

August 29, 2016

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: *Business Data Services in an Internet Protocol Environment et al., WC Docket Nos. 16-143, 15-247, and 05-25 and RM-10593*

Dear Ms. Dortch:

CenturyLink, Inc., Frontier Communications Corporation, FairPoint Communications, Inc., and Consolidated Communications (“Mid-Size ILECs”) hereby respond to the proposal submitted into the record in the above-referenced proceedings by Verizon and INCOMPAS on August 9, 2016.<sup>1</sup> As the Mid-Size ILECs explain below (and have previously discussed), the record does not support any of the specific planks of the Verizon-INCOMPAS proposal. It should go without saying that the Commission may not, on the basis of an alleged compromise, adopt outcomes that are on their own indefensible.<sup>2</sup> The core features of the Verizon-INCOMPAS proposal lack merit, and the Commission therefore must reject them.

***1. The Verizon-INCOMPAS proposal is neither a “middle ground” compromise nor an “administratively simple framework.”*** Verizon and INCOMPAS have not, as they claim, proposed a “middle ground” approach.<sup>3</sup> The Mid-Size ILECs and others have explained that changes in Verizon’s business model – most notably its extensive sale of rural exchanges and the increasing importance of its out-of-region wireless offerings to its overall strategy – have

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<sup>1</sup> Letter from Kathleen Grillo, Senior Vice President, Verizon, and Chip Pickering, Chief Executive Officer, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Aug. 9, 2016) (“August 9 Letter”).

<sup>2</sup> See, e.g., *Schurz Communs. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (Posner, J.) (stating that the Commission may not simply adopt an “unprincipled compromise[] of Rube Goldberg complexity among contending interest groups” or “throw[] up [its] hands and split[] the difference” between two conflicting visions). Here, as discussed below, Verizon and INCOMPAS are not even “contending” parties, nor do they subscribe at this point to conflicting visions.

<sup>3</sup> August 9 Letter at 1.

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brought its interests here closely into alignment with those of INCOMPAS's members. Specifically, Verizon has become a much more substantial purchaser – perhaps even a net purchaser – of BDS offerings. Thus, agreement between Verizon and INCOMPAS does not reflect a “middle ground” of any sort, but simply a mutual desire for lower rates shared by entities with similar financial goals.<sup>4</sup>

Nor does the August 9 proposal offer an “administratively simple framework.”<sup>5</sup> To the contrary, Verizon and INCOMPAS have proposed a return to byzantine, command-and-control ratemaking, particularly in the Ethernet marketplace, which (as detailed below) virtually all participants in the docket recognize is the most competitive sector at issue here. In particular, Verizon and INCOMPAS propose an impracticable “benchmarking” regime under which “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 ... 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.”<sup>6</sup> This charge would “include the rates for one channel termination, one fixed mile, five variable miles and 1/20th of a DS3/DS1 multiplexing arrangement.”<sup>7</sup> Then, “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,” using “the rates in each price-cap carrier’s publicly available product guide.”<sup>8</sup> Carriers that do not have such a product guide “would file with the Commission rate information necessary to establish the benchmarks.”<sup>9</sup> Where the information is not available, “the Commission could develop a benchmark using the average of the available information.”<sup>10</sup> This process would, apparently, be repeated annually. This process is not only mind-numbingly

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<sup>4</sup> See Joint Reply Comments of CenturyLink, Inc., Consolidated Communications, FairPoint Communications, Inc., and Frontier Communications Corp., WC Docket Nos. 16-143 *et al.*, at 41-49 (filed Aug. 9, 2016) (“Mid-Size ILECs Reply Comments”). See also Comments of AT&T Inc., WC Docket Nos. 16-143 *et al.*, at 4 n.11, 6 n.16 (filed June 28, 2016); Reply Comments of AT&T Inc., WC Docket Nos. 16-143 *et al.*, at 9, 55-56, 68-69 (filed Aug. 9, 2016) (“AT&T Reply Comments”); Harold Feld, *AT&T’s BDS Hissy Fit Is Bad Strategy*, Wetmachine: Tales of the Sausage Factory (July 5, 2016), available at <http://www.wetmachine.com/tales-of-the-sausage-factory/atts-bds-hissy-fit-is-bad-strategy/> (observing that Verizon has become “a net purchaser of business data service (BDS) as it has sold off wireline systems and expanded both its wireless and content offerings”).

<sup>5</sup> August 9 Letter at 1.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

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complex, it also would require extensive oversight and review by the Commission. Moreover, it is highly unlikely to produce rates that respond to market conditions, and it is completely inconsistent with the Commission's prior stance that its "primary means" of achieving its public interest goals "has been competition," since "[t]he cost-based prices achieved in competitive markets ensure optimal utilization of the network by consumers and give service providers accurate information regarding the benefits and costs of introducing new services and incentives for investing in technological innovations."<sup>11</sup> Finally, Verizon and INCOMPAS provide no means to address the inevitable ambiguities, disputes, and inefficiencies that will arise in applying their artificial framework to this dynamic marketplace. Whatever else might be said of this proposal (and, for reasons discussed below, it is deeply flawed on the merits as well), the claim that it is "administrably simple" is patently false.

**2. *There is no basis for a catch-up rate cut, much less one as extreme as proposed by Verizon and INCOMPAS.*** Verizon and INCOMPAS propose a breathtaking rate cut of approximately 24% for TDM-based BDS offerings in areas served by price-cap LECs in the first two years of the Verizon-INCOMPAS proposal.<sup>12</sup> Economic analysis of the KLEMS data demonstrates that, since implementation of the CALLS plan, costs for the TDM offerings at issue have not fallen by nearly this much. Among other things, the costs for inputs used in the provision of TDM BDS offerings are either holding constant or rising, utilization of these facilities is falling (limiting ILECs' abilities to amortize costs over many customers relying on shared facilities), and the rates frozen by the CALLS plan were themselves below competitive levels.<sup>13</sup> If anything, when all relevant factors are accounted for, econometric modeling calls for a rate *increase* of between 6.45% and 17.5%.<sup>14</sup> Further, analyses purporting to justify significant

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<sup>11</sup> *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5024 ¶ 6 (1996); *see also id.* ("In addition, competition gives producers strong incentives to stimulate demand and reduce costs. By forcing producers to minimize the per-unit costs of providing service, competition generally advances, rather than hinders, universal service. It increases the number of consumers willing and able to connect to the nation's telecommunications networks.").

<sup>12</sup> Specifically, Verizon and INCOMPAS propose a cut of 10% plus an inflation-adjusted 4.4% reduction in year one, followed by a 5% cut plus another inflation-adjusted 4.4% reduction in year two. *See* August 9 Letter at 1.

<sup>13</sup> *See* Mid-Size ILEC Reply Comments at 16; *see also infra* note 18.

<sup>14</sup> *See* Mark Schankerman and Pierre Régibeau, *Response to the FCC Further Notice: Regulation of DSI and DS3 Services*, attached to Letter from Russell P. Hanser, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016) ("Schankerman/Régibeau Declaration"). *See also* Mid-Size ILEC Reply Comments at 13-16. Similar analyses submitted by AT&T show that there is no evidentiary basis for a one-time rate cut. *See* AT&T Reply Comments at 76-77 and sources cited therein.

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rate cuts are either based on cost models not designed to measure changes in productivity or rely on European data designed to measure value added rather than gross output; neither data set is appropriate for use in measuring alleged efficiency gains in the American BDS marketplace.<sup>15</sup> In short, there is no legitimate data in the record to support a reduction in current DSn rates. Verizon itself agreed just months ago that “[t]here [i]s [n]o [r]ecord [e]vidence [s]upporting a [f]inding [t]hat ILEC [r]ates [a]re [u]njust and [u]nreasonable.”<sup>16</sup> As such, adoption of the drastic cuts proposed by Verizon and INCOMPAS would be arbitrary and capricious.

**3. There is no record basis for annual inflation-adjusted 4.4% rate cuts.** Verizon and INCOMPAS next propose to follow their enormous “catch-up” rate reductions with annual cuts of 4.4% minus inflation.<sup>17</sup> As just explained, however, the costs associated with provision of DSn BDS offerings are not falling and may well be rising.<sup>18</sup> Econometric analysis suggests that real prices should be allowed to rise by at least 0.5% per year going forward, and that accounting for inflation results in a factor designed to increase nominal prices by 1.06% per year.<sup>19</sup> Under these circumstances, there is no lawful rationale for annual “real” rate cuts of 4.4%.

**4. There is no basis for finding that the markets for all offerings at or below 50 Mbps are non-competitive.** As they have before, Verizon and INCOMPAS propose that all BDS offering speeds at or below 50 Mbps be deemed conclusively non-competitive.<sup>20</sup> Neither the Commission’s extensive data set nor the expansive evidence submitted by parties to this proceeding supports this result. The record shows the presence of multiple competitors on a nationwide basis, many of whom can and do provision service at levels at or under 50 Mbps. Drs. Mark Israel, Daniel Rubinfeld, and Glenn Woroch have found that the data revealed no market power in the marketplace for packet-based services at bandwidths of less than 45 Mbps.<sup>21</sup> And as the FNPRM observes, Dr. Rysman’s report “concludes that there may not be market

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<sup>15</sup> See Schankerman/Régibeau Declaration at ¶¶ 49-67.

<sup>16</sup> Comments of Verizon, WC Docket No. 05-25, at 61 (filed Jan. 28, 2016) (subheading III.A); *see also id.* at 61-63.

<sup>17</sup> See August 9 Letter at 1.

<sup>18</sup> See generally Mid-Size ILEC Comments at 70-73; Mid-Size ILEC Reply Comments at 8, 21-26.

<sup>19</sup> Schankerman/Régibeau Declaration at ¶¶ 109-12.

<sup>20</sup> August 9 Letter at 2. Verizon and INCOMPAS even seem to contemplate that the “conclusively non-competitive” threshold should be higher than 50 Mbps. *See id.* (stating that “the specified threshold should be *no lower than* 50 Mbps”) (emphasis added).

<sup>21</sup> Mark Israel, Daniel Rubinfeld, and Glenn Woroch, *Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM and a Proposed Competitive Market Test, Second White Paper*, at 26 (filed June 28, 2016).

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power in the supply [of] BDS at bandwidths in excess of approximately 50 Mbps.”<sup>22</sup> Nor do the data suggest that competitors are unable economically to provide service at these levels. To the contrary, Dr. Rysman’s report indicates that facilities-based competitors provide DS1-level service in 24% of locations, and that in another 42% of cases a facilities-based provider capable of provisioning DS1 service is in the census block but not in the building.<sup>23</sup> Likewise, facilities-based competitors provide DS3-level service in 44% of locations, and are in the census block but not the building in another 56% of cases (*i.e.*, that facilities-based providers of DS3 service are ubiquitous).<sup>24</sup> Drs. Israel, Rubinfeld, and Woroch’s analysis showed that “competitive providers ... extend laterals to buildings with very low demand,” and have in fact deployed facilities to a great number of locations in which total demand for competitors’ offerings falls well below the 50 Mbps threshold.<sup>25</sup> Even when competitors lack facilities of their own, they frequently can rely on other options – for example, Ethernet over Copper – to provide service. There is, in short, no factual predicate for a bright-line declaration that all offerings under 50 Mbps are non-competitive.

In addition to its failure to accord with the record, a 50 Mbps cutoff would blatantly contravene the Commission’s oft-stated commitment to developing a nuanced regime based on marketplace data.<sup>26</sup> The agency’s extensive data collection was designed to evaluate competition in a geographically specific manner, distinguishing those areas in which competition does and does not exist. Indeed, under the Verizon-INCOMPAS proposal, a market would be deemed non-competitive even if the evidence shows that numerous providers have facilities capable of providing high-bandwidth services in that market. There is no reason to abandon the Commission’s data-based approach in favor of bright-line cut-offs simply presuming a uniform dearth of competition for certain offerings notwithstanding empirical evidence at the Commission’s disposal showing otherwise.<sup>27</sup>

***5. There is no support for a competitive market test that uses census blocks as the geographic market or that requires more than two competitors for an affirmative finding.*** Verizon and INCOMPAS’s approach to assessing competition in those areas where they would

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<sup>22</sup> *Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 ¶ 237 (2016) (“FNPRM”).

<sup>23</sup> See Marc Rysman, “Empirics of Business Data Services,” White Paper, Apr. 2016 (rev. June 2016), Attachment 3 (“Revised Rysman Report”).

<sup>24</sup> *See id.*

<sup>25</sup> Declaration of Mark Israel, Daniel Rubinfeld, and Glenn Woroch, at 23 (Feb. 19, 2016), attached to Reply Comments of AT&T, Inc., WC Docket No. 05-25 (filed Feb. 19, 2016).

<sup>26</sup> *See, e.g.*, CenturyLink, Inc. *et al.*, Motion to Strike, WC Docket Nos. 16-143 *et al.*, at 4-8 (filed June 17, 2016) (describing the history of the data collection).

<sup>27</sup> *See generally* Mid-Size ILEC Reply Comments at 44-46.

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tolerate the consideration of actual data is flawed in two fundamental ways, both of which the Mid-Size ILECs have discussed previously. First, Verizon and INCOMPAS's proposal that census blocks be used as the appropriate geographic market is impractical and would not be workable<sup>28</sup> – further undermining their general claim, rebutted above, that its framework is administrable. Moreover, some census blocks contain only a single building,<sup>29</sup> and the Commission's prudent, previous rejection of a location-by-location approach thus logically precludes its adoption of census blocks here. Rather than eschew the data altogether, the Commission should apply it to a larger geographic unit; the record shows that census tracts offer a far more practical and less controversial option than census blocks.<sup>30</sup>

Second, the notion that there must be “more than two”<sup>31</sup> competitors in a market in order for it to be deemed competitive contravenes the record evidence, sound economic analysis, and Commission precedent, all of which support the proposition that welfare-maximizing outcomes can arise from just two competitors in markets of the type at issue here.<sup>32</sup> In addition, an inflexible approach that requires a particular number of competitors in each market would disrupt the ability of BDS providers and multi-location customers to freely negotiate mutually beneficial BDS service arrangements for service bundles that span “competitive” and “non-competitive” markets.<sup>33</sup> In such situations, it is the number of competitors in the most competitive part of the footprint that should matter. That Verizon and INCOMPAS apparently cannot agree on just how many competitors must be present until they would be satisfied evinces an unreliable (and decidedly non-data-driven) “we'll know it when we see it” approach to competition that underscores the extremely limited utility of their proposal as a basis for any further action in this proceeding.<sup>34</sup>

**6. *There is no legal, policy, or factual basis for reversing forbearance regarding Ethernet rate regulation.*** Verizon and INCOMPAS next propose a complex scheme under which rates for Ethernet BDS would be “benchmark[ed]” to rates for allegedly comparable TDM

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<sup>28</sup> Mid-Size ILEC Comments at 51-52.

<sup>29</sup> Letter from Christopher T. Shenk, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-143, at 3 n.10 (filed Aug. 22, 2016) (“August 22 Economist Meeting”) (describing a presentation by economists retained by CenturyLink and AT&T).

<sup>30</sup> Mid-Size ILEC Reply Comments at 48.

<sup>31</sup> August 9 Letter at 3.

<sup>32</sup> Mid-Size ILEC Comments at 57-61; Mid-Size ILEC Reply Comments at 51-55; August 22 Economist Meeting at 7.

<sup>33</sup> Mid-Size ILEC Reply Comments at 49-51.

<sup>34</sup> August 9 Letter at 3 (“We are continuing to discuss how many providers we think would be enough to deem a census block competitive, but agree that it should be more than two.”).

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offerings.<sup>35</sup> As the Mid-Size ILECs have explained, the Commission may not and should not transpose monopoly-era rate regulation on the highly competitive Ethernet marketplace.

As an initial matter, many price-cap ILECs, including three of the Mid-Size ILECs, enjoy forbearance from *ex ante* rate regulation under Section 10 of the Communications Act.<sup>36</sup> The courts have made clear that a grant of forbearance “extinguish[es]” the related requirement; as a result – and as the Mid-Size ILECs have explained previously – the Commission lacks legal authority to rescind such relief.<sup>37</sup>

Even apart from the legal barriers to Ethernet rate regulation, the record evidence does not support such regulation as a policy matter. The marketplace for Ethernet BDS services is competitive and evidences falling prices, even amidst widespread forbearance from rate regulation. The record shows that competitors have deployed high-capacity facilities in virtually every census block with special access demand. Earlier this year, before its change of position, Verizon itself noted that “there is no basis on which to increase regulation of ILEC business broadband services, including legacy special access and Ethernet.”<sup>38</sup> Dr. Rysman, for his part, “d[id] not detect an effect of competition for high bandwidth lines” – that is, his “approach to detecting market power” found only “inconsistent and insignificant results on local competition” for Ethernet offerings.<sup>39</sup> Indeed, he noted that “competitive providers are a robust presence,

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<sup>35</sup> *Id.* at 2.

<sup>36</sup> See, e.g., *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd 12260 (2008); *Verizon Telephone Companies’ Petition for Forbearance from Title II and Computer Inquiry Rules with Respect to Their Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 04-440 (Mar. 20, 2006), *pet. for review denied sub nom. Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007) (deemed grant in connection with, *inter alia*, exchanges subsequently acquired by FairPoint); *CenturyLink’s Petition for Forbearance from Dominant Carrier Regulation and the Computer Inquiry Tariffing Requirement with Respect to its Enterprise Broadband Services Is Granted by Operation of Law*, Public Notice, WC Docket No. 14-9 (Mar. 16, 2015).

<sup>37</sup> *Sprint Nextel*, 508 F.3d at 1132; see generally Mid-Size ILEC Comments at 32-34; Mid-Size ILEC Reply Comments at 55-57.

<sup>38</sup> Letter from Maggie McCready, Vice President – Federal Regulatory and Legal Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-247 *et al.*, at 6 (filed Mar. 1, 2016) (“Verizon March 1 Ex Parte”).

<sup>39</sup> Revised Rysman Report at 23-24.

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almost the size of ILECs in terms of number of buildings served” by fiber.<sup>40</sup> On August 18, Vertical Systems Group (“VSG”) confirmed as much, finding that Level 3 and Charter each provided a greater share of Ethernet connections than any of the Mid-Size ILECs – or, indeed, any ILEC other than AT&T.<sup>41</sup> Indeed, VSG reported that “more than 60 percent of new [Ethernet] connections were delivered by CLECs and Cable MSOs during the first half of 2016,”<sup>42</sup> leaving ILECs with only 40%. The Verizon-INCOMPAS “compromise” cannot supplant these core facts, and cannot justify regulating a sector in which no provider – and certainly no ILEC – enjoys market power. Such regulation would be especially harmful where, as here, it would truncate investment and deployment by ILECs and their competitors alike.<sup>43</sup>

Further, in addition to the administrative complexities outlined above, the specific benchmarking regime urged by Verizon and INCOMPAS also lacks merit. Verizon and INCOMPAS propose arbitrarily to tie rates to a particular type of DS1 circuit that bears no relationship to how Ethernet service is actually provisioned and priced in the marketplace (“one channel termination, one fixed mile, five variable miles and 1/20th of a DS3/DS1 multiplexing arrangement”).<sup>44</sup> Moreover, they would apply their single one-size-fits-all approach to numerous carriers, without any recognition of the ways in which competition leads to diverse and innovative rate structures. While the proposal recognizes that a “product guide” might be unavailable, it does *not* acknowledge that existing product guides may not reflect the services that most customers actually buy. Even if not for all of these flaws, the proposal’s very premise – that the rapidly evolving Ethernet marketplace is static and that Ethernet prices should relate linearly to DS<sub>n</sub> rates – has no basis whatsoever in fact or law. It merely reflects the interest, now

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<sup>40</sup> *Id.* at 3; *see generally* Mid-Size ILEC Comments at 20-26.

<sup>41</sup> *See* Vertical Systems Group, Mid-Year 2016 U.S. Carrier Ethernet LEADERBOARD (Aug. 18, 2016), available at <http://www.verticalsystems.com/vsglb/mid-year-2016-u-s-carrier-ethernet-leaderboard/> (“Mid-Year 2016 Ethernet Leaderboard”).

<sup>42</sup> *Id.*

<sup>43</sup> *See, e.g.*, Reply Comments of Charter Communications, Inc., WC Docket Nos. 16-143 *et al.*, at 3 (filed Aug. 9, 2016) (“Although the Commission asserts its desire to encourage facilities-based investment, there is simply no scenario in which price regulation could accomplish that goal.”); Comments of Comcast Corporation, WC Docket Nos. 16-143 *et al.*, at 27 (filed June 28, 2016) (“While Commission action may be justified to eliminate barriers to entry and investment, the Commission should ensure that any rules it adopts do not create such barriers. Any such rules ... would directly undermine the paramount goal of promoting increased investment and competition in the BDS marketplace, and would create administrability problems and other costs that far outweigh any purported benefits.”) (“Comcast Comments”); Comments of Cox Communications, Inc., WC Docket Nos. 16-143 *et al.*, at i (filed June 28, 2016) (stating that “the proposed regulations significantly impact investment decisions in advanced facilities”).

<sup>44</sup> August 9 Letter at 2.

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shared by Verizon and INCOMPAS's members, in procuring next-generation services at rock-bottom rates.

Finally, there is no justification for the “heads I win, tails you lose” proviso on which the Verizon-INCOMPAS benchmark framework rests. They “propose that the existence of [Ethernet price] benchmarks would not justify increased rates.”<sup>45</sup> There is, however, no logical basis for claiming that Ethernet rates should be set by transposing rates charged for DS<sub>n</sub> offerings when and only when that would result in reductions from existing rates. Rather, carriers should have the option of increasing their rates where the new mechanism calls for that result. This is especially important given that many multi-location deals, for purposes of convenience, apply the same averaged rates in all locations. This could result in rates for higher-cost areas that are, when considered individually, below market levels. To then arbitrarily reduce these rates based on a benchmarking approach would force these rates even further below market value while foreclosing the rate averaging approach that currently allows the ILEC to recover its costs. Likewise, there is no basis for Verizon and INCOMPAS's assertion that “prices for those services should continue to decline over time.”<sup>46</sup> While this outcome might well follow from technological advances and growing economies of scale, it is not at all guaranteed. A broad set of factors (including but not limited to economic recession, changing societal needs, unexpected increases in the cost of inputs, and supply-chain disruptions) could lead to short- or long-term *increases* in costs. Moreover, as the D.C. Circuit has emphasized, carriers are not required to offer discount plans of the type that govern many BDS offerings today.<sup>47</sup> As such, providers could well eliminate such plans, or reduce the available discounts, in the face of mandatory reductions to their standard rates. Any regime the Commission adopts should be driven by actual events, empirical analysis, and the laws of supply and demand, not by *ipse dixit* declarations regarding how prices “should” behave over time.

**7. *There is no record support for a presumption that ILECs provide BDS ubiquitously throughout their service territories.*** Under the Verizon-INCOMPAS proposal, “the ILEC, including its affiliates, would be deemed to be a single facilities-based provider in all census blocks within the ILEC's service area.”<sup>48</sup> This proposal is clever: It would obscure the many locations in which a CLEC has facilities and the ILEC does not, thus reducing the set of circumstances in which CLECs and/or cable providers would, under any technology-neutral approach, be subject to rate regulation. But the proposal does not accord with the facts. In reality, ILECs have deployed fiber to only a minority of in-region business locations, and hold few advantages over competitive rivals in connection with such deployments. This, presumably,

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<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.*

<sup>47</sup> *See BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052, 1057 (D.C. Cir. 2006).

<sup>48</sup> August 9 Letter at 2.

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helps explain why (as noted above) CLECs and cable companies provisioned more than 60% of new Ethernet ports in the first half of 2016.<sup>49</sup>

**8. There is no basis for excluding “best-efforts” and other HFC-based cable offerings or UNE-based offerings from the competitive analysis.** Verizon and INCOMPAS repeat their proposal that “a provider only using UNEs or offering only best-efforts services” be excluded from any competitive market test.<sup>50</sup> As the Mid-Size ILECs have explained, there would be no lawful basis for such exclusions, which would ignore the Commission’s well-settled responsibility to consider *all* substitutes in conducting market analysis – including developing competition from intermodal alternatives.<sup>51</sup> First, the alleged distinction between so-called “best efforts” services and BDS – rooted primarily in purported unavailability of service level guarantees for cable offerings – is without merit. The record evidence reveals that even “best efforts” cable offerings are provisioned pursuant to such guarantees,<sup>52</sup> and that BDS purchasers routinely rely on those offerings in lieu of ILEC services.<sup>53</sup> Verizon, for its part, submitted this year a detailed filing describing “[c]able’s success in the marketplace and its near ubiquitous presence as a competitor that is winning DS1 and Ethernet customers away from ILECs and other providers through its Ethernet products *and its broadband Internet access product.*”<sup>54</sup> Even Dr. Rysman has acknowledged that “some customers may view best-efforts broadband

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<sup>49</sup> See Mid-Year 2016 Ethernet Leaderboard.

<sup>50</sup> August 9 Letter at 2-3.

<sup>51</sup> See Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 369 ¶ 562 (3d ed. 2007) (a product market “includes (1) identical products, (2) products with such negligible physical or brand differences that buyers regard them as the same product, and (3) other products that buyers regard as such close substitutes that a slight relative price change in one will include intolerable shifts of demand away from the other”) (internal citations omitted). As the Commission has held, “when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.” *Application of EchoStar Commc’ns Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Commc’ns Corp. (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, 20606 ¶ 106 (2002) (citing Horizontal Merger Guidelines, issued by the U.S. Dep’t of Justice & Federal Trade Comm’n §§ 1.11, 1.12 (rev’d Apr. 8, 1997)). See also *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 572-73, 83-85 (D.C. Cir. 2004); *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002).

<sup>52</sup> See, e.g., Letter from Melissa E. Newman, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 15-247 *et al.* (filed Apr. 8, 2016).

<sup>53</sup> See Mid-Size ILECs Reply Comments at 37-41.

<sup>54</sup> Verizon March 1 Ex Parte Letter at 6 (emphasis added).

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services as a viable alternative” to other BDS services.<sup>55</sup> In particular, cable modem services are functionally superior to DS1 links.<sup>56</sup>

Of course, cable providers’ HFC-based offerings are even more robust, and signal the ready ability to upgrade to fiber when a demand arises. As Comcast recognizes, “in areas where a cable provider is able to provide Ethernet services over its HFC facilities, the presence of those HFC facilities in a given market could indicate that the ILEC in that market faces some degree of potential competition from the cable provider – and such potential competition may be relevant when considering whether to continue regulating the ILEC as a dominant provider in that market.”<sup>57</sup> And Verizon observed in March that “[c]able companies are able to offer lower-cost Ethernet over HFC without making major network investments,” at bandwidth levels that are “sufficient for many customers.”<sup>58</sup>

Likewise, Verizon and INCOMPAS’s proposed dismissal of UNE-based competition is meritless. As the Mid-Size ILECs and others have explained, UNE-based competition plays a vital role in the BDS marketplace.<sup>59</sup> Indeed, the Commission has long emphasized the competitive effect of UNEs when rebuffing ILECs’ arguments that unbundling requirements

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<sup>55</sup> See generally USTelecom, *Survey of Small and Medium Business Internet and Data Networking Service Users: Methodology, Results, and Implications, June 2016* (Aug. 8, 2016) (“USTelecom Survey”), attached to Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 *et al.* (filed Aug. 9, 2016); see also Comments of the United States Telecom Association, WC Docket Nos. 16-143 *et al.*, at 3-17 (filed June 28, 2016) (describing survey results and methodology).

<sup>56</sup> A DS1 circuit transmits 1.544 Mbps in each direction, whereas, according to the Commission’s end-of-2015 Measuring Broadband America Report, by September of 2014 even ordinary cable modem service offered download speeds over 40 Mbps and upload speeds over 6 Mbps – both many times the throughput offered by a DS1. See *2015 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the United States*, Charts 12.1, 12.2, available at <https://www.fcc.gov/reports-research/reports/measuring-broadband-america/measuringbroadband-america-2015# Toc43190159>.

<sup>57</sup> Comcast Comments at 5.

<sup>58</sup> Verizon March 1 Ex Parte Letter at 2-3.

<sup>59</sup> See generally Mid-Size ILEC Comments at 44-48. As CenturyLink previously explained, it – and other companies like it – often buy Ethernet local access provisioned over copper UNEs, “because it is frequently the lower-priced alternative and these services are a good fit for many of [CenturyLink’s] end user customers.” Reply Comments of CenturyLink, WC Docket No. 05-25, at 15-16 (filed Feb. 19, 2016) (internal citations omitted); see also Reply Comments of Frontier Communications Corporation, WC Docket No. 05-25, at 14-15 (filed Feb. 19, 2016) (explaining the underpinning competitive nature of Ethernet over copper).

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should be narrowed or eliminated.<sup>60</sup> CLECs themselves have argued that UNE-based services are important competitive alternatives to ILEC BDS,<sup>61</sup> and have stated that unbundled DS1s and DS3s are “often necessary inputs for competitive carriers’ delivery of innovative and tailored offerings to business service customers.”<sup>62</sup> Dr. Rysman, too, supports a Commission “analysis of UNE competition.”<sup>63</sup> Moreover, while there are geographical and other limits on UNEs’ availability, this point is irrelevant here: The Mid-Size ILECs only ask that UNE-based competition be accounted for in the competitive analysis *where such competition exists or could exist*, not where the relevant network elements are unavailable as UNEs. There are, in short, no appropriate grounds on which to disregard UNE-based competition.

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<sup>60</sup> See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18717 ¶ 20 n.86 (2007) (“[W]e observe that the relief we grant excludes TDM-based, DS-1 and DS-3 special access services. Thus, those services, in addition to section 251 UNEs, remain available for use as wholesale inputs for these enterprise broadband services.”); *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2574 ¶ 65 (2005); see also *Covad Commc’ns v. FCC*, 450 F.3d 528, 539 (D.C. Cir. 2006) (noting the Commission’s finding “that the availability of UNEs serves to discipline special access rates by exercising a ‘constraining influence’ on the ILECs’ ability to increase their [special access] rates”).

<sup>61</sup> Windstream has noted that legacy DS1 and DS3 facilities “are particularly useful, when combined with a carrier’s own electronics, in providing Ethernet services below 50 Mbps, including to small retail chains, schools, medical providers, and widespread offices of governmental entities.” Comments of Windstream Corporation, WC Docket Nos. 16-143 *et al.*, at 18 (filed May 20, 2016). According to Windstream, CLECs use DS1 and DS3 loops “not just to offer TDM-based transmissions, but also to provide Ethernet services.” Petition for Declaratory Ruling of Windstream Corporation, GN Docket No. 13-5, at 2 (filed Dec. 29, 2014).

<sup>62</sup> *Id.* at 16.

<sup>63</sup> FNPRM, App. B, Marc Rysman, “Empirics of Business Data Services,” White Paper, Apr. 2016, at 203.

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For these reasons, the Commission should reject the Verizon-INCOMPAS proposal. Instead, it should focus on evidence-based decision-making that reflects the realities of costs and competition in the BDS marketplace.

Sincerely,

*/s/ Russell P. Hanser*

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