REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

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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COMMENTS OF CHARTER COMMUNICATIONS, INC.

Charter Communications, Inc. ("Charter") hereby submits these comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM")[1] in the above-captioned proceedings. Charter supports the comments submitted concurrently by the National Cable and Telecommunications Association ("NCTA"), which explain the legal deficiencies in the Commission's proposals and how those proposals would deter precisely the type of competition in the Business Data Services ("BDS") market that the Commission seeks to promote. Charter submits these comments to underscore those arguments, to provide additional information regarding Charter's own experience as a recent competitive entrant into the BDS market, and to

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

articulate specific concerns regarding the manner in which the Commission's proposals would adversely impact BDS competition.

INTRODUCTION AND EXECUTIVE SUMMARY

Charter respectfully submits that imposing price regulation on cable providers would be harmful to competition in the BDS market and unlawful in several respects. As the Commission rightfully recognizes, cable providers have invested heavily in fiber infrastructure over the past decade, which has begun to bring additional facilities-based competition into the BDS market and has contributed to broadly declining prices for BDS. Imposing price regulation on cable providers would thwart this vital competition. Although cable providers like Charter have made great strides in carving out a space within the BDS marketplace, we continue to face significant obstacles in competing with incumbent LECs and entering new markets. Price regulation would only further tip the scale against additional expansion and entry by cable providers, undercutting the very competition the Commission seeks to encourage. Furthermore, cable providers lack any market power that could conceivably justify the imposition of price regulation on their services. Indeed, given the state of the BDS market and the paucity of data before the Commission, the record does not lawfully support such a regulatory approach.

If the Commission does decide to price regulate cable providers, however, it cannot lawfully regulate the large universe of BDS provided on a private-carriage basis. Many BDS, particularly for large enterprise customers, are negotiated with sophisticated purchasers on an individual basis and tailored to individual businesses' requirements. These private-carriage services do not fall within the Commission's Title II authority, and therefore price regulation and other common-carrier requirements could not lawfully be imposed. Nor could the Commission lawfully compel BDS providers to offer on a common-carrier basis services that are provided via

private carriage today, as it lacks authority under the Communications Act and has in any event failed to provide adequate notice of any such proposal.

I. THE CURRENT REGULATORY REGIME HAS ENCOURAGED CABLE PROVIDERS TO BE THE DRIVERS OF BDS COMPETITION.

The starting point for any discussion of competition in the BDS marketplace must be a point on which the FNPRM is unequivocal: that the major success story has been cable's entry into the market, offering additional, facilities-based competitive options in a space long dominated by a handful of large incumbent LECs.[2] This expansion by cable providers like Charter into the BDS market occurred in the absence of any price regulation. Indeed, it is precisely this pro-competitive environment that has allowed cable operators the flexibility and confidence to make the significant investments necessary to create the "great entry success story" the FNPRM recognized.[3]

The Commission has long emphasized the importance of increased facilities-based competition in the BDS marketplace from cable operators and, indeed, has taken significant steps

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[2] *See, e.g.*, FNPRM ¶ 2 ("Cable companies have entered the market, supplementing the BDS offerings of both traditional [incumbent LECs] and [competitive LECs]."); *id.* ¶ 59 ("Over the past ten years, cable systems operators have emerged as significant suppliers of BDS. . . . In the mid-2000s, cable operators started to strategically expand their reach to serve business customers, focusing initially on small businesses in their franchise areas with less than 20 employees with their 'best efforts' Internet broadband service offerings. By 2008, network upgrades allowed cable industry executives to begin including cell backhaul in their overall commercial service planning, and by 2011, cable companies were expanding their service to mid-sized businesses with between 20 and 500 employees. In the last year, cable operators have strategically set their sights even higher on serving the needs of the nation's largest business customers." (footnotes and internal quotation marks omitted)); *id.* ¶ 236 ("The great entry success story has been that of cable. Less than a decade ago cable largely provided no business services of any kind that were materially different from the services marketed to residential customers. Yet, for more than half a decade cable business revenues have experienced [a] compound annual growth rate of 20 percent, starting with the smallest business customers and working their way up to the largest." (footnotes omitted)).

[3] *Id.* ¶ 236.

to facilitate cable's growth in this space. For instance, in its 2012 Order granting in part NCTA's petition for forbearance from Section 652 of the Communications Act for transactions between competitive LECs and cable operators,[4] the Commission justified its forbearance by citing the 1996 Act, in which "Congress recognized that cable operators were likely to emerge as facilities-based competitors for local telephone services."[5] It went on to recognize that forbearing from Section 652(b) would "likely speed the entry of cable operators into the market for telecommunications services provided to business customers" and would "foster increased facilities-based competition."[6]

The Commission reiterated the public-interest benefits of cable providers' entry into the market for business services as recently as last month, in its order approving Charter's merger with Time Warner Cable and Bright House Networks.[7] There, the Commission concluded that the transaction would likely benefit competition by enabling Charter to provide service through a single network to business customers that have locations across the standalone service areas of

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[4] *In re Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions between Competitive Local Exchange Carriers and Cable Operators Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions between Competitive Local Exchange Carriers and Cable Operators*, Order, 27 FCC Rcd 11,532 (2012).

[5] *Id.* at 11,544 ¶ 27.

[6] *Id.*; *see also id.* at 11,545 ¶ 28 (highlighting that "although many cable operators are relatively new entrants competing in the marketplace for the provision of telecommunications services to business customers, cable operators have expansive—and in some areas, ubiquitous—network facilities that can be upgraded to compete in telecommunications services markets at relatively low incremental cost." (footnote omitted)).

[7] *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 15-149, FCC 16-59 ¶ 377 (May 10, 2016) ("*Charter-TWC-A/N Order*").

each applicant, allowing Charter to increase its deployment of commercial and enterprise network facilities.[8]

Charter's significant investment in the BDS market over the past several years is a prime example of how—without price regulation—cable providers are already prioritizing network expansion and thereby providing competitive alternatives for business consumers. Since the beginning of 2013, Charter has invested **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** annually in the expansion of its BDS capabilities.[9] Also, since the beginning of 2013, Charter has expanded its provision of BDS to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** new locations.[10]

In addition to investing **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of capital annually, Charter has prioritized its efforts in the enterprise space in an effort to obtain additional market share from the still-dominant incumbent LECs. In one example, Charter recently launched its Very Near Net ("VNN") promotion at a price significantly below the average price offered by Charter's competitors, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[11] Charter conservatively estimates that, as a result of the recent merger, it is

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[8] *Id.*
[9] Declaration of Phil Meeks ¶ 3 ("Meeks Decl.") (attached as Exhibit A).
[10] *Id.*
[11] *Id.*

now in a position to extend its attractive VNN pricing to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** mid-size and enterprise-size businesses across its footprint.[12] And, because of its expanded footprint and corresponding ability to serve additional business locations in-footprint, Charter estimates that it is now able to offer a competitive alternative to incumbent LECs for an additional **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** multi-site businesses.[13] Still, while Charter is making inroads into the market, Charter's share of the market remains quite small compared with incumbent LECs and other market participants.[14] As explained in the FNPRM, despite double-digit growth in recent years, all cable companies together currently make up less than 8 percent of the total BDS market by revenue.[15]

Further, cable's entry into the BDS market has been accompanied by broad-based price declines in BDS, which strongly suggests that additional regulation is unnecessary. For instance, for legacy Time Warner Cable alone, the average regional price of a 100 Mbps dedicated service in 2013 was **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month; by the first quarter of 2016, that price had fallen to only **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month.[16] Indeed, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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[12] *Id.* ¶ 4.
[13] *Id.*
[14] FNPRM ¶ 217; *see also* Part III, *infra.*
[15] FNPRM ¶ 218.
[16] Meeks Decl. ¶ 5.

[END HIGHLY CONFIDENTIAL INFORMATION].[17] Prices at lower speed tiers decreased too. Over the same time period, legacy Time Warner Cable's 10 Mbps service fell from an average of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month, and its 5 Mbps service fell from an average of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** monthly.[18] These declining prices are not unique but instead are indicative of prices falling across the marketplace.[19]

Also, notably, although Charter is increasingly putting competitive pressure on incumbent LECs within the BDS market, it does so without requiring many of the contractual provisions frequently imposed by incumbent LECs that the Commission has concluded are potentially anti-competitive.[20] For example, Charter does not include **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[21] Similarly, Charter does

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[17] *Id.*
[18] *Id.*
[19] *Id.*; *see also, e.g.*, Comments of National Cable & Telecommunications Association, WC Docket No. 05-15 at 5 (citing Hal Singer, Economists Incorporated, *Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Analysis* at 14-15 (Apr. 2016)).
[20] FNPRM ¶¶ 8, 322-343, 447-491.
[21] Meeks Decl. ¶ 13.

not impose **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[22] The same concerns regarding anti-competitive behavior articulated in the FNPRM are simply not present with respect to Charter, which is a new entrant and does not exert market power.[23]

In short, the Commission is correct to recognize cable providers' great strides in recent years to introduce BDS competition. That cable providers are investing significantly in facilities-based BDS, that prices are broadly falling, and that cable providers are providing BDS without the terms and conditions that the Commission is concerned may be anticompetitive is all powerful evidence that competition is already advancing in the BDS marketplace. Clearly, an expansion of price regulation beyond incumbent LECs is unnecessary. Charter, in particular, has been at the forefront of making the investments in its network necessary to expand its foothold into the BDS market. Given this new-entrant driven growth, and in light of the Commission's own declaration that "competition is best,"[24] the Commission should not impose additional regulations that could undermine the "great entry success story" of cable.[25]

II. PRICE-REGULATING CABLE-PROVIDED BDS WOULD DISCOURAGE THE INVESTMENT THE COMMISSION SEEKS TO PROMOTE.

Despite the significant foothold cable providers like Charter have gained in the BDS market over the past decade, cable providers' competitive position is still tenuous, and it is not a foregone conclusion that the "great entry success story" of cable will continue.[26] As the Commission

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[22] *Id.*
[23] *See also* Part III, *infra*.
[24] FNPRM ¶ 5.
[25] *Id.* ¶ 236.
[26] *Id.*

acknowledges, cable providers face all of the same barriers to entry as competitive LECs, and they must also incur significant costs to expand their footprints, which were intended to reach residential customers, in order to serve large enterprise-level businesses.[27] Yet cable providers are less able than incumbent LECs to offer competitively priced solutions.[28] For example, companies like Charter must frequently purchase out-of-footprint network capacity from other providers in order to serve multi-site customers, raising the cost and coordination required to offer BDS.[29] In contrast, incumbent LECs, with their expansive regions and long-established partner relationships, face lower overall barriers to entry compared to both cable providers and competitive LECs.[30]

New regulations also may impact the types of technology and markets in which Charter may provide BDS. Legacy Charter has provided BDS exclusively over its fiber network. In contrast, legacy Time Warner Cable recently started to offer BDS over hybrid fiber coaxial ("HFC").[31] While HFC may offer the potential to expand the range of locations in which Charter can make BDS available, it remains to be seen how HFC-delivered BDS will fit into the marketplace, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[32] Price-regulating the BDS

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[27] *Id.* ¶¶ 231-232.
[28] *Id.* ¶ 232.
[29] Meeks Decl. ¶ 6.
[30] *See, e.g.*, Comments of Birch Communications, Inc., BT Americas, Inc., EarthLink, Inc. and Level 3 Communications, WC Docket No. 05-25 at 19-22 (Jan. 22, 2016) ("Comments of Birch Commc'ns et al.").
[31] Meeks Decl. ¶ 10; *see also* Time Warner Cable Inc. Notice of Ex Parte Communications, WC Docket No. 05-25 at 2-3 (Mar. 3, 2016) ("Time Warner Cable Inc. Notice of Ex Parte").
[32] Meeks Decl. ¶ 10. As other parties to this proceeding have explained, dedicated services provided over HFC plant, which the Commission includes within the definition of "BDS," may not be a competitive substitute for TDM- or fiber-based services. *See, e.g.*, Letter from Thomas Jones, Counsel for Level 3 Communications, LLC and EarthLink, Inc. to Marlene H. Dortch,

market—even just in geographic areas deemed "non-competitive"—would throw a very negative variable into Charter's consideration of whether continuing to provide BDS over HFC makes economic sense.[33]

Given the already steep hurdles Charter faces to expand its BDS business, and in light of the Commission's goal to *promote* facilities-based competition into new areas, the Commission should be loath to expand price regulation to non-dominant providers. This would only create disincentives for cable providers to undertake further investment. Charter's buildout decisions are based **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[34] Given Charter's buildout model, price regulation would not, under any scenario, encourage additional investment or deployment, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[35]

Moreover, even if the Commission's price regulation were to allow cable providers to offer BDS at rates with sufficient returns, price regulation would create significant regulatory uncertainty that in itself would discourage investment. Among other things, regardless of where this Commission were to set rates, price-regulation, once in place, would create opportunities for

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Secretary FCC, WC Docket No. 05-25 (Apr. 14, 2016); *see also* Comments of Birch Commc'ns et al. at 16-17. Because HFC BDS lacks the reliability, performance, and speed of dedicated services provided over legacy loops and fiber, HFC services are often unable to compete with incumbent LECs' services, even where there is existing cable plant.

[33] Meeks Decl. ¶ 10.

[34] *Id.* ¶ 9.

[35] *Id.*

future Commissions to set rates of return below acceptable levels. Such regulatory uncertainty—particularly when paired with the compliance costs of a new regulatory structure—is likely to lead providers like Charter toward other, more productive uses of investment dollars.[36]

III. REGULATING CABLE-PROVIDED BDS IS UNNECESSARY TO PROTECT CONSUMERS, BECAUSE CABLE PROVIDERS LACK MARKET POWER.

The FNPRM's proposals to impose "technology neutral" regulation is a sharp break from the Commission's decades-long holding that non-dominant carriers, like Charter, do not exercise market power, and that there is therefore no legitimate basis for regulating prices.[37] Indeed, while the FNPRM identifies direct evidence of market power in the delivery of DS1 and DS3 services,[38] it contains no such finding with respect to cable-provided BDS. Moreover, the Commission recognizes the pro-competitive effect of cable's entry[39] and that cable providers still make up only a small share of the BDS market—less than 5% as of 2013.[40] This, together with the Commission's failure to provide any evidence that cable operators exercise market power, is strong evidence that price regulation of cable-provided BDS is unnecessary to protect consumers.

Charter's own experience, moreover, is further proof that cable providers do not exercise market power with respect to BDS. Although the number of customers Charter is able to serve

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[36] *Id.*

[37] *See* FNPRM ¶ 16 (citing *In re Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Service*, Memorandum Opinion and Order, 22 FCC Rcd 18,705, 18,707 ¶ 3 (2007) ("*AT&T Forbearance Order*")); *see also In re Tariff Filing Requirements for Nondominant Common Carriers*, Notice of Proposed Rulemaking 8 FCC Rcd 1395, 1395 ¶ 3 (1993) (describing the Commission's findings that tariff regulation of carriers lacking market power was unnecessary and, in fact, harmful to competition).

[38] FNPRM ¶¶ 237-255.

[39] *See, e.g.*, *id.* ¶ 236.

[40] *Id.* ¶ 218.

continues to grow at an impressive rate, the number of locations to which Charter provides BDS is relatively small.[41] Charter's BDS reach pales in comparison to that of much larger incumbent LECs whose ubiquity gives them a tangible advantage and precludes cable providers from exercising any meaningful market power. Indeed, the Senior Vice President of Business Product Management for AT&T recently highlighted that cable companies are not a threat to AT&T's enterprise services, remarking that—in order to compete—cable providers "would all have to cobble together something to get a full scale MPLS service and I don't think any big enterprise wants to be the guinea pig."[42] Although its recent merger approval has improved Charter's ability to compete in this area, it remains a significant concern.[43]

Further evidence that Charter lacks market power is the ability of Charter's customers to exercise significant leverage in contract negotiations. Charter's largest BDS customers, purchasers of wireless backhaul, are sophisticated, typically seeking multiple bidders on requests for proposals that contain strict pricing constraints, making it impossible for Charter to dictate terms.[44] As discussed above, the fact that Charter's contracts do not utilize the types of terms and conditions that the Commission has called out as potentially anti-competitive is further evidence that Charter's BDS offerings remain very much constrained by the market.[45]

Finally, to the extent that the Commission's proposals stem from a concern that cable providers' networks will allow them to dominate the coming market for backhaul services for 5G

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[41] Meeks Decl. ¶ 6.
[42] *See* Sean Buckley, *AT&T: Cable's Enterprise Play Will Challenge Us Initially with Internet Access*, Fierce Telecom (June 1, 2016), http://www.fiercetelecom.com/story/att-cables-enterprise-play-will-challenge-us-initially-internet-access/2016-06-01; *see also* Meeks Decl. ¶ 6.
[43] Meeks Decl. ¶ 6.
[44] *Id.* ¶ 12.
[45] *See* Part I, *supra.*

wireless, that concern is misplaced. Although cable providers' HFC plant may extend through significant portions of their footprint, HFC plant may not be well-suited for 5G wireless backhaul **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[46] And, as the Commission has acknowledged, there is greater competitive entry and potential competition for high bandwidth BDS services such as those provided over fiber. Thus, to the extent that cable providers are asked to provide backhaul for 5G wireless technologies, it would be through portions of their networks where there is substantial competition and where cable providers remain at a significant disadvantage relative to incumbent LECs.

IV. THE COMMISSION CANNOT DEVELOP A RATIONAL SCHEME TO REGULATE NON-DOMINANT CARRIERS BASED ON THE CURRENT RECORD.

In addition to the concerns set forth above, the Commission's "technology neutral" proposals to regulate cable-provided BDS are not and cannot be supported by the record. Therefore, regulating cable-provided BDS would be arbitrary and capricious.

Over the course of the Commission's nearly fifteen-year review of dedicated services pricing, the Commission's regulatory efforts have rightly focused exclusively on price-cap incumbent LECs, given their dominant position within the market.[47] Indeed, the longstanding basis for the Commission's foregoing action in the BDS space was premised on incumbent LECs'

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[46] *Id.* ¶ 11; Prepared Remarks of FCC Chairman Tom Wheeler, *The Future of Wireless: A Vision for U.S. Leadership in a 5G World*, National Press Club, Washington, D.C. (June 20, 2016) (emphasizing 5G's demands with respect bandwidth capacity and latency); *see also* note 32, *supra.*
[47] *See* FNPRM ¶¶ 12-28 (detailing the Commission's regulation of incumbent LECs).

individual market power, which persists today.[48] The FNPRM now proposes a "new start,"[49] and for the first time suggests that non-dominant providers—including new entrants such as Charter—could be subject to price regulation in areas that are deemed non-competitive.[50] The Commission makes this proposal despite recognizing that, in the absence of price regulation, cable-provided competition has been the "great entry success story" in the BDS market.[51]

The record on which the Commission bases its proposals does not support the conclusion that cable BDS providers should be regulated. To begin, the proposals to regulate cable providers alongside incumbent, market-dominant LECs appear to have been taken whole cloth from a recent agreement between Verizon and INCOMPAS.[52] In that agreement, reached between only two parties to this proceeding and filed less than a month before the Commission issued the nearly three-hundred page FNPRM—and only *one day* before Commissioner Wheeler released a public statement previewing the FNPRM's contents[53]—Verizon and INCOMAS laid out in detail what the Commission would ultimately propose. The Commission then relied on that same agreement to justify the expansive, and entirely new, price regulation proposed in the FNPRM, claiming that the "goals of the Further Notice are supported by the joint principles recently announced by

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[48] *See In re Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Service*, Memorandum Opinion and Order, 22 FCC Rcd 18,705, 18,707 ¶ 3 (2007) ("*AT&T Forbearance Order*").
[49] FNPRM ¶ 4.
[50] *Id.* ¶¶ 6, 354.
[51] *Id.* ¶ 236; *see also id.* ¶ 232 (citing Comcast as an example of "[e]fforts to enter and expand in markets are being made with success").
[52] Letter from Kathleen Grillo, Senior Vice President, Public Policy & Government Affairs, Verizon, and Chip Pickering, Chef Executive Officer, INCOMPAS, WC Docket No. 05-25, RM-10593 (Apr. 7, 2016).
[53] Chairman Tom Wheeler, *Out with the Old, In with the New*, FCC Blog (Apr. 8, 2016 10:45 AM), https://www.fcc.gov/news-events/blog/2016/04/08/out-old-new.

INCOMPAS and Verizon."[54] This sort of insular feedback loop suggests that the Commission is not engaging in well-reasoned decision making.[55]

Moreover, the Commission's proposals are based almost entirely on a single year of data gathered through the Commission's *2015 Collection*.[56] Multiple commenters in this proceeding have described that data's flaws—specifically, that it is incomplete and understates competition in the marketplace.[57] Although the Commission touts the *2015 Collection* as the "most comprehensive collection of information ever assembled for a Commission rulemaking proceeding" and the "most robust dataset available to date on the suppliers and purchasers in the BDS industry in the United States,"[58] it nowhere convincingly addresses the data's clear limitations. Competitive LECs and cable providers alike have continued to expand their networks since 2013, meaning that the Commission would be regulating based on information that is now almost four years stale. Level 3 alone, for instance, recently stated its intention to "deploy new loops to approximately 3,000 to 4,000 commercial buildings in the U.S. each year."[59] And Level 3's annual BDS revenues have grown dramatically since the *2015 Collection*, from just over $3 billion in 2013 to nearly $5 billion in 2015, compared with decreasing revenues by the largest

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[54] FNPRM ¶ 159.

[55] *See Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009) (indicating that the Administrative Procedure Act requires an agency to remain sufficiently open-minded during rulemaking proceedings).

[56] FNPRM ¶ 41 ("The large majority of information collected . . . is from the year 2013."); *see also In re Special Access for Price Cap Local Exchange; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service*, Report and Order, 28 FCC Rcd 13,189, 13,192 ¶ 7 (2013).

[57] *See, e.g.*, Application for Review of the United States Telecom Association, WC Docket No. 05-25 at 5-8 (Oct. 24, 2014); Reply Comments of Frontier, WC Docket No. 05-25 at 19-20 (Feb. 19, 2016); Reply Comments of Verizon, WC Docket No. 05-25 at 24 (Feb. 19, 2016).

[58] FNPRM ¶ 43.

[59] *See, e.g.*, Reply Comments of Level 3 *et al.*, WC Docket No. 05-25 at 33-34 (Feb. 19, 2016).

incumbent LECs over the same period.[60] As discussed above, Charter, for its part, has invested **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** annually in its BDS capabilities since the beginning of 2013, and over the same time period Charter has extended its provision of BDS to an additional **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** locations.[61] And, as a result of its recent merger, Charter will be able to serve an additional approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** multi-site businesses, and therefore provide even more competition to incumbent LECs.[62] It is clear that more recent data paints the picture of a rapidly evolving BDS marketplace across the country, demonstrating that it is unnecessary and inappropriate to drastically change the BDS regulatory landscape at this time. Adding additional burdens on cable operators would threaten the current momentum towards greater competition.

The stakes in the BDS market are also particularly high, making it all the more important that the Commission refrain from expanding the scope of any price-regulation regime. In the Commission's own words, "BDS is critical to the delivery of innovative broadband services for businesses and government institutions and is a major contributor to the nation's economy."[63] Moreover, the size of the market is massive. Revenues for the sale of dedicated services as of

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[60] FNPRM at 217, Appendix B, Dr. M. Rysman, White Paper: Empirics of Business Data Service (Apr. 2016).
[61] Meeks Decl. ¶ 3.
[62] *Id.* ¶ 4; *see also Charter-TWC-A/N Order* ¶ 377 (recognizing as a public interest benefit that the merger would allow the combined companies to serve more multi-site enterprise customers, therefore increasing competition).
[63] FNPRM ¶ 44.

2013 were nearly $45 billion, and revenues for the broader enterprise-services market—of which BDS is an integral part—could presently exceed $75 billion annually.[64] The importance and size of the BDS market makes it quite risky to regulate new entrants.

Particularly given the rapidly evolving nature of the marketplace, and cable providers' continued investment and expansion of their entry into that market, the Commission offers no compelling reason to expand regulation now. It should first ascertain the extent to which market forces can continue to bring about increased facilities-based competition.

V. THE COMMISSION LACKS LEGAL AUTHORITY TO EXTEND ITS PROPOSED REGIME TO PRIVATE-CARRIAGE ARRANGEMENTS.

Even if the Commission were to regulate BDS as a general matter, which it should not, its proposed regulatory scheme cannot be applied to the large segment of the BDS market that is provided via private, rather than common carriage. Any attempts to do so would be both procedurally improper—as the FNPRM does not provide adequate notice—as well as substantively improper, as this would exceed the Commission's authority under Title II.

First, as a matter of process, the FNPRM does not purport to regulate services provided by private carriage.[65] Rather, it appears to assume that all BDS are provided on a common-carrier basis subject to Sections 201 and 202 of the Act.[66] However, this is not the case. To the contrary,

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[64] *Id.*

[65] *See id.* ¶ 261 (citing Sections 201 and 202 of the Communications Act as the basis for regulating BDS); *see also id.* ¶ 257 (addressing objections by parties to the proceeding "to being fully included in the new framework" by indicating that "business data services are telecommunication services" and that "BDS providers are therefore common carriers"); *id.* (justifying the Commission's "New Technology Neutral Regulatory Framework for Business Data Services" by explaining that "providers are subject to Title II in the provision of their services").

[66] *Id.* ¶ 257 ("[B]usiness data services are telecommunications services, regardless of the provider supplying the service. BDS providers are therefore common carriers. And as such . . . the providers are subject to Title II in the provision of their services, including packet-based BDS services such as Ethernet." (footnote omitted)).

like many other new entrants in the BDS market, Charter provides BDS through private-carriage arrangements. For example, Charter enters into individualized negotiations with potential BDS customers over **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. For enterprise customers in particular, service relationships are individually tailored, and it is not infrequent that negotiations over these terms fall apart because they are unacceptable to one party or the other. These customers often submit detailed requests for proposals to address their individualized needs—requests that cannot be served by off-the-rack terms.[67] Also, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[68] Charter, for its part, makes individualized determinations regarding whether and on what terms it will provide BDS, depending on, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].[69] These individualized determinations are the hallmarks of private-carriage arrangements.[70]

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[67] Meeks Decl. ¶ 7.
[68] *Id.*
[69] *Id.* ¶ 8; *see also* Time Warner Cable Inc. Notice of Ex Parte Communications at 3 (describing legacy Time Warner Cable's individualized process for determining whether to offer dedicated service to a particular customer).
[70] *See, e.g.*, *In re Cable & Wireless, PLC*, Cable Landing License, 12 FCC Rcd 8516, 8522 ¶ 14 (1997).

If the Commission extends its proposed new regulations to BDS offered via private carriage—or if it attempts to compel BDS providers to offer all of their services (or some subset of their services) on a common-carriage, rather than a private-carriage basis—the FNPRM does not provide legally adequate notice.[71]

Moreover, any attempt to impose the proposed rules on BDS offerings provided via private carriage would also be unlawful as a substantive matter. BDS provided through private-carriage arrangements is, by definition, not a common-carrier service and therefore does not fall within the scope of Title II.[72] And the Commission may not turn private carriage into common carriage by fiat, based merely on its determination of what is in the public interest.[73] Whether "[a] particular system is a common carrier" is determined "by virtue of its functions, rather than because it is declared to be so."[74] To the extent that Charter (or any other cable provider) offers BDS on a private-carriage basis today, the Commission cannot simply declare these offers to be common carriage when the facts and record indicate otherwise. The D.C. Circuit long ago "rejected . . . an unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending on the regulatory goals it seeks to achieve."[75] Thus, to the extent providers offer

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[71] *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317-18 (2012). Nor could the Commission impose price regulation on private-carriage BDS through an enforcement proceeding given the lack of clear prior notice.
[72] *See* 47 U.S.C. §§ 201, 202.
[73] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance." (Citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC*")).
[74] *NARUC*, 525 F.2d at 644.
[75] *Id.*

any BDS via private carriage, as discussed above, the Commission has no authority under Sections 201 and 202 of the Communications Act to regulate its price.

Nor does Section 706 of the Act—or any other basis for imposing price regulation for that matter—confer on the Commission the authority to treat private-carriage BDS like a common-carrier service. The D.C. Circuit has held unambiguously that the Commission may not impose common carrier–style regulation on services that are not, in fact, offered on a common-carrier basis.[76] Any attempt to regulate BDS private carriage through another section of the Communications Act would run headlong against this holding.

[76] *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014); *see also* 47 U.S.C. § 153(51) ("A telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent it is engaged in providing telecommunications services.").

CONCLUSION

For the reasons stated above, the Commission should decline to impose price regulation on new entrants to the BDS market. 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.

June 28, 2016

Respectfully submitted,

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EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

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

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 comments in the above-captioned proceedings based on my personal knowledge of Charter's business operations and my review of Charter's records.

2. Over the past decade, Charter (including legacy Time Warner Cable and legacy Bright House Networks) has made a concerted effort to enter the market for Business Data Services

("BDS"), as that term is defined in the Federal Communications Commission's ("Commission") Tariff Investigation Order and Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceedings, released on May 2, 2016.

3. Although the BDS market remains dominated by incumbent local exchange carriers ("LECs"), Charter has made meaningful strides in providing facilities-based BDS competition. For instance, since the beginning of 2013, Charter has invested **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** annually in the expansion of its BDS capabilities. Also, since the beginning of 2013, Charter has expanded its provision of BDS to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** new locations. In addition to capital investment, Charter has prioritized its sales and marketing efforts in the enterprise space in an effort to obtain additional market share from dominant incumbent LECs. For example, Charter recently launched its Very Near Net ("VNN") promotion, at a price significantly below the average price offered by Charter's competitors, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

4. As a result of the recent merger, and based on conservative estimates, Charter is now in a position to extend its attractive VNN pricing to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** mid-size and enterprise-size businesses across its footprint. Also, because of Charter's expanded footprint and corresponding ability to serve additional business locations in-footprint, Charter estimates that it is now able to offer a competitive alternative to incumbent LECs for an additional

[BEGIN HIGHLY CONFIDENTIAL INFORMATION] **[END HIGHLY CONFIDENTIAL INFORMATION]** multi-site businesses.

5. Charter's BDS prices have fallen over time. For legacy Time Warner Cable alone, the average regional price of a 100 Mbps dedicated service in 2013 was **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month; by the first quarter of 2016, that price had fallen to only **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Over the same time period, legacy Time Warner Cable's 10 Mbps service fell from an average of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** per month to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, and its 5 Mbps service fell from an average of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**. These declining prices are not unique but instead are indicative of prices falling across the marketplace.

6. Despite Charter's concerted efforts, its BDS network remains quite small when compared to its principal competitors, who are able to compete more effectively for customers for a number of reasons, including the ubiquity of their networks' reach and their established relationships with other providers. Charter must also frequently purchase out-of-footprint network

capacity from other providers in order to serve multi-site customers, raising the cost and coordination required to offer BDS. These differences in many instances allow Charter's more established competitors, primarily incumbent LECs, to continue to maintain their dominant position, especially given their ability to serve a larger share of multi-site enterprise customers' locations.

7. Charter enters into individualized negotiations with potential BDS customers over **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. For enterprise-level customers in particular, service relationships are individually tailored, and it is not infrequent that negotiations over these terms fall apart because they are unacceptable to one party or the other. Because enterprise customers often submit detailed requests for proposals ("RFPs") to address their individualized needs, Charter is unable to respond to these RFPs with standard contract terms. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

8. In considering whether to provide service to BDS customers—particularly enterprise-level customers—Charter makes individualized determinations regarding whether and on what terms it will do so. Charter considers, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

9. Although Charter currently intends to continue to invest significantly in expanding its facilities-based BDS capabilities, additional regulation would create disincentives for Charter to undertake further investment. Charter's buildout **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Under this model, price regulation would not, under any scenario, encourage additional investment in or deployment of BDS, because **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Price regulation would also create additional regulatory uncertainty that could require Charter to make conservative assumptions in determining whether to further invest in BDS, which would also discourage additional investment. In addition, to the degree that the proposed regulations impose compliance costs, those costs would require Charter to direct funds toward compliance and away from further network expansion.

10. Additional regulation also may impact the types of technology and markets in which Charter may provide BDS. Before the recent merger, Charter provided BDS exclusively over its fiber network; legacy Time Warner Cable, however, recently began offering BDS over its hybrid fiber coaxial ("HFC") plant. It is yet to be seen how HFC-delivered BDS will fit into the marketplace, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Price regulating BDS would complicate Charter's ongoing consideration of whether to provide BDS over HFC going forward, making it less likely that Charter would invest further in that aspect of its BDS business.

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

[END HIGHLY CONFIDENTIAL INFORMATION], HFC plant may not be well suited for 5G wireless backhaul.

12. Even though cable providers have begun to offer an alternative for customers, the BDS market remains extremely competitive. For any particular potential customer, there are frequently multiple bidders on RFPs, and those RFPs typically include strict pricing constraints. Charter's largest customers, for instance, are purchasers of wireless backhaul. These purchasers are sophisticated and typically seek multiple bidders on RFPs, which make it impossible for Charter to dictate pricing and contractual terms.

13. Charter's contracts, moreover, do not include many of the contractual terms that the Commission has identified as potentially problematic in the FNPRM, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. For instance, Charter's contracts do not include **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Nor does Charter **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION].

REDACTED – FOR PUBLIC INSPECTION

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

Executed on June 28th, 2016

PHIL MEEKS