000 feet and beyond from the nearest splice point is not competitive at speeds ranging from 10 to 100 Mbps because TDS CLEC could not recover its required revenue and compete with lower RBOC retail rates."[21] Similarly, in Windstream's experience "a single 100 Mbps circuit almost never generates the amount of revenue required to justify deployment of a new last-mile connection by its competitive carrier operations, even when Windstream has already deployed fiber feeder in the

[20] Comments of TDS Metrocom, LLC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 11 (filed June 28, 2016) ("TDS FNPRM Comments").

[21] Third Declaration of Matthew J. Loch, ¶ 13 (Feb. 19, 2016), attached to Reply Comments of TDS Metrocom, LLC, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016).

customer's vicinity."[22] Level 3 has explained that it cannot economically justify deployment of new fiber connections at capacities of 100 Mbps or less to most customer locations, stating that "[t]he distance between a customer location and a splice point on Level 3's network usually exceeds the construction feasibility limits for bandwidths of 100 Mbps and below."[23]

II. Price Reform

Competitive reform in the business data services market must include meaningful price reductions in order to promote a "virtuous cycle" of investment and development, because—as the Commission has found—competition spurs innovations by network providers, which drive end-user demand for more advanced broadband services, which in turn stimulates competition among providers to further invest in their broadband networks and the services offered over those networks.[24] In contrast, if prices are distorted, "social welfare is reduced. Market power is such a distortion, which leads not only to higher prices, but also to lower consumption as a result. This is due to the *price elasticity of demand (PED)*, the tendency of buyers to increase (or reduce) consumption in response to a reduction (or increase) in price."[25]

INCOMPAS recently submitted into the record a study that demonstrates that price reductions for business data services would have "spill-over effects that multiply the benefits to the broader society."[26] In particular, the WIK-Consult Report concludes that, in addition to

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[22] Declaration of David Schirack and Mike Baer, ¶ 16 (June 28, 2016), attached to Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 16-143 & 05-25, RM-10593 (filed June 28, 2016).

[23] Declaration of John Merriman on Behalf of Level 3 Communications, LLC, ¶ 6 (June 27, 2016), attached to Joint CLEC FNPRM Comments.

[24] *See Preserving the Open Internet, et al*., Report and Order, 25 FCC Rcd. 17905, ¶ 14 (WCB 2010).

[25] WIK-Consult Report at 9.

[26] *Id.* at 8.

restoring consumer surplus appropriated by incumbent LECs going forward, regulatory reductions in prices for business data services to restore competitive levels would result in a "reduction in deadweight loss, where increased consumption in response to reducing inflated prices generates societal benefits."[27] The WIK-Consult Report looks at the 2003 analysis by Rappoport, Taylor, *et al.* on the simulated impact of reducing the incumbents' business data services prices by a significant percentage.[28] The downstream effect of this price reduction on all industry sectors was quantified by means of a macroeconomic model. The conclusion of this evaluation is as follows:

> If this price reduction had gone into effect at the start of 2003, they estimate that it would have had the effect of adding 132,000 jobs and $14.5 billion in real Gross Domestic Product (GDP) to the U.S. economy. This large predicted response is an important and perhaps surprising finding. The annual increase in real GDP of $14.5 billion is *2.6 times as great* as the direct reduction in prices of $5.6 billion, which is to say that the spill-over effects into the broader economy are substantial. In other words, the importance of these services extends beyond the telecommunications industry proper, and is moreover subject to significant *multiplier effects*.[29]

It is often erroneously assumed that a reduction in price translates into a reduction in gross revenue for the service provider, but valuable welfare effects need not come at the expense of incumbent providers. As the WIK-Consult Report explains, depending on the PED, a reduction in price is likely to have little effect on the revenues of the provider and may even lead to an increase in revenue. The report concludes by explaining:

> [t]he [PED] for business data services is substantial; consequently, any price reductions would tend to be offset by increased volumes. The [PED] for these services is somewhere between -1.0 and -2.0, with the balance of evidence

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[27] *Id*. at 8.

[28] *Id.* at 10 (citing Paul N. Rappoport, Lester D. Taylor, *et al*., "Macroeconomic Benefits from a Reduction in Special Access Prices" (2003)).

[29] *Id*.

> suggesting that it is significantly in excess of -1.0. At a relatively unlikely PED of -1.0, reductions in price of up to 25% reduce revenues by at most slightly over 6%; under much more realistic assumptions, these reductions in price actually increase gross revenue.[30]

Indeed, the fact that business data services prices can be substantially reduced and still exceed incremental costs is supported by CenturyLink senior leadership. Recently its CFO characterized these services as "high margin" for the incumbent.[31] And according to CenturyLink's CEO, CenturyLink would see a benefit in cost savings in the form of lower prices when purchasing the business data services outside its incumbent region.[32]

Moreover, a regression analysis submitted by Dr. Jonathan Baker shows that "prices of high-bandwidth connections are likely substantially in excess of competitive levels" and that "the presence of four or more in-building and four or more in-block high-bandwidth rivals lowers the prices of high bandwidth connections by 43 percent according to one estimate and by 25 percent according to another."[33] Price reductions of that magnitude in response to competitive pressure support a reasonable inference that the margins for such services are sufficiently large to absorb such price reductions and yet remain above incremental costs, perhaps by a significant amount.

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[30] *Id*. at 26.

[31] In describing net exposure from FCC reform between business data services (referred to as special access in the transcript) revenue versus any costs for network access, R. Stewart Ewing, CenturyLink's Chief Financial Officer, states that "it's wholesale revenue basically, and its high margins. . . . So there aren't a lot of continuing incremental expenses associated with providing that service. It's mostly the investment that was required to build a service out. There's some maintenance costs, but it's probably pretty minimal." CenturyLink, Inc. FQ1 2016 Earnings Call Transcript at 11, http://ir.centurylink.com/Cache/1500085040.PDF?Y=&O=PDF&D=&fid=1500085040&T=&iid=4057179.

[32] *Id.* at 12.

[33] Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, ¶ 3 (June 28, 2016), attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (originally filed June 28, 2016) (refiled as revised Jul. 14, 2016).

This is especially the case for wholesale inputs, given (as discussed further below) incumbents even are pricing capacity for wholesale inputs above rates for retail service solutions. Meaningful price reform for both TDM- and packet-based services is needed to accomplish the Commission's objective of transforming this critical market and realizing the ensuing economic benefits.

The Verizon/INCOMPAS June 27 Letter and August 9 Letter propose price reforms for both TDM- and packet-based services. Price caps should apply to TDM-based business data services in areas served by price-cap LECs and, jointly with Verizon, we propose a benchmark for Ethernet services deemed non-competitive. As proposed, new entrants would not be subject to the benchmark at least until the FCC reassesses market competition in approximately three years. As INCOMPAS has explained, the current data supports application of the benchmarks to the incumbent LECs. The Commission should assess the further application to other entities periodically.

In accordance with the competitive test described above, TDM-based DS1 and DS3 services would be deemed non-competitive as they are lower than 50 Mbps. As a result, price caps should apply to TDM-based business data services in areas served by price-cap LECs, including areas currently subject to Phase II pricing flexibility. Prices in Phase II areas should be returned to price cap levels before any further adjustment. There should be a one-time adjustment to rates for these services to account for the freeze in rates under the *CALLS Order*. We propose that the Commission apply this one-time rate adjustment in two steps. In the first year, we propose the Commission reduce the Price Cap Index ("PCI") by 10 percent with an additional rate reduction based on an X-factor of 4.4 percent minus inflation. In the second year, we propose an additional five percent reduction in the PCI, plus an additional rate adjustment

based on an X-factor of 4.4 percent minus inflation. This two-step one-time adjustment is reasonable and supported by the *Further Notice*.[34]

The record also supports significant price reductions for Ethernet services deemed non-competitive at all bandwidth levels.[35] In the June 27 Letter, Verizon and INCOMPAS supported a benchmark approach for packet-based business data services deemed non-competitive. Today, we proposed the following administratively manageable methodology for establishing these benchmarks for services offered in price-cap carrier served areas:[36]

- The benchmark for the switched Ethernet service closest in quality to TDM-based DS1 special access that each price-cap carrier currently offers at its lowest speed above 1.5 Mbps—typically 2 Mbps or 3 Mbps—for a three-year term would equal the carrier's tariffed, publicly available DS1 special access circuit rate for a three-year term, after applying the full one-time adjustment and annual X-Factor minus inflation adjustment. The DS1 circuit rate would include the rates for one channel termination, one fixed mile, five variable miles and 1/20th of a DS3/DS1 multiplexing arrangement. This and all other Ethernet benchmarks cover charges for the carrier handoff point to the end user premises.
- Once the lowest-speed benchmarks are established, the benchmarks for higher Ethernet speeds would be derived by applying the price-cap carrier's respective relationship of rates for higher-speed Ethernet services to the lowest-speed Ethernet services. The Ethernet rate relationship would be developed using the rates in each price-cap carrier's publicly available product guide. A carrier that does not have a publicly available product guide would file with the Commission rate information necessary to establish the benchmarks. For carriers for which the necessary information is not available, the Commission could develop a benchmark using the average of the available information. Services with a different quality of service should reflect a reasonable relationship to the benchmark.

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[34] *See Further Notice* ¶¶ 407 tbl. 7, 410 tbl. 8, 411 tbl. 9. If anything, this represents a low adjustment. *See*, Comments of Sprint Corporation, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, at 50-53 (filed June 28, 2016).

[35] *See* Declaration of Jonathan B. Baker on Competition and Market Power in the Provision of Business Data Services, ¶¶ 10-19 and ¶¶ 20-22, attached to Letter from Jonathan B. Baker to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593 (filed June 28, 2016) (refiled July 14, 2016).

[36] The parties have not yet agreed as to the appropriate relationship between wholesale and retail pricing.

- Price-cap carriers would post on their websites schedules of the benchmarks.
- The benchmarks would be reduced annually by 4.4 percent minus inflation.
- New entrants would not be subject to the benchmark at least until the FCC reassesses market competition in approximately three years.

The parties are working to further define the Ethernet service level closest to TDM-based DS1 special access and related issues, but agree it should be associated with one of the highest levels of business data services quality of service a provider offers. We agree, the above framework should be implemented in a manner that results in actual price reductions from current levels (i.e., not merely "paper gains") for both TDM and Ethernet services, including those purchased through discount plans, and that prices for those services should continue to decline over time. We proposed that the existence of these benchmarks would not justify increased rates. The benchmarks should apply in a neutral manner, and we propose that the Commission should make clear that Ethernet services provided to wireless providers are subject to this framework, including the benchmarks.

III. Commission Action Should Ensure That Wholesale Last-Mile Inputs Are Priced Below Comparable Capacity Retail Offerings.

The record in this proceeding demonstrates that, in addition to any other remedies, the Commission must establish and enforce a backstop that wholesale business data services rates for last-mile inputs provided by a market leader must be lower than the market leader's lowest retail rates for the same capacity by an amount not less than the incremental cost the market leader would have incurred to provide the final retail product, but did not incur to provision the wholesale product.[37] The record shows very low margins in the provision of enterprise services

[37] *See Further Notice* ¶¶ 442-46. *See also* Declaration of Robert D. Willig ¶¶ 4, 8, 21 ("Willig Declaration"), attached as Attachment B to Reply Comments of Windstream Services, LLC, WC Docket No. 05-25 & 16-143, RM-10593 (filed Aug. 9, 2016) ("Windstream Reply

by competitive LECs,[38] and off-net access purchased from incumbents can comprise by far the largest portion of total expenses.[39] Thus, competitive carriers are especially susceptible to a price squeeze, whereby incumbents use their last-mile market power to "strategically manipulate the price of their direct competitors' wholesale inputs to prevent competition in the downstream retail market."[40]

Dr. Robert D. Willig observes in his declaration that, according to economic theory, market leaders in the business data services marketplace—whether in a monopoly or duopoly—can have the incentive to engage in anticompetitive behavior to eliminate downstream competitors.[41] When this occurs, market leaders may try to eliminate downstream competition, either by merging with competitors, or by raising the wholesale rates for critical inputs to a level

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Comments") (noting that the rates that market leaders in non-competitive markets charge their wholesale carrier customers for critical inputs, such as last-mile connectivity to customer locations, should approximate the implicit rates that the market leaders charge their own retail customers for the same inputs at a wholesale level).

[38] *See, e.g.*, Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, WC Docket No. 16-143, at 1 (July 5, 2016) (noting, from its experience as an ILEC and a CLEC, that "overall margins are significantly higher for ILEC operations as compared with CLEC operations.").

[39] Windstream provided information about its margins in a declaration accompanying its June 28, 2016 Comments. *See* Declaration of David Schirack and Mike Baer, Attachment A to Windstream Comments, ¶ 3 ("Schirack/Baer Declaration"), appended as Attachment A to Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, WC Docket Nos. 05-25, 16-143, RM-10593 (filed June 28, 2016).

[40] *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 63 (2005), aff'd sub nom. Covad Commc'ns v. FCC, 450 F.3d 528 (D.C. Cir. 2006); *see also, e.g., Qwest Forbearance Order* ¶ 34 (noting that a firm with market power in the wholesale market for necessary inputs has the "incentive and ability" to "raise rivals' costs"); *Technology Transitions Order* ¶ 167 ("[D]epending on the competitive state of various markets, there may be an incentive for the incumbent to charge higher rates at the wholesale level in order to prevent or disadvantage competition at the retail level.").

[41] *See* Willig Declaration ¶¶ 13-17.

such that the input costs of its downstream rival are higher than the downstream retail prices charged by the market leader for the finished service.[42] This anticompetitive behavior squeezes out competitors that are more efficient than the market leaders themselves at providing the finished communications solutions that are used by business, government, and nonprofit customers.[43]

Indeed, multiple commenters find that incumbents now are executing such price squeezes on a frequent basis in the business data services marketplace. As Sprint noted in its comments, "the record is replete with evidence that incumbent LECs price essential wholesale inputs for retail BDS services, particularly the last-mile transmission link, are higher than the carrier's own retail prices as a 'means for raising rivals' costs and discriminating against competitors without outright denying them access to the input.'"[44] TDS remarks that "[a]lthough the partner carrier's portion of the network facilities is only a part of the whole service, in TDS CLEC's experience, when the RBOC is the partner carrier, the RBOC charges more for its "piece" of the service than it charges its retail customer for the "whole" end-to-end service."[45] Level 3 et al. note that "a leading competitor is most likely to engage in this conduct by charging high prices for standalone Business Data Services (which are usually purchased by wholesale customers) and low prices for bundled service offerings (which are usually purchased by retail customers)."[46]

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[42] *See id.* ¶¶ 6.

[43] *See id*.

[44] Sprint Comments at 73 (*citing* Windstream Dedicated Services Comments at 63).

[45] TDS Comments at 20. *See also* Windstream Comments at 41 ("Windstream is seeing situations in which the ILEC's retail price is below the wholesale rate it charges to Windstream merely for the last-mile component of the same capacity and type of connection.").

[46] Birch et al. Comments at 72.

This is entirely contrary to what would occur in a competitive and efficient marketplace. As Windstream notes, "when subject to meaningful competition, a typical supplier would charge its wholesale customers less per unit than its retail customers. This is because the supplier incurs fewer costs on a wholesale basis (e.g., costs for sales, product development, marketing, customer support, billing, and uncollectibles are avoided or greatly reduced), and the supplier commonly is assured reduced churn and greater revenue certainty by wholesale customers' committing to larger volumes and longer purchase terms."[47] TDS adds that "offering wholesale customers a discount off retail rates is standard practice within the telecommunications industry (and others)," and that TDS CLEC "routinely provides a lower, discounted price to wholesale (carrier) customers . . . in consideration for the responsibilities and costs assumed by the wholesale (carrier) customer," but that the largest ILECs do not follow this practice.[48] Moreover, as Dr. Willig explains in his declaration, offering wholesale discounts for critical inputs "prevents the inefficient outcome in which the bottleneck owner prices its critical input such that the final downstream product sales are diverted away from a more efficient downstream competition, e.g., a rival downstream competitor that offers a service to the customer that better meets the preferences, needs, or demands of the customer."[49]

The Act requires carriers to engage in just and reasonable and nondiscriminatory practices and pricing and not to engage in unjust or unreasonable discrimination.[50] The

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[47] Windstream Comments at 39. *See also* Sprint Comments at 74.

[48] TDS Comments at 21.

[49] Willig Declaration ¶ 20.

[50] *See* 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . ."); 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations,

Commission should reinforce these provisions by making clear that the failure of a market leader to offer a meaningful wholesale discount in response to standard avoided costs, in addition to discounts for term and volume commitments, is presumptively unreasonable.

This is necessary to ensure most business data service customers have a meaningful choice in communications solutions providers. Viable leased last-mile access is critical to enabling robust competition, given the lack competition and barriers to deployment to most customer locations.[51] If a wholesale/retail backstop is implemented effectively, according to former FCC Chief Economist Jonathan Baker, it will enhance competition because the incumbent provider will be less able to impose "supracompetitive retail prices" at these locations and thereby "prevent a CLEC from obtaining a 'toehold' in the retail market that it might use in order to enter the wholesale market."[52] Dr. Willig also observes that unlocked competition downstream would spur all providers to invest to deliver more efficient and better finished retail communications solutions, as well as to invest in more advanced facilities "that will improve a firm's competitive advantage over retail sales."[53]

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facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device . . . .")

[51] *See, e.g.*, Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶ 44, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 14, 2016) (noting that the FCC's data show that 77.3 percent of buildings nationwide have one in-building provider and almost all of the rest (20.8 percent) have only two in-building providers). *See also* Birch et al. Comments at 19-20 (noting "significant barriers to entry, comprehensively documented in this proceeding, have prevented competitive LECs and cable companies from deploying connections to new locations.").

[52] *See* Sprint Comments at 75-76 (*quoting* Reply Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services, Attachment B to Letter from Jonathan Baker, Consultant, Level 3, Windstream, and XO, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, ¶¶ 15- 16 (filed Apr. 14, 2016).

[53] Willig Declaration ¶ 26.

In particular, as Windstream discusses, the Parity Pricing Rule—developed in the scenario of a market power in the production of a bottleneck input needed by all producers of a final product—requires that, to promote competition and efficiency in the market, the price of the bottleneck input must be lower than the retail price.[54] Specifically, the amount of the wholesale discount should be no less than the costs that the market leader does not incur as a result of selling the critical input on a wholesale basis to the carrier customer instead of selling the finished communication solution on a retail basis.[55] These costs include the costs associated with providing the services that are part of the retail solution but are not (or not to the same extent) part of the wholesale critical input, such as the sales commissions and sales-related incentive compensation, for designing the communications solution and customer network, and for middle mile facilities not used when the wholesale purchaser provides the middle mile transport.[56]

To implement the parity pricing principle effectively and with a minimum of complexity, the Commission should, as Dr. Willig recommends, "publicly identify the relevant information and best evidence for assessing the levels of prices for the bottleneck services that are implicitly charged by the ILECs to their own retail customers, and on that basis make available to wholesale customers reasonable estimates of the applicable parity-based wholesale prices."[57] As Windstream has previously suggested, one reasonable estimate for the discount to apply to retail

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[54] Windstream Comments at 39-40.

[55] *See id.*

[56] *See id.* ¶ 29; Schirack/Baer Declaration ¶ 8; Windstream Declaration ¶ 21.

[57] Willig Declaration ¶ 42.

rates to reach the parity-based wholesale price, at least with respect to avoided sales costs, is the range of percentages charged by third-party sales agents.[58]

Disputes will be reduced if the Commission establishes clear expectations regarding appropriate discount levels. And to the extent that disputes still occur, competitive providers cannot rely solely on filing complaints under Section 208, as AT&T suggests,[59] to seek a determination in every instance that a market leader has failed to provide an adequate wholesale discount. Even if a competitive provider prevails on any given complaint about wholesale rates, the customer would long ago have chosen another provider during the pendency of the complaint.[60] Thus, as Dr. Willig concludes, "it is plain that sole reliance on case-by-case utilization of Section 208 complaint procedures would not rescue customers from their loss of competitive supply options."[61]

IV. Cable-Provided Business Data Service Are Common Carrier Service.

Under the Communications Act, "telecommunications carriers" are subject to "common carrier" regulation to the extent that they are engaged in providing a "telecommunications service."[62] A "telecommunications service" means the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[63] Thus, under the Act, any provider that offers

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[58] *See* Windstream Comments at 43-44.

[59] *See* AT&T Comments at 9 n.20.

[60] *See* Declaration of Christopher Nein ¶ 6, appended as Attachment D to Windstream Reply Comments; Willig Declaration ¶ 34-35.

[61] Willig Declaration ¶ 34.

[62] 47 U.S.C. § 153(51).

[63] 47 U.S.C. § 153(53).

telecommunications for a fee "directly to the public" is a common carrier.[64] This is the "statutory test" for common carriage.[65]

The courts have offered additional guidance on the distinction between common and private carriage. In *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*") and *National Ass'n of Regulatory Utility Commissioners v. FCC*, 530 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*"), the D.C. Circuit established a common-law test (the "*NARUC* test") for determining whether a telecommunications provider offers a common carrier service. Under the *NARUC* test, telecommunications providers that "make capacity available to the public indifferently" must be regulated as common carriers.[66] The *NARUC* test further recognizes "the indiscriminate offering of service on generally applicable terms" as the "traditional mark" of a common carrier service.[67]

To determine whether a specific telecommunications carrier is engaged in common carriage, the Commission may apply either the statutory or the common law test.[68] Because the statutory definition of the term "telecommunications service" is ambiguous, the "Commission's interpretation and application of the term 'common carrier' warrants *Chevron* deference."[69] Moreover, because the Commission has "relaxed the duties of common carriers in certain

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[64] *United States Telecom Ass'n v. FCC*, No. 15-1063, 2016 WL 3251234 at *18 (D.C. Cir. June 14, 2016).

[65] *Id.*

[66] *Id.* (internal quotation marks omitted).

[67] *Cellco P'ship v. FCC*, 700 F.3d 534, 546 (D.C. Cir. 2012) (internal quotation marks and alterations omitted).

[68] *United States Telecom Ass'n*, 2016 WL 3251234 at *18.

[69] *Cellco P'ship*, 700 F.3d at 544 (citing *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1331-32 (D.C. Cir. 2002)).

respects,"[70] including by allowing them to sell services based on individually negotiated agreements,[71] "the line between common carriers and private carriers . . . has blurred."[72] As a result, "common carriage is not all or nothing—there is a gray area," or a "space between *per se* common carriage and *per se* private carriage," where the Commission's "determination . . . warrants deference."[73] Accordingly, under both tests, the "Commission has significant latitude to determine the bounds of common carriage in particular cases."[74]

The cable companies that filed comments in response to the *Further Notice* concede that at least a significant number of cable business data services offerings amount to common carrier services.[75] They could not reasonably dispute this fact. Cable operators provide business data services service to businesses "of all sizes" across numerous industry verticals[76] at more than

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[70] *Cellco P'ship*, 700 F.3d at 546.

[71] *See, e.g.*, *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003); *Iowa Telecommc'ns Servs. v. Iowa Util. Bd.*, 563 F.3d 743, 750 (8th Cir. 2009); *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14,221, 14,258 ¶ 69 (1999) (allowing incumbent LECs to offer BDS pursuant to individually negotiated contract tariffs in certain markets); *Hyperion Telecommunications, Inc. Petition Requesting Forbearance et al.*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd. 8596, 8609 ¶ 27 (1997) (permissively detariffing competitive access services).

[72] *Cellco P'ship*, 700 F.3d at 546.

[73] *Id.* at 547.

[74] *Id.* at 547.

[75] *See, e.g.*, Comments of Comcast Corporation at 15, WC Docket Nos. 16-143, 15-247, and RM-10593 (filed June 28, 2016) ("Comcast Comments") (arguing that some, but not all, cable BDS is private carriage, and focusing specifically on BDS sold to carrier and large multi-location enterprise customers); Comments of the National Cable & Telecommunications Association at 11, WC Docket Nos. 16-143 and 05-25 (filed June 28, 2016) ("NCTA Comments") (arguing against a "blanket assertion" that "every competitive BDS offering is a common carrier service"); Comments of Charter Communications at 2, WC Docket Nos. 16-143, 15-247, 05-25, and RM-10593 (filed June 28, 2016) ("Charter Comments") (arguing that "[m]any BDS," and specifically BDS offered to "large enterprise customers," are private carrier services).

[76] Comcast Comments at 10 ("Comcast offers data services to business customers of all sizes"); Declaration of John W. Mayo at ¶ 36 n.27, attached to Comcast Comments at Exhibit B; *see also* Declaration of Jeremy Bye and Larry Steelman at ¶ 7 ("Bye and Steelman Decl.") (Cox services

100,000 fiber-connected locations.[77] Thus, in light of cable operators' "routine[]" and "wide[]" marketing of business data services,[78] they plainly offer business data services "directly to the public" and meet the statutory test for common carriage.

Because cable operators sell business data services to businesses of all types and sizes using "generally applicable" performance, network architecture, and pricing packages, their business data services offerings also meet the common law test for common carriage. As the cable operators readily explain, they offer business data services using standard packages defined by specific service capacities, performance levels, network topologies, and even pricing. For example, Comcast uses "standard 'rack' rates" for retail Ethernet business data services, provides these services at specified capacity "increments" and quality of "service tiers (Basic, Priority, and Premium)," and offers customers their selection of private line, virtual private line, or multipoint-to-multipoint service.[79] Similarly, Charter's business services affiliate, Spectrum

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"business 'verticals[]' including healthcare providers, schools, financial institutions, and state and local governments'"), attached to Comments of Cox Communications, Inc. at Exhibit 1, WC Docket Nos. 16-143 and 05-25 (filed June 28, 2016) ("Cox Comments"); Letter from Matthew A. Brill, Counsel for Comcast Corporation, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, FCC, at 2-3, WC Docket No. 05-25 (filed Mar. 25, 2016) ("Comcast March 25, 2016 Ex Parte") (discussing sales of "business class data services [to] . . . various types of customers," including "small and medium businesses," "mid-market businesses," and "national and enterprise businesses"); Letter from Matthew A. Brill, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket No. 05-25 (filed Mar. 3, 2016) ("TWC March 3, 2016 Ex Parte") ("TWC's commercial sales teams are focused on customer segments (very small, small, mid-market, enterprise/verticals, national accounts, wireless carriers, and wholesale) . . . .").

[77] Comcast Comments at 21 (discussing Dr. Rysman's finding that cable companies reach "about half" of the total 277,000 locations with a BDS connection from a competitive provider). Cable HFC is not in the same product market as business data services, but cable companies serve even more businesses at more locations via this product.

[78] *Protecting & Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5763 ¶ 363 (2015) ("*2015 Open Internet Order*")

[79] Comcast Comments at 11-13.

Enterprise, markets business data services to the public with three available "levels of network performance"—"Premier," "Express," or "Standard"—using one of three established network configurations—Ethernet Private Line, Ethernet Virtual Private Line, or Ethernet Private LAN.[80]

Nevertheless, some cable companies attempt to evade proper regulatory treatment by claiming that the nature of the business data services buyer somehow converts a common carrier service into private carriage. Specifically, Comcast claims that "cellular backhaul service" and other business data services sold to carrier customers are private carrier services.[81] Comcast further argues that some retail sales to large, multiple location businesses amount to private carriage.[82] Charter similarly asserts that "enterprise-level" business data services are private carrier services.

This argument has no merit. In support of their claimed status as private carriers, the cable companies contend that they make cost-benefit determinations before deciding whether to extend facilities to wholesale and enterprise customers,[83] and Comcast ominously asserts that it "chooses" the carrier customers "with which" it will deal (without explaining the basis for this

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[80] SPECTRUM BUSINESS, https://business.spectrum.com/content/business-ethernet, (last visited July 11, 2016).

[81] Comcast Comments at 15-17; Declaration of David Allen at ¶¶ 3-4 ("Allen Decl."), attached to Comcast Comments at Exhibit E.

[82] Comcast Comments at 16-17 (Comcast EDI and Ethernet Transport services are private carrier services); *see also* Declaration of John Guillaume at ¶ 4, attached to Comcast Comments at Exhibit C (explaining that EDI and Ethernet transport services are "typically targeted towards businesses with at least 50 employees [and] multiple locations").

[83] Comcast Comments at 16 (Comcast "must make an initial determination whether investing to extend facilities to a potential customer meets Comcast's investment and business objectives"); *see also id.* at 42, 65; Declaration of Robert Victor at ¶ 3, attached to Comcast Comments at Exhibit G (Comcast applies "a financial rate-of-return model to determine whether extending facilities would be economically justified"); NCTA Comments at 11.

decision, thereby raising the question of whether this is a tactic to undermine competition).[84] The cable companies also claim that they individually negotiate service agreements with wholesale and enterprise customers,[85] and can price business data services at a discount from "standard 'rack' rates . . . depend[ing] on term, volume, and total commitment."[86] On these grounds, the cable operators ask the Commission to conclude they "do[] not hold [themselves] out indifferently to the public or any class of customers," with the enormous breadth of their business data services offerings notwithstanding.[87]

None of the practices identified by the cable companies is sufficient to establish their status as private carriers. As an initial matter, to qualify as a common carrier, a cable provider need not make business data services "available to the entire public," and "may . . . turn[] away" business "either because it is not of the type normally accepted or because the carrier's capacity has been exhausted."[88] Thus, the cable operators' unremarkable practice of extending facilities only where the revenue justifies the cost—a practice that is hardly unique to carrier or enterprise-level sales[89] and is the norm among all business data services providers[90]—is insufficient to convert their common carrier services into private carriage.

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[84] Comcast Comments at 16; *see also* Allen Decl. at ¶ 13.

[85] *See* Comcast Comments at 15-17; Charter Comments at 18; NCTA Comments at 11-12; Declaration of Jeffrey Finkelstein at ¶ 11, attached to Cox Comments at Exhibit 3.

[86] Comcast Comments at 16-17.

[87] *Id.* at 15.

[88] *NARUC I*, 525 F.2d at 641.

[89] TWC March 3, 2016 Ex Parte (describing "build analysis" for fiber and HFC business services); Comcast March 25, 2016 Ex Parte (same).

[90] *See Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 2016 WL 2719636, at ¶¶ 211-212 (rel. May 2, 2016) (discussing the practices of competitive and incumbent carriers alike to perform revenue

Moreover, Comcast's practice of selectively "choos[ing]"[91] which carrier customers to serve, while generally providing business data services to a large number and wide range of business customers, is proof of unreasonable discrimination—not private carriage. Cable operators cannot, on the one hand, sell business data services to hundreds of thousands of business customers of all types, and, on the other, deny service to a limited set of retail competitors in order to avoid common carrier regulation. As an initial matter, the limited denials of service simply would not "outweigh the evidence of common carriage recited above."[92] More importantly, however, Comcast's position, if adopted, would allow telecommunications providers to gain an exemption from common carrier regulation by engaging in the very kind of strategic denials of service that common carrier regulation specifically prohibits. It would also undermine longstanding Commission precedent[93]—some of which the cable industry supported creating[94]—that clarifies that common carrier services "include wholesale services to other carriers."[95] No new cable interpretation of "common carrier," which produces these multiple

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or rate-of-return analyses in deciding whether to build out to a customer location); *see generally* Responses to Question II.A.8 in the *2015 Collection*.

[91] Comcast Comments at 16.

[92] *Iowa Telecommc'ns Servs., Inc.*, 563 F.3d at 750.

[93] *See, e.g.*, *Implementation of the Non-Accounting Safeguards*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21,905 at 22,032-33, 22,033-34 ¶¶ 263, 265 (1996) ("telecommunications services are common carrier services, which include wholesale services to other carriers"); *Implementation of the Non-Accounting Safeguards*, Second Order on Reconsideration, 12 FCC Rcd. 8653 at 8670-71 ¶ 33 (1997) (there is "no basis in the statute, legislative history, or FCC precedent for finding the reference to 'the public' in the statutory definition to be intended to exclude wholesale telecommunications services"); *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776 at 9177-8 ¶ 785 (1997) ("Common carrier services include services offered to other carriers").

[94] *See Time Warner Cable Request for Declaratory Ruling*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, 3518 ¶ 12 (2007) ("[T]he definition of 'telecommunications services' long has been held to include both retail and wholesale services under Commission precedent.")

[95] *Id.*

perverse effects, could be required under *Chevron*. To the contrary, it would be unreasonable on its face.

Finally, the cable companies' practice of individually negotiating large contracts with carrier or multi-location enterprise customers, and offering varying discounts off of standard rack rates that depend on volume and term, is entirely consistent with common carriage. It is well-settled that in the great many cases where telecommunications services are sold without tariffs, common carriers may—and often must—individually negotiate rates, terms, and conditions for service.[96] For that very reason, case law on the distinction between private and common carriage directly contradicts the positions peddled by the cable companies in this proceeding. For example, in *Iowa Telecommunications Services*, the Eighth Circuit held that a carrier's provision of service on unpublished terms that vary from customer to customer was not enough to establish its status as a private carrier.[97] Moreover, in *Orloff*, the D.C. Circuit expressly rejected a petitioner's argument that "[s]etting rates by negotiation . . . is inconsistent with . . . designation" as a common carrier, and permitted a common carrier to offer sales concessions from standard rack rates to some but not all customers, so long as it did so reasonably.[98] Most recently, in *United States Telecom Ass'n*, the D.C. Circuit upheld the Commission's determination that "individualization in pricing or terms is not a barrier to finding that a service is a telecommunications service"—as well as the Commission's express "disavow[al]" of any "prior precedents [that] suggest otherwise."[99]

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[96] *See, e.g.*, *id.*; *Cellco P'ship*, 700 F.3d at 548; *Orloff*, 352 F.3d at 419.

[97] *Iowa Telecommc'ns Servs.*, 563 F.3d at 750.

[98] *Orloff*, 352 F.3d at 420.

[99] *2015 Open Internet Order*, 30 FCC Rcd. at 5763 ¶ 363 & ¶ 363 n.1012; *see also United States Telecom Ass'n*, 2016 WL 3251234 at *18 (finding that the FCC's application of the statutory test for common carriage in paragraph 363 of the *2015 Open Internet Order* was reasonable).

These judicial determinations not only recognize the reality of the modern telecommunications marketplace, but are also faithful to the text of the Act. Indeed, the statute merely requires a provider to offer telecommunications "for a fee directly to the public"[100] in order to be subject to common carrier regulation, and imposes no requirement that all customers receive service on "off-the-rack terms."[101] As the D.C. Circuit recently clarified, the Commission may rest its determination of a carrier's regulatory status on the basis of this statutory definition alone.[102] Moreover, by acknowledging that common carriers can individually negotiate service agreements, the courts have ensured that Section 251(a) still carries force.[103] Section 251(a) requires all "telecommunications carriers" to interconnect directly or indirectly with all other telecommunications carriers. Interconnection agreements—especially among non-incumbents—are individually negotiated between carriers, at least when not tariffed. Thus, if individual negotiation between carriers were sufficient to transform common carriage transmission into private carriage, as the cable industry argues, carriers would become effectively exempt from interconnection obligations for all services provided to other carriers. As a result, Section 251(a) would become a dead letter—in direct contravention of "the familiar principle of statutory interpretation which requires construction so that no provision is rendered inoperative or superfluous, void or insignificant."[104]

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[100] 47 U.S.C. § 153(53).

[101] Charter Comments at 18.

[102] *United States Telecom Ass'n*, 2016 WL 3251234 at *18.

[103] 47 U.S.C. § 251(a).

[104] *C.F. Commc'ns Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (internal quotation marks omitted).

Given the overwhelming evidence that cable companies supply business data services on a common carriage basis, and the cable industry's failure to identify sale practices that command a different regulatory classification, the Commission must reject the cable industry's unsupported claims.

Conclusion

INCOMPAS believes that the Commission has before it one of the most robust records of evidence ever compiled by the agency and that this record clearly demonstrates that the Commission must intervene to ensure that rates for business data services are just and reasonable. With Verizon we have offered the Commission a new policy framework for these services that we encourage the Commission to adopt. Moreover, we urge the Commission to ensure that providers offer business data services at wholesale rates that are less than retail rates and to reject the cable industry's arguments that its business data services are offered via private carriage arrangements. By doing so, the Commission will be promoting a virtuous cycle of innovation and investment by competitors and incumbents alike, benefitting the public, including businesses of all sizes, community anchor institutions, mobile wireless consumers, and government customers.

Respectfully submitted,

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