

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

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 for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593

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REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

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REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. (“Charter”) hereby submits these reply comments in the above-captioned proceeding.

The comments submitted thus far are notable for what they do *not* contain: any reasoned explanation why cable providers, as new market entrants, should be subject to price regulation. As Charter explained in its initial comments, the Further Notice of Proposed Rulemaking (“FNPRM”)¹ lacks any analysis that could support the price regulation of cable Business Data Services (“BDS”), which would only inhibit its growth and undermine the facilities-based competition the Commission has recognized is crucial. None of the comments submitted in response to the FNPRM even attempt to explain why the regulation of cable BDS is either

¹ *In re Business Data Services in an Internet Protocol Environment*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723 (2016) (“FNPRM”).

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necessary or desirable. To the contrary, the comments demonstrate that significant cable investment in the past few years has occurred under the current environment because new entrants are not subject to regulation. Moreover, the comments do not provide any explanation of how the Commission can build a rational regulatory scheme based on stale data from 2013. And, like the FNPRM itself, the comments fail to explain how the Commission can lawfully impose common-carriage obligations on private-carriage BDS, given new entrants' lack of market power, the lack of any lawful basis for such action under Title II, and the absence of adequate notice of the contours of any such proposal. For all of these reasons, Charter respectfully asks that the Commission decline to price regulate BDS provided by new entrants.

I. PRICE REGULATING CABLE-PROVIDED BDS WOULD DISCOURAGE FURTHER BDS INVESTMENT.

The comments submitted in response to the FNPRM paint a clear picture of substantial and growing investment into facilities-based BDS competition. Cable providers in particular have been the most significant drivers of this growth, bringing additional competition to a market long dominated by incumbent LECs, with Charter alone investing **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** annually in the expansion of its BDS capabilities since the beginning of 2013, allowing it to expand its provision of BDS to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** new locations.² Charter's sales force aggressively seeks new business across its footprint, and Charter now offers promotional pricing below the average price offered by Charter's competitors in an effort to win business from incumbent LECs and others.³ Other

² Charter Comments at 5.

³ *Id.* at 5-6.

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cable providers have made similarly impressive expansion efforts. Competitive LECs, for their part, have invested heavily as well in broad-based fiber expansion and additional options for BDS consumers.⁴ As a result of all this investment by new entrants, prices for BDS services have fallen broadly across the market place. This and other evidence in the record makes clear that the Commission’s current light touch approach to regulating non-TDM BDS is working.⁵

It is not a certainty, however, that the “great entry success story” of cable will continue.⁶ Although the Commission asserts its desire to encourage facilities-based investment, there is simply no scenario in which price regulation could accomplish that goal. Currently, market forces incentivize Charter to compete for every new and existing BDS customer where it can achieve a reasonable return on its investment. Constraining prices, and therefore the possible returns that new entrants can make on their investment, will make the allocation of capital to BDS expansion less attractive. This, in turn, will discourage further investment and slow further entry.⁷ For this reason, the Fiber to the Home Council Americas (“FTTH”)—a non-profit organization whose mission is to promote fiber deployment—opposes expansion of the Commission’s BDS rules to fiber networks, arguing that it would only discourage the deployment of additional fiber connections.⁸ Notably, no commenters have even attempted to

⁴ See NCTA Comments at 6-8 (describing BDS investments by Level 3, Windstream, TDS, XO, and Google).

⁵ See also Dr. Hal Singer, Economists Incorporated, *Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Analysis* at 2 (Apr. 2016); Anna-Marie Kovacs, *Regulation in Financial Translation, Business Broadband: Assessing the Case for Regulation* at 2 (Mar. 2016).

⁶ FNPRM, 31 FCC Rcd at 4829-30 ¶ 236.

⁷ See Charter Comments at 10.

⁸ See FTTH Comments at 19-20.

explain how price regulation could plausibly incentivize further investment. The Commission should decline to impose regulations that would quite clearly undermine its stated objective.

II. ADDITIONAL REGULATION IS UNNECESSARY BECAUSE CABLE PROVIDERS LACK MARKET POWER.

Clearly, then, the practical effect of price regulating cable BDS would be to discourage investment, thereby undercutting the very market forces that would drive the price reductions the Commission seeks. Even putting this aside, it is axiomatic that price regulation is only appropriate—if at all—where substantial market power permits the regulated provider to set supra-competitive prices.⁹ Indeed, less than two weeks ago, the Commission reiterated that providers who lack market power should be subject to “relaxed regulatory treatment” in order to “reduce barriers to entry and thereby fulfill consumer demand more efficiently than applying the same regulatory requirements to all carriers.”¹⁰ Neither the FNPRM nor the comments provide any support for the notion that cable providers have market power such that price regulation could be appropriate. To the contrary, the record clearly shows that cable providers lack market power. For instance, the available data show that, as of 2013, incumbent LECs accounted for approximately 82 percent of BDS revenues, whereas cable providers accounted for only

⁹ See *In re Policy Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, First Report and Order, 85 FCC 2d 1, 19 ¶ 51 (1980) (“*Competitive Carrier First Report and Order*”); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefore*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 447 ¶ 6 (1981); see also *In re Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3274-75 ¶¶ 4-5 (1995) (describing the Commission’s longstanding reasoning for declining to regulate carriers that lack market power).

¹⁰ See *In re Technology Transitions*, GN Docket No. 13-5, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, FCC 16-90, ¶ 10 (rel. July 15, 2016) (citing *Competitive Carrier First Report and Order*, 85 FCC 2d at 15 ¶ 56); see also *id.* at 6 ¶ 19 (“The Commission regulates carriers as dominant only to the extent they possess market power.”).

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approximately 5 percent.¹¹ Even assuming 20 percent annual growth, cable providers' market share would still be less than 8 percent by the end of 2016.¹² Thus, despite impressive investment in expanding their BDS networks, cable providers are comparatively minor players in the market, and they will likely remain so for the foreseeable future.

Cable providers like Charter also continue to face disadvantages when competing against larger and more dominant incumbent LECs, and even larger competitive LECs, like Level 3.¹³ Although some commenters suggest that cable providers' hybrid fiber coaxial ("HFC") networks allow them nearly ubiquitous access to business consumers,¹⁴ that is simply incorrect. As Charter and other commenters have pointed out—and as competitive LECs have long maintained—it remains to be seen how enterprise services delivered over HFC will fit into the marketplace, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]¹⁵

[BEGIN HIGHLY CONFIDENTIAL INFORMATION] **[END**
HIGHLY CONFIDENTIAL INFORMATION] are particularly present with respect to
wireless backhaul, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**
[END

¹¹ See FNPRM, 31 FCC Rcd at 4819 ¶ 218, Figure 9.

¹² See *id.* ¶ 218; see also NCTA Comments at 21-29; Comcast Comments at 21-22.

¹³ Charter Comments at 11-13; see also *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 428 (D.C. Cir. 1986) (indicating that a low market share could “presumptively disprove[]” market power).

¹⁴ See, e.g., AT&T Comments at 15; see also FNPRM, 31 FCC Rcd at 4833-34 ¶ 249.

¹⁵ Charter Comments at 9-10; see also, e.g., Joint CLECs Comments at 25-26.

HIGHLY CONFIDENTIAL INFORMATION]¹⁶ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]¹⁷

Charter's relatively limited reach puts it at a particular disadvantage when competing for large enterprise customers, because Charter must frequently purchase out-of-footprint network capacity from other providers in order to offer service to their multiple locations.¹⁸ Charter's inability to provide on-network service to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** multi-site locations puts it at a competitive disadvantage because of technical concerns that arise when using Type-II (*i.e.*, off-network) circuits.¹⁹ In addition, customers understand that providers are in a better position to promptly address service concerns on their own network than on capacity leased from third-parties.²⁰

Finally, every indication in the record is that cable BDS is offered competitively. Charter, in particular, is investing to expand its network to reach new customers, while at the same time BDS prices are falling sharply across the full range of bandwidths. Indeed, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

¹⁶ Second Declaration of Phil Meeks ¶ 3 (“Second Meeks Decl.”) (attached as Exhibit A).

¹⁷ *Id.* ¶ 4.

¹⁸ Charter Comments at 5-6.

¹⁹ Second Meeks Decl. ¶ 5.

²⁰ *Id.*

[END HIGHLY CONFIDENTIAL INFORMATION]²¹ which would not be the case if Charter were exercising market power. Other cable providers have also grown significantly while offering BDS at increasingly lower prices, providing further evidence of strong competition.²² Indeed, even proponents of additional BDS regulation largely focus their complaints of market power on incumbent LECs, further undermining any basis for the Commission to price regulate new entrant cable providers.²³

III. THE COMMISSION CANNOT LAWFULLY REGULATE CABLE PROVIDERS BASED ON THE CURRENT RECORD.

As Charter highlighted in its opening comments, and as other commenters explained, the 2013 data on which the Commission relies does not support the Commission's proposals, because it provides only a snapshot of the market at a particular moment in time, and because the BDS market has changed meaningfully in the intervening years.²⁴ Growth in the BDS market since 2013 has been substantial, and any analysis based on 2013 data cannot account for competition in the market as it exists today. Prices have also fallen substantially, calling into question Dr. Rysman's conclusions that market power exists even for less competitive TDM BDS. Even proponents of further regulation acknowledge that cable's entry into the BDS market has recently introduced significant competition and that, accordingly, prices have fallen since

²¹ Charter Comments at 6.

²² Comcast Comments at 15; Cox Comments at ii.

²³ *See, e.g.*, INCOMPAS Comments at 4-5 (discussing the effects of price regulation on incumbent LECs); Joint CLECs Comments at 20-21 (highlighting the market power of incumbent LECs). Verizon for its part complains that one cable provider has refused to sell Verizon Ethernet services where Verizon is an incumbent LEC. *See* Verizon Comments at 17 (citing Declaration of Daniel Higgins ¶ 5). However, even if true, this single anecdotal example cannot support a wholesale expansion of BDS regulation to cable providers, who, as Charter and others have explained, lack market power.

²⁴ Charter Comments at 13-17.

2013.²⁵ Indeed, Verizon itself acknowledges that the 2013 data does not “fully account for the game-changing entry of cable, including the significant potential competition it imposes in light of cable’s rapid expansion in the Business Data Services market place.”²⁶

There is, to say the least, significant reason to doubt the continued meaningfulness of the 2013 data on which the Commission’s conclusions are grounded. Several of the commenters raise concerns regarding the completeness of the data and the conclusions that Dr. Rysman draws from them, further undermining its use as a legitimate basis for additional regulation.²⁷ At a minimum, the Commission should decline to impose sweeping regulatory changes based on this data.

IV. THE COMMISSION LACKS AUTHORITY TO REGULATE PRIVATE-CARRIAGE BDS.

Charter explained in its opening comments that, even if the Commission were to regulate non-TDM BDS going forward, the price regulation proposed in the FNPRM cannot lawfully be applied to the large portion of the BDS market that is provided via private carriage. The Commission lacks Title II authority over those services and has, in any event, failed to give adequate notice of any proposal to compel common carriage of such services.²⁸ These concerns have been echoed by NCTA and Comcast.²⁹ In short, many BDS relationships are the result of individualized negotiations between sophisticated parties **[BEGIN HIGHLY**

²⁵ See Joint CLECs Comments at 70-71.

²⁶ Comments of Verizon, WC Docket No. 13-14 (June 28, 2016).

²⁷ See, e.g., Joint Comments of CenturyLink, Inc., Consolidated Communications, Fairpoint Communications, Inc., and Frontier Communications Corp., WC Docket No. 05-25 (June 28, 2016) (“Mid-Size ILECs Comments”); Comments of United States Telecom Association, WC Docket No. 05-25 at 19-20 (June 28, 2016).

²⁸ Charter Comments at 17-20.

²⁹ NCTA Comments at 11-15, 30-33; Comcast Comments at 61-66.

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[END HIGHLY CONFIDENTIAL INFORMATION] particularly at the enterprise level and for wireless backhaul.³⁰ Particularly given the lack of any evidence that cable providers exercise market power, there is no lawful basis for the Commission to compel the provision of BDS services through common carriage.³¹

The weight of legal authority before the Commission is conspicuously lopsided. None of the comments submitted in support of the proposals in the FNPRM provides a reasoned explanation for how price regulation can lawfully be extended to these non-Title II services. Rather, proponents of expanded regulation merely assert circularly that BDS are “telecommunications services” and can therefore be subject to price regulation.³² Verizon, for example, whose comments come closest to addressing the issue, acknowledges that there may be a distinction between certain BDS and other services offered to “retail customers.”³³ Yet Verizon goes on to assume, without explanation, that providers should be subject to common carrier obligations in all instances.³⁴ Even if the Commission’s Title II authority were capable of being extended to private-carriage BDS (which it is not), the Commission cannot regulate BDS on the basis of such assumption and without either adequate notice or record support. The

³⁰ Charter Comments at 17-18; NCTA Comments at 11-15; Comcast Comments at 61-66.

³¹ Charter Comments at 19-20; NCTA Comments at 30-33; Comcast Comments at 66-71; *see also In re AT&T Submarine Sys., Inc.*, Cable Landing License, 11 FCC Rcd 14,885, 14,893-94 ¶ 30 (1996); *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976).

³² *See, e.g.*, Sprint Comments at 91-92 (“Because BDS amounts to “telecommunications,” all providers that offer BDS to the public are common carriers and subject to Title II of the Act in their provision of BDS.”); *see also* FNPRM, 31 FCC Rcd at 4836 ¶ 257 (“[B]usiness data services are telecommunications services, regardless of the provider supplying the service. BDS providers are therefore common carriers.” (footnote omitted)).

³³ Verizon Comments at 10.

³⁴ *Id.* at 10, 17.

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FNPRM neither proposes to regulate private-carriage BDS nor seeks comment on whether competitive BDS could be treated as a common-carriage service in all instances. The Commission, therefore, has not provided adequate notice for the public to comment meaningfully on any attempted regulation of private-carriage BDS.³⁵ For the above reasons, price regulation in this proceeding must necessarily be limited to only a portion of the BDS market.

CONCLUSION

For the reasons stated above and in Charter’s opening comments, the Commission should not extend BDS regulation to cable providers. Alternatively, and at a minimum, the Commission should gather additional data before dramatically expanding the scope of BDS regulation, which could discourage further investment and harm competition. And to the extent it proceeds with such regulation at all, it cannot regulate BDS offered on a private-carriage basis.

August 9, 2016

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Respectfully submitted,

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³⁵ See, e.g., *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (holding that the Administrative Procedures Act requires agencies to “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully (quotation marks omitted)); *HBO, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1997) (requiring a “two-way street” of dialogue between the agency and the public).

EXHIBIT A

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SECOND DECLARATION OF PHIL MEEKS

1. My name is Phil Meeks. I am the Executive Vice President of Charter Communications, Inc. (“Charter”) and President of Spectrum Enterprise. Spectrum Enterprise provides enterprise-grade Internet, networking, voice, commercial video, and managed services to Charter’s mid-market, enterprise, wholesale, and carrier customers. The Spectrum Enterprise team that I lead manages all aspects of sales, marketing, product, operations, and business planning for Spectrum Enterprise. I submit this declaration in support of Charter’s reply comments in the above-captioned proceedings based on my personal knowledge of Charter’s business operations and my review of Charter’s records.

2. In my declaration of June 28, 2016, I explained that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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HIGHLY CONFIDENTIAL INFORMATION] make it uncertain how enterprise services delivered over HFC will fit into the marketplace.

3. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] are particularly present with respect to wireless backhaul, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]

4. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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5. Charter's relatively limited reach puts it at a particular disadvantage when competing for large enterprise customers, because Charter must frequently purchase out-of-footprint network capacity from other providers in order to offer service to their multiple locations. Charter's inability to provide on-network service to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** multi-site locations puts it at a competitive disadvantage because of technical concerns that arise when using Type-II (*i.e.*, off-network) circuits. In addition, in my experience, customers often understand that providers are in a better position to promptly address service concerns on their own network than on capacity leased from third-parties.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 8, 2016


PHIL MEEKS