

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Investigation of Certain Price Cap Local)	WC Docket No. 15-247
Exchange Carrier Business Data Services)	
Tariff Pricing Plans)	

**COMMENTS OF WINDSTREAM SERVICES, LLC, INCOMPAS,
AND SPRINT CORPORATION**

Karen Reidy
INCOMPAS
1200 G Street NW
Suite 350
Washington, DC 20005
(202) 872-5745

John T. Nakahata
Henry Shi
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

*Counsel to Windstream Services, LLC
and Sprint Corporation*

December 4, 2017

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	2
II.	BELLSOUTH IS NOT APPLICABLE TO THE ORDER’S APPLICATION OF THE JUST AND REASONABLENESS STANDARD UNDER SECTION 201(B) OF THE COMMUNICATIONS ACT.....	6
	A. Unlike the Order, BellSouth Did Not Involve Harm to Customers or to Competition in the BDS Market.....	6
	B. The BellSouth Court’s Reasoning Under Section 272’s Nondiscrimination Standard Is Not Applicable to a Different Standard Under Section 201(b).....	9
III.	THE ORDER CORRECTLY FOUND THAT ALL-OR-NOTHING AND EXCESSIVE PENALTIES PROVISIONS ARE UNJUST AND UNREASONABLE PRACTICES UNDER SECTION 201(B) OF THE COMMUNICATIONS ACT.....	11
	A. The Record Supports the Order’s Conclusion that All-or-Nothing Provisions Are Anticompetitive.....	11
	B. The Order’s Findings on Shortfall and Early Termination Penalties Were Supported by the Record and Grounded in Basic Contract Law	13
IV.	THE PREDICTIONS MADE BY THE COMMISSION IN THE BDS ORDER REQUIRE EXTENDING, OR AT A MINIMUM, AFFIRMING THE ORDER.....	15
	A. The BDS Order’s Deregulation of Over 91 Percent of the BDS Market Is Premised on Emergence of Adequate Facilities-Based Competition in the Medium Term of 3 to 5 Years	16
	B. The Commission Should Expand the Remedies Adopted in the Order to Reduce the Harmful and Anticompetitive Provisions in Current ILEC DS1 and DS3 Plans.....	19
	1. The Commission Should Further Limit Anticompetitive Lock-In Provisions	19
	2. The Commission Should Find Unlawful Provisions that Impose Penalties Based on Gross Revenue.....	23
	C. Reversing the <i>Order</i> Would Sabotage the Commission’s Prediction of Competitive Entry Set Out in the <i>BDS Order</i>	24
V.	THE COMMISSION SHOULD NOT ENABLE THE REINSTITUTION OF PRACTICES THAT VIOLATE SECTION 2 OF THE SHERMAN ACT.....	26
	A. ILECs Currently Have Monopoly Power Over the Provision of BDS in the Vast Majority of Markets.....	28
	B. The All-or-Nothing Provisions Amount to Illegal Exclusionary Conduct	30
VI.	CONCLUSION	35

COMMENTS OF WINDSTREAM SERVICES, LLC, INCOMPAS, AND SPRINT CORPORATION

Windstream Services, LLC (“Windstream”), on behalf of its affiliates and subsidiaries, INCOMPAS, and Sprint Corporation file these comments in response to the Commission’s Public Notice¹ concerning a tariff investigation order adopted by the Commission in April 2016.² For the reasons discussed below, we urge the Commission to affirm the findings in the *Order* in all respects and expand the remedies it adopted in the *Order*. Doing so would help facilitate the transition to IP-based networks and promote competition. Reversing the *Order*, on the other hand, would sabotage a critical prediction underpinning the Commission’s entire policy framework for business data services (“BDS”), and would enable the incumbent local exchange carriers (“ILECs”) that currently dominate the market for low-bandwidth BDS to unlawfully maintain their monopoly status.

I. INTRODUCTION AND SUMMARY

Over the past two years, the Commission has dramatically changed the regulatory framework for the \$45 billion BDS market. In April 2016, the Commission adopted the *Order*, culminating an effort that began in 1992 to address “[t]he existence of certain long-term special access arrangements [that] raise potential anticompetitive concerns since they tend to ‘lock up’

¹ *Wireline Competition Bureau Seeks Comment in Connection with Court Remand of Tariff Investigation Order*, Public Notice, DA 17-1078 at 2 (rel. Nov. 3, 2017) (“*Public Notice*”).

² *See Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 (2016) (“*Order*”).

the access market.”³ The *Order* found that provisions in certain ILEC tariffed volume commitment discount plans were unjust and unreasonable because they had the effect of locking in customers, charging excessive penalties, and harming competition by preventing customers from switching to alternative providers. Specifically, the *Order* found that certain provisions requiring customers to buy all of their special access services under the same discount plan, along with excessive shortfall and early termination penalty provisions, were unjust and unlawful under Section 201(b) of the Communications Act of 1934, as amended. AT&T petitioned for review of the Commission’s *Order*.

Concurrently with the *Order*, the Commission issued a further notice to propose rules that would deregulate BDS in markets where competition exists, and, where “competition does not exist,” act “to ensure that non-competitive market conditions do not disadvantage [BDS] customers and their ability to compete and innovate in downstream markets.”⁴ The Commission proposed the adoption of a competitive market test, based on a data collection of unprecedented scope, and informed by traditional antitrust principles, to determine which BDS markets were competitive. In doing so, the Commission recognized that competition in the BDS markets was “uneven,” and that competition “remains stubbornly absent” from places and “most noticeably low-bandwidth services.”⁵

A year later, the Commission adopted the *BDS Order*, which among other things deregulated lower bandwidth DS1 and DS3 channel terminations in more than 91 percent of

³ *Expanded Interconnection with Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369, 7463, ¶ 201 (1992); *see also Order* ¶ 92.

⁴ *Order* ¶ 5.

⁵ *Id.* ¶ 3.

locations with BDS demand. The competitive market test that produced this result deemed all of the locations in a given county to be competitive if either 50 percent of the locations with BDS demand in that county were located within one-half mile of a facilities-based provider offering BDS, or if 75 percent of the census blocks in the county were served by a cable provider. This competitive market test did not require there to be *any* alternative facilities-based provider connected to a customer location for that location to be considered competitive. Instead, the Commission predicted that a nearby provider would, over the medium term of 3 to 5 years, connect its facilities to locations to meet customer demand, which would provide sufficient revenue to support the costs of entry.

Shortly after adopting the *BDS Order*, the Commission moved the court for a voluntary remand of the *Order*, which was subsequently granted. On November 3, 2017, the Commission released the *Public Notice*, seeking comment on issues that will permit the Commission “to consider the extent to which the reasoning in the *Order* is compatible with the *Bell[S]outh* decision . . . or to otherwise reconsider its determination that the tariff provisions in question were unlawful.”⁶ We submit these comments to urge the Commission to affirm and expand the *Order*.

First, the D.C. Circuit’s *BellSouth* decision offers no guidance on the Commission’s analysis in the *Order*, much less provides reasoning that is inconsistent with that in the *Order*.⁷ The *BellSouth* court held that the Commission had failed to support its conclusion under a nondiscrimination claim, which asserted that a discount plan favored BellSouth’s affiliate over an unaffiliated larger carrier. The court found that the Commission did not adequately explain its

⁶ *Public Notice* at 2.

⁷ See *BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006).

finding of discrimination against the unaffiliated carrier because it failed to identify how the plan had harmed the carrier relative to the BellSouth affiliate. In contrast, the *Order* did not evaluate a discount plan under a nondiscrimination standard, but instead found that all-or-nothing and excessive penalty provisions of the tariffs unreasonably harmed the purchasers and had an anticompetitive effect on the market. The *Order* and *BellSouth* thus evaluated two different sets of facts under two different legal standards found in two different sections of the Communications Act. The court's reasoning in *BellSouth* provides no basis for the Commission to reconsider its conclusions in the *Order*.

Second, the *Order* correctly found that the all-or-nothing provisions unjustly and unreasonably restricted customers' ability to reduce their volume commitment levels, and harmed competition in the BDS market by preventing customers from purchasing from competitive providers. The *Order* also correctly found that shortfall and early termination fees that exceeded the ILECs' expectation damages under basic contract principles unjustly and unreasonably penalized customers. These findings were well supported by the record, and the ILECs failed to provide evidence justifying those provisions.

Third, the *BDS Order*'s prediction for the emergence of facilities-based competition depends on the ability of customers to switch their demand to competitive providers and away from the ILECs, which currently provide the only connection to 86 percent of locations with low-bandwidth BDS demand. However, even after the *Order*, shortfall penalties in ILEC discount plans still prevent customers from switching to a competitive provider. The Commission should take additional steps to help free up demand that remains locked into ILEC DS1 and DS3 discount plans. At a minimum, the Commission should affirm the *Order*. Reversing the *Order*, and allowing ILECs to reinstitute the tariff plan provisions that were found

to be unlawful, would further lock in demand and deprive nearby providers of customer revenue that is necessary to support entry into the market. As a result, the Commission would be sabotaging its own prediction in the *BDS Order* and undermining its own policy for the bringing competition to the BDS market.

Fourth, even if the *BDS Order* made a reasonable prediction about *future* competition, reversing the *Order* would enable the ILECs to maintain their *current* dominance in violation of Section 2 of the Sherman Act. By reinstituting the all-or-nothing provisions declared unlawful in the *Order*, the ILECs could foreclose a significant portion of BDS demand from potential entrants, harming the very competitive process that the Commission intended to promote through the *BDS Order*. The Commission should prevent such unlawful anticompetitive conduct by affirming the *Order*.

II. *BELLSOUTH* IS NOT APPLICABLE TO THE *ORDER*'S APPLICATION OF THE JUST AND REASONABLENESS STANDARD UNDER SECTION 201(B) OF THE COMMUNICATIONS ACT

In the *Public Notice*, the Commission sought comments on, among other things, “the extent to which the reasoning in the *Order* is compatible with the *Bell[S]outh* decision.”⁸ For the reasons discussed below, *BellSouth* is simply not relevant to the analysis or conclusions in the *Order*. The only resemblance between the issues in *BellSouth* and those now before the Commission is that both relate to ILEC volume discount plans. Beyond that superficial similarity, the *Order* analyzed a different set of facts under a different statutory provision and legal standard.

A. Unlike the *Order*, *BellSouth* Did Not Involve Harm to Customers or to Competition in the BDS Market

⁸ *Id.*

The Commission order at issue in *BellSouth* resolved a complaint brought by AT&T against BellSouth, in which AT&T alleged that BellSouth's volume-based special access discount plan violated Section 272 of the Communications Act.⁹ Section 272 imposes nondiscrimination safeguards and obligations on the Bell operating companies that provide services to their own affiliates.¹⁰ The discount plan at issue in that case provided percentage discounts that increased as the buyer's circuit commitment tier increased.¹¹ For each commitment tier, which was based on eligible customer revenues, the minimum purchase level was set at 90 percent of the buyer's total special access purchases from BellSouth in the six months preceding the buyer's subscription to the discount plan.¹² During the five-year term, the buyer may adjust the commitment tier upward, but not downward.¹³

AT&T alleged that BellSouth's discount plan discriminated in favor of its BellSouth's affiliated long-distance provider, which was much smaller than AT&T, in two ways. First, AT&T argued, and the Commission agreed, that the plan favored smaller providers like BellSouth's affiliate because the per-circuit discount increased at a slower rate compared to the increase in the commitment volume.¹⁴ Second, the Commission found that the plan favored BellSouth's smaller affiliate because it was easier for smaller providers, which grow at a faster

⁹ See *AT&T Corp. v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd. 23898 (2004) ("*BellSouth Order*"), vacated by *BellSouth Telecommunications, Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006). AT&T also raised claims under Section 201(b) and Section 202(a) of the Communications Act, but the Commission did not reach those claims and dismissed them without prejudice. See *BellSouth Order* ¶ 43.

¹⁰ See 47 U.S.C. § 272.

¹¹ See *BellSouth Order* ¶ 10.

¹² *Id.* ¶ 11.

¹³ *Id.* ¶ 12.

¹⁴ *Id.* ¶ 25.

rate compared to larger providers such as AT&T, to meet and exceed the 90 percent threshold each year during the plan’s term.¹⁵

The *BellSouth* case did not immunize all voluntary discount plans from scrutiny; the court simply found that the Commission failed to provide an adequate explanation of the discriminatory harm. In vacating the Commission’s order, the *BellSouth* court first noted that the Commission did not explain why the discount rate should increase at a proportionate rate to the commitment volume.¹⁶ Instead of comparing BellSouth’s plan against a hypothetical discount plan, the court compared it against the rate structure that would be in place in the absence of any discount plan, and found that BellSouth’s plan “substantially *disadvantaged* BellSouth Long Distance by giving it a far smaller percentage discounts than its larger competitors.”¹⁷ Because the Commission did not explain how AT&T was treated worse than BellSouth’s affiliate, even though AT&T was paying a lower rate, the court concluded that the Commission’s finding as to the discount rate structure was arbitrary.

The court also found the Commission’s determination as to the commitment requirement to be arbitrary because “nothing in the Commission order demonstrates that the 90% commitment requirement in fact harmed any of its putative victims—the large, established companies.”¹⁸ The Commission’s order stated that the larger carriers will “likely come to lack the volume needed to qualify for renewing” the plan, and “will likely experience diminishing

¹⁵ *Id.* ¶ 36.

¹⁶ *BellSouth*, 469 F.3d at 1057 (“[T]he Commission provided no evidence that any company offers a linear discount plan, much less evidence that such plans so pervade the industry as to form the appropriate basis for comparison.”).

¹⁷ *Id.*

¹⁸ *Id.* at 1059.

headroom.”¹⁹ However, as the court noted, the harms were “a prediction of future trends,” and the Commission failed to show how carriers like AT&T “were at all harmed by the 90% commitment requirement.”²⁰

In contrast to the proceeding in *BellSouth*, the *Order* was issued after the Commission had compiled a voluminous record, based on which it found the unlawful provisions caused three distinct types of harms, as further discussed below. First, the Commission found that the all-or-nothing provisions restricted customers’ ability to reduce their commitment level or consider alternative providers.²¹ Second, the Commission found that the shortfall and early termination provisions penalized customers by charging them an amount greater than the expectation damages of the ILEC.²² Third, the Commission found that the unlawful provisions harmed competition in the BDS market because they foreclosed potential demand from alternative providers.²³ All of these findings about present effects, none of which was found in the Commission’s order vacated by *BellSouth*, more than meet the court’s requirement that the Commission explain how special access purchasers and competition are harmed by the plan provisions that the Commission determined to be unjust and unreasonable.

B. The *BellSouth* Court’s Reasoning Under Section 272’s Nondiscrimination Standard Is Not Applicable to a Different Standard Under Section 201(b)

The *Order* concluded that the all-or-nothing and excessive penalty provisions constituted unjust and unreasonable practices under Section 201(b). In contrast, the court’s analysis in

¹⁹ *BellSouth Order* ¶ 38.

²⁰ *BellSouth*, 469 F.3d at 1060.

²¹ *See Order* ¶ 103.

²² *Id.* ¶ 117.

²³ *Id.* ¶ 148.

BellSouth was limited to Section 272 and AT&T's discrimination claim, and necessarily focused on how BellSouth's discount plan affected AT&T as compared to how it affected BellSouth's affiliate. As a result, language in the court's *BellSouth* opinion that appears to endorse voluntary discount plans is limited by the case's Section 272 context, and does not apply to the *Order*'s analysis under Section 201(b).

First, the *BellSouth* court observed that the Commission in its order had "neglected a critical fact, namely that [BellSouth] had no obligation to offer a volume discount plan at all, much less a linear plan."²⁴ The court's reasoning makes sense for a nondiscrimination claim, which necessarily compares the relative effect of a tariff plan. Had BellSouth not offered any discount plan, AT&T would be paying the same rate as BellSouth's own affiliate. Thus, BellSouth could not be treating AT&T *worse* than it did its own affiliate by providing a discount plan that, in fact, gave AT&T a *greater* discount than was available to BellSouth's affiliate. The court's observation does *not* mean that discount plans can never be unlawful under Section 201(b)'s just and reasonableness standard simply because they were voluntarily offered by the ILEC.

Second, the court also stated that larger carriers' complaint about the lack of headroom was "more appropriately attributed to their free choice than to the 90% commitment requirement," and that "[h]ad they not voluntarily increased their commitments, each would have had vastly more headroom."²⁵ Again, when analyzing a discrimination claim, the court naturally examined whether the terms of the plan favored BellSouth's affiliate over the larger carriers. In this case, BellSouth's affiliate was subject to the exact same discount structure and the same 90%

²⁴ *BellSouth*, 469 F.3d at 1057.

²⁵ *Id.* at 1059.

commitment requirement. Prior to AT&T's voluntary increase, the same 90% commitment requirement did not present the same headroom constraint. Thus, the 90% commitment requirement in the plan, which applied to all purchasers, did not on its own have a more detrimental impact on AT&T compared to BellSouth's affiliate. The *BellSouth* court's reasoning here likewise does not mean that ILEC discount plans for which customers sign up could *never* violate Section 201(b)'s just and reasonableness standard.

III. THE *ORDER* CORRECTLY FOUND THAT ALL-OR-NOTHING AND EXCESSIVE PENALTIES PROVISIONS ARE UNJUST AND UNREASONABLE PRACTICES UNDER SECTION 201(B) OF THE COMMUNICATIONS ACT

A. The Record Supports the *Order*'s Conclusion that All-or-Nothing Provisions Are Anticompetitive

In reaching the conclusions in the *Order*, the Commission drew on an extensive record illustrating how all-or-nothing provisions suppress competition. Competitive LECs that purchased DS1 and DS3 circuits under the plans subject to the tariff investigation faced stiff economic penalties for failing to meet their historic purchase levels. Even as end user customers increasingly demanded Ethernet-based BDS alternatives, competitive LECs were restricted in transitioning their own supply toward Ethernet connections. The Commission concluded that these provisions unreasonably restricted competitive LECs from considering alternatives both from the ILEC and from competitive suppliers.

As the *Order* explained, the all-or-nothing provisions “preclude customers from electing to lower the amount of DS1 and DS3 services purchased at the inception of a high percentage commitment plan or option.”²⁶ All-or-nothing provisions inflate the minimum commitment level because plan customers cannot purchase some portion of their DS1 and DS3 needs under a

²⁶ *Order* ¶ 103.

different plan and thereby reduce their commitment.²⁷ The *Order* cited accounts in the record stating that all-or-nothing provisions enforced by shortfall penalties (whether or not exceeding contractual expectation from full performance) meant that switching to an alternative supplier “not a viable option.”²⁸ Although the Commission invited the ILECs to submit into the record data substantiating their justifications for these provisions, the ILECs declined to do so.²⁹

Having concluded that all-or-nothing provisions were unjust and unreasonable under Section 201(b), the Commission implemented modest remedies in response. The Commission adopted a “targeted approach” that it intended to “enhance competitive LECs’ ability to respond to the changing nature of the business data services market, minimize disruption of incumbent LEC’s tariffs, and accelerate the adoption of IP technologies to the benefit of consumers.”³⁰ As discussed below,³¹ we submit that additional remedies are appropriate, especially in light of the conclusions and policy adopted by the Commission in the *BDS Order*. The remedies the *Order* adopted with respect to all-or-nothing provisions were exclusively prospective. The Commission “decline[d] to apply corrective action to existing agreements under these plans,”³² and sought

²⁷ *See id.*

²⁸ *See id.* ¶ 105 & n. 273; Comments of XO Communications, LLC, WC Docket No.15-247, at 21-26 (filed Feb. 5, 2016) (“XO Comments”); Declaration of Gary Black, Jr. on Behalf of Level 3 Communications, LLC (“Black Decl.”) ¶ 16, attached as Appendix A to Opposition of Birch, BT Americas, EarthLink, INCOMPAS, Integra, and Level 3, WC Docket No 15-247 (filed Feb. 5, 2016) (“Joint CLEC Comments”); Joint CLEC Comments at 35 (explaining that Level 3 has declined to purchase from alternative providers “[b]ecause the penalties that Level 3 would incur by switching providers would far exceed these potential savings”).

²⁹ *See Order* ¶¶ 106-107.

³⁰ *Id.* ¶ 87

³¹ *See infra* part IV.

³² *Order* ¶ 111.

further comment on how to “implement this prohibition in existing agreements in a way that addresses the impact of the unlawful provisions.”³³ Competitive providers have proposed various remedies to unlawful all-or-nothing provisions in existing contracts, or at least ways to ameliorate their harms. Level 3 proposed to provide a “fresh look” for purchasers subject to plans with all-or-nothing provisions, so that a customer may adjust the commitment levels without terminating the plan entirely. Windstream proposed that the Commission should order that the tariff plans be modified so that Ethernet purchases made by the customer from the same ILEC could be “credited” toward the minimum commitment levels.³⁴ Although this remedy would not alter the levels themselves, which had been set under the now-unlawful all-or-nothing provisions, it would at least reduce the shortfall and early termination penalties.³⁵ However, the Commission has not acted on the further notice.

B. The *Order*’s Findings on Shortfall and Early Termination Penalties Were Supported by the Record and Grounded in Basic Contract Law

The Commission concluded, based on record evidence, that excessive shortfall penalties “unreasonably limit the customer’s ability to make efficient choices and impede technology transitions.”³⁶ Such penalties “combined with high minimum purchase requirements harm competition by preventing competitive LECs from making cost-based choices about whether and when to transition their TDM purchases to Ethernet services, whether through purchase or

³³ *Id.* ¶ 113.

³⁴ See Opposition of Windstream Services, LLC, WC Docket No. 15-247, at 18-20 (filed Feb. 5, 2016) (“Windstream Opposition”).

³⁵ See *id.* at 19.

³⁶ *Order* ¶ 117.

construction.”³⁷ Excessive early termination penalties also harm competition by preventing purchasers from switching providers or self-provisioning.³⁸

The shortfall and early termination penalties found to be unlawful also violated the black-letter contract law principle that a party is not entitled to recover as damages for breach of contract any amount in excess of what it would have received had the contract been fully performed, net of costs that were not incurred because of the breach.³⁹ Whether liquidated damages provisions, such as the shortfall and early termination fees, are enforceable depends on two factors under traditional contract principles. Both support the Commission’s finding in the *Order*. First, liquidated damages are less likely to be reasonable and enforceable if, at the time the parties enter into the contract, the parties’ actual damages from breach are relatively easy to determine with certainty.⁴⁰ In this case, the ILEC’s damages for shortfall and early termination are not difficult to calculate: they are no greater than the revenue it would have generated from the DS1 and DS3 circuit net of the costs avoided. Second, liquidated damages are less likely to be enforceable to the extent they exceed the actual damages suffered by the non-breaching

³⁷ *Id.* ¶ 129; Joint CLEC Comments at 19 (“The threat of high shortfall penalties, imposed when customers fall below their committed volumes, deters competing wholesale providers from shifting demand to alternative providers . . .”).

³⁸ *Order* ¶ 148.

³⁹ *See Order* ¶ 132; *see also, e.g.*, Restatement 2d Contracts § 347a (“Contract damages are ordinarily based on the injured party’s expectation interest . . . , [and] put him in as good a position as he would have been in had the contract been performed.”); *id.* § 347d (“This cost avoided is subtracted from the loss in value caused by the breach in calculating his damages.”).

⁴⁰ *See id.* § 356 cmt. b (“The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty (see § 351), the easier it is to show that the amount fixed is reasonable.”).

party.⁴¹ The Commission noted that some, though not all, of the shortfall provisions would have produced penalties greater than the ILEC's expectation damages, and found that "penalties for breach that exceed the expected impact on the harmed contracting party's net revenue stream are unreasonable."⁴² Likewise, the Commission found early termination penalties that exceeded "the opportunity cost the incumbent LEC would incur as a result of the breach" to be unjust and unreasonable.⁴³

IV. THE PREDICTIONS MADE BY THE COMMISSION IN THE *BDS ORDER* REQUIRE EXTENDING OR, AT A MINIMUM, AFFIRMING THE *ORDER*

The Commission made sweeping deregulatory changes in the *BDS Order*,⁴⁴ having predicted that, despite the current highly concentrated markets, facilities-based competition will arrive in the medium term (over the next three to five years) to meet demand. The undersigned disagree fundamentally with the Commission's premises and reasoning in reaching this conclusion, and have challenged that conclusion as arbitrary and capricious.⁴⁵ Nonetheless, we here urge the Commission to act consistently with its prediction and analysis in the *BDS Order*, and to expand the remedies in the *Order* to enable BDS customers to switch to other facilities-

⁴¹ See *id.*; see also, e.g., *In re Trans World Airlines, Inc.*, 145 F.3d 124, 135 (3d Cir. 1998) (affirming conclusion that liquidated damages provision is unenforceable penalty where "they simply have no bearing on [the non-breaching party's] probable loss in the event of breach"); *Leasing Service Corp. v Justice*, 673 F.2d 70, 73 (2d Cir. 1982) ("[C]ontractual terms providing for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable.").

⁴² *Order* ¶ 133.

⁴³ *Id.* ¶ 155.

⁴⁴ *Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 32 FCC Rcd. 3459 ¶ 13 (2017) ("*BDS Order*").

⁴⁵ *Citizens Telecomm's Co. of Minnesota, LLC v. FCC*, Petition for Review of an Order of the Federal Communications Commission No. FCC 17-43 by Ad Hoc Telecommunications Users Committee et al., Nos. 17-2296, 17-2342, 17-2344, 17-2685 (8th Cir. June 19, 2017).

based providers if and when such providers are able to offer competitive service. At the same time, we caution the Commission against reversing the *Order*. Doing so would enable ILECs to reinstitute the all-or-nothing provisions and deny potential entrants the revenue necessary to overcome the barriers to entry, thus undermining the Commission's predictions in the *BDS Order*.

A. The *BDS Order*'s Deregulation of Over 91 Percent of the BDS Market Is Premised on Emergence of Adequate Facilities-Based Competition in the Medium Term of Three to Five Years

The *BDS Order* adopted a competitive market test that led to the elimination of price cap and tariffing protections in more than 91 percent of locations with BDS demand, even though 86 percent of locations with lower bandwidth demand presently do not have *any* competitive provider offering service.⁴⁶ The Commission concluded that the predicted emergence of facilities-based providers capable of serving customers meant that continued price cap regulations are not necessary to ensure just and reasonable rates.⁴⁷ Under the competitive market test, a location with BDS demand is deemed to be competitive with respect to DS1 and DS3 channel terminations if it is located in a county in which either one of two conditions is met:

1) 50 percent of the locations with BDS demand in that county are within a half mile of a location served by a competitive provider, or

⁴⁶ See Letter from John Nakahata, Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143, 05-25, RM-10593 (filed Mar. 27, 2017) (citing analysis of the Commission's data collection indicating that approximately 86 percent of customer locations with aggregate bandwidth demand of below 50 Mbps have no provider offering service other than the incumbent).

⁴⁷ *BDS Order* ¶¶ 160-62.

2) 75 percent of the census blocks in that county have a cable provider present based on the Commission's Form 477 data.⁴⁸

Critically, the Commission's test does not require a facilities-based BDS provider to actually be offering service to any particular customer location, or to even have facilities capable of supplying service connected to that location within a few months or even a year or more.

Instead, the test rests on a *prediction* about the ability of nearby providers to compete with the incumbent with the sole connection to a customer location at some point three to five years in the future, since the test "assesses the availability of actual and likely competitive options."⁴⁹ The *BDS Order*'s reasons for forbearing from the application of tariffing requirements in competitive markets also anticipate the emergence of potential entrants to the market. The Commission recognized that in the counties it has deemed competitive, "some end users may not have viable alternatives to the incumbent LEC's DS1 and DS3 end user channel terminations services and other special access services within" the "near-term."⁵⁰ Nonetheless, the Commission concluded that "even in these areas, we believe tariffing may reduce incentives for competitive entry and ultimately inhibit growth in the market and competition over the longer term."⁵¹

The *BDS Order* offered two justifications for its predictions that nearby facilities will lead to adequate competition in the "medium term" of three to five years. First, the *BDS Order*

⁴⁸ *Id.* ¶ 86.

⁴⁹ *Id.* ¶ 97.

⁵⁰ *Id.* ¶ 162. The Commission also declined to reclassify counties that were subject to Phase 2 pricing flexibility as "non-competitive" even when they did not meet either prong of the competitive market test. Those areas lack even the prediction of competitive choice within three to five years. *See id.* ¶ 164.

⁵¹ *Id.* ¶ 162.

concluded that “providers actively compete for customers located within about a half mile from their networks by bidding on requests for proposal and sending their sales personnel to offer their services.”⁵² Second, the *BDS Order* concluded that “providers of BDS are commonly willing to extend their existing network . . . to meet demand,” and “additionally assume[d] . . . that a cable company competes for any BDS demand, or will do so within a few years, wherever it is supplying mass market broadband services over its own network, or will do so sometime over the next few years.”⁵³

The common thread connecting these justifications is the premise that there is a sufficient number of customers capable of switching providers to attract competitors to build their own facilities or at least bid for business.⁵⁴ Assuming this is true, a sufficient number of customers that demand BDS, including those that currently purchase DS1 and DS3 channel termination services from ILECs, must be able efficiently to switch to nearby providers. As discussed below, if the Commission were to reverse the findings in the *Order*, ILECs would be able to lock in a substantial portion of demand in multiyear contracts in the near term, during which they would be the only provider in some 86 percent of locations with lower bandwidth demand. Denied the revenue from these locked-in customers, nearby providers would be unable to emerge as actual competitors as envisioned in the Commission’s *BDS Order*.

⁵² *Id.* ¶ 118.

⁵³ *Id.* ¶ 119.

⁵⁴ *Id.* ¶ 51; *id.* ¶ 52 (“Competitive LECs rarely build on speculation and instead prefer to have a customer in place before undertaking the costs associated with buildouts.”). The *BDS Order* acknowledges that even nearby providers would still build if “the cost of meeting demand within one-half mile, including the costs of network extension and customer connection, is usually less than the present value of expected net revenues that buildout to that location will entail.” *Id.* ¶ 119.

B. The Commission Should Expand the Remedies Adopted in the *Order* to Reduce the Harmful and Anticompetitive Provisions in Current ILEC DS1 and DS3 Plans

The *Order*'s findings and remedies were an important incremental step forward in unlocking demand, promoting competition, and transitioning to IP-based network technology. Unfortunately, shortfall and early termination penalties are still triggered by failure to meet volume commitments, commitment levels which were set years ago and inflated by all-or-nothing provisions that the *Order* left in place. Even the revised tariff plans still require all-or-nothing commitments at the operating company rather than holding company level. As a result, customers are still locked into multiyear contracts with volume commitment levels that "stunt the development of an addressable market and thus have an anti-competitive effect."⁵⁵ Moreover, despite the clear language of the *Order* requiring shortfall penalties to be calculated based on net revenues, ILEC tariff plans still impose excessive penalties based on gross revenue. The Commission should build on the remedies adopted in the *Order* and further reduce the barriers erected by ILECs to prevent customers from switching to potential alternative providers.

1. The Commission Should Further Limit Anticompetitive Lock-In Provisions

Even with the much-needed remedies implemented by the *Order*, shortfall and early termination penalties continue to prevent Windstream from considering alternative BDS wholesale providers, whether traditional CLECs or cable providers. Even when a competitive provider offers a more competitive price for higher bandwidth than does the ILEC, such as a lower price for 2 Mbps or 3 Mbps Ethernet compared to a DS1 channel termination, the shortfall penalty more than wipes out any potential cost savings. To choose a competitive provider, Windstream would, in effect, be paying twice for the same circuit, once to the competitive

⁵⁵ *Order* ¶ 126.

provider, and again to the ILEC in the form of a penalty. As a result, Windstream has had to forego purchasing from competitors.

The Commission should act further to reduce the lock-in effects of ILEC tariff plans. First, the Commission should find unlawful those revised all-or-nothing provisions that impose requirements at the level of Access Customer Name Abbreviations (“ACNA”), rather than holding company, but otherwise carry a similar effect as did the original provisions. For instance, “[i]f a customer subscribes to [Commitment Discount Plan] on or after July 16, 2016, all eligible service types *under the ACNA(s) designated* for inclusion in such CDP must be included in CDP,” except for limited exceptions that were also included in the previous version of the tariff pricing plan.⁵⁶ Under this regime, Verizon has maintained the unlawful requirement that each ACNA, which is frequently associated with a legacy entity within a larger holding company, purchase all of its circuits on one pricing plan or another.

These all-or-nothing requirements pose the same problems that the Commission identified in the *Order*, merely at a slightly different level of granularity. Any purchaser with substantial demand under an ACNA has a limited ability under these provisions to “manage their special access purchases in an efficient manner,” such as by reducing their minimum commitments with Verizon by allocating some DS1 or DS3 circuits to a circuit-based term only plan or month-to-month rates.⁵⁷ Verizon has made it difficult to transfer circuits from one

⁵⁶ Verizon Revised Tariff No. 1 § 25.1.1(D)(2) (1st rev. page 25-1.1) (emphasis added). The emphasized clause is the only addition to the previous provision. *See* Verizon Tariff FCC No. 1 § 25.1.1(D) (orig. page 25-1.1), Transmittal No. 871 (issued Oct. 31, 2007) (“If a customer subscribes to a CDP, all eligible service types must be included in CDP [with limited exceptions].”).

⁵⁷ *Order* ¶ 100 (discussing Comments of XO Communications, LLC on the Further Notice of Proposed Rulemaking at 24, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016)).

ACNA to another, frequently by requiring that the circuit be disconnected and reconnected.⁵⁸ In addition, a purchaser may not want to switch circuits among ACNAs for its own customer management reasons.⁵⁹ With such impediments, purchasers are still forced to place all of an ACNA's demand into a discount plan and face the same impracticability of lowering their minimum commitments upon renewal that the Commission had noted.⁶⁰ As a result, Windstream has continued to face significant shortfall penalties based on volume commitments set under these all-or-nothing provisions, even after forgoing alternative providers and replacing lower-priced unbundled DS1 loop purchases with DS1 circuits.

There are other ways to request and track how a customer would like to purchase individual circuits that serve the Commission's goal of protecting customers' purchase options against restrictions that are not supported by a corresponding reasonable business concern. Standard Access Service Requests ("ASRs") have additional fields that can be used to facilitate more granular designations than requiring that all demand within an ACNA be placed into a plan. In fact, Frontier, in its changes, proposes a much less restrictive approach than does Verizon.⁶¹ Accordingly, the Commission should find these revised all-or-nothing provisions to be unlawful.

⁵⁸ See Declaration of Margaret Rubino ¶ 5, Attach. A to Petition of Windstream Services, LLC, INCOMPAS, EarthLink, and Sprint Corp. to Reject or Suspend and Investigate Verizon Transmittal No. 1335 (filed July 8, 2016).

⁵⁹ *Id.* ¶ 6.

⁶⁰ See *id.*

⁶¹ See, e.g., Frontier Telephone Companies Tariff FCC No. 5 § 5.6.19(A)(2) (2d rev. page 5-132), Transmittal No. 67 (issued July 1, 2016) (requiring customers to issue ASRs to add or convert existing DS3 Special Access Lines billed month-to-month and/or under other term pricing plans to the DS3 Term Volume Plan). See also Frontier Description and Justification at 4, Transmittal No. 67 (July 1, 2016).

Second, the Commission should find it is unjust and unreasonable for an ILEC to either: (1) exclude the spend from a customer's purchase of Ethernet circuits from that ILEC from counting toward the attainment of DS1 and DS3 commitments; or (2) impose onerous eligibility requirements that are in certain current "migration" provisions.⁶² Windstream has submitted into the record one option for crediting purchases of Ethernet circuits toward DS1 and DS3 volume commitments, which would count a purchase of an Ethernet circuit of up to 12 Mbps toward a DS1 circuit commitment, and a purchase of an Ethernet circuit of up to 100 Mbps toward a DS3 circuit commitment.⁶³ Early termination liability also should not apply to any instance where a DS1 or DS3 connection is prematurely disconnected and replaced with a similarly comparable Ethernet connection (or if the remaining TDM term is longer than the longest Ethernet term commitment, to the end of that Ethernet term commitment).⁶⁴ Of course, in cases in which the DS1 or DS3 commitment included circuit portability, any Ethernet purchase would be able to substitute for the prematurely disconnected DS1 or DS3 circuit without incurring early termination liability.

Third, the Commission should institute a "fresh look" opportunity for tariff discount plans that provides customers the ability to reset their commitment quantities after each shortfall penalty assessment. These commitments were—as dictated by the ILECs—based on historical purchases, which do not reflect present market conditions. Failure to allow customers to reset

⁶² See Windstream Opposition at 15-16 (describing restrictions in migration provisions that severely limit their applicability).

⁶³ See Windstream Opposition at 19 & n.49.

⁶⁴ A reduced termination liability would be appropriate if the replacement Ethernet purchase was discontinued prior to the end of original term of the DS1 or DS3 circuit not subject to portability, but only for the time between the end of the customer's Ethernet purchase and the end of the original term of the DS1 or DS3 circuit.

commitment quantities impedes the transition to packet-based services by subjecting them to ever-rising shortfall penalties,⁶⁵ which the customer can avoid only by purchasing additional DS1 and DS3 circuits instead of switching to a potential competitive provider. Taking these additional steps would increase the demand that is available to potential entrants who, according to the Commission's prediction, would construct new facilities to meet such demand.

2. The Commission Should Find Unlawful Provisions that Impose Penalties Based on Gross Revenue

In addition to taking the steps discussed above, the Commission should also expressly find unlawful shortfall and early termination provisions that impose penalties equal to the gross revenue represented by the shortfall amount or remainder of the contract term, respectively. The *Order* found that “penalties for breach that exceed the expected impact on the harmed contracting party’s *net* revenue stream are unreasonable.”⁶⁶ The *Order* also states that net revenues should be calculated by taking the “revenues that [the ILEC] would otherwise have gained,” plus additional costs if any, such as “processing or disposal,” minus the “operating costs” that are saved by not providing the service.⁶⁷ Despite the direction in the *Order*, Windstream is still facing shortfall and early termination penalties that are almost always calculated based on the *gross* revenue from DS1 and DS3 channel terminations and mileage. Basic contract law principles also support limiting shortfall and early termination penalties to net revenues. For example, costs that ILECs do not incur due to an early termination should be

⁶⁵ See Comments of Windstream Services, LLC on the Further Notice of Proposed Rulemaking, at 70-71, WC Docket Nos. 05-25, 16-143, RM-10593 (filed June 28, 2016) (“Windstream BDS FNPRM Comments”).

⁶⁶ *Order* ¶ 133 (emphasis added).

⁶⁷ *Id.* ¶ 132.

deducted.⁶⁸ The Commission should fully implement its finding in the *Order* that excessive shortfall and early termination penalties are unlawful by further clarifying that penalties should not be measured by reference to ILECs' gross revenue under the plans.

C. Reversing the *Order* Would Sabotage the Commission's Prediction of Competitive Entry Set Out in the *BDS Order*

Conversely, reversing the incremental remedies in the *Order* would render the Commission's market predictions in the *BDS Order* even less likely to occur by further locking in demand. First, purchases made through, and thus subject to the lock-in provisions in, the commitment plans at issue in the *Order* represent a significant portion of the demand in the overall BDS market. Purchases made through the plans at issue in the *Order* represent "30 percent of all TDM revenues for the four incumbent LECs subject to the tariff investigation."⁶⁹ The share of the BDS market represented by TDM-based services like DS1 and DS3 service "remain[s] relevant to retail and wholesale customers today and will remain so for many years to come."⁷⁰ The Commission's data collection in the BDS proceeding shows that TDM services represented 60 percent of the BDS market in 2013.⁷¹

Second, as the Commission concluded in the *Order*, all-or-nothing provisions that inflate the commitment levels of volume plans have the anticompetitive effect of preventing customers

⁶⁸ See, e.g., *Comar Marine, Corp. v. Raider Marine Logistics, LLC*, 792 F.3d 564, (5th Cir. 2015) (affirming conclusion that the termination fee was an unreasonable penalty because it "makes no deductions to account for the fact that [plaintiff] would have fewer expenses in the event of termination"); *A.V. Consultants, Inc. v. Barnes*, 978 F.2d 996, 1001 (7th Cir. 1992) (affirming conclusion that liquidated damages provision was unenforceable penalty because it would entitle plaintiff to "be receiving its expected profit *plus* the value of its services-services [plaintiff] was free to sell elsewhere" (emphasis in original)).

⁶⁹ *Order* ¶ 90.

⁷⁰ *Order* ¶ 85

⁷¹ See *BDS Order* ¶ 68.

from switching providers.⁷² The *BDS Order*'s prediction and outlook for the market also relies on the availability of demand that can provide enough revenue for a competitive provider to build out its network over medium term of three to five years. The duration of the lock-in effect undercuts the *BDS Order*'s medium-term timeframe. Although the *BDS Order* imposed a three-year period for mandatory detariffing, customers purchasing under current commitment plans are still locked in until mid-2020.

Even after detariffing, the ILEC will still be the only facilities-based provider in the vast majority of locations with BDS demand until new facilities can be constructed. Customers will still rely on the ILEC's services, whether they continue to be DS1 and DS3 services or migrate to Ethernet services. As Windstream and AT&T have explained, the "rack" rates for Ethernet services are much higher than the rates that customers actually pay.⁷³ To avoid these unrealistic rates, wholesale customers have to negotiate and sign on to discount plans. As discussed above, Windstream has negotiated against the backdrop of the *Order* and the limits it has imposed on unjust and unreasonable contract terms.

However, if the Commission reverses the conclusions in the *Order* that all-or-nothing provisions are unjust and unreasonable under Section 201(b), customers negotiating with ILECs will have little leverage to exclude those same onerous terms from Ethernet discount plans. The Commission assured customers lacking access to an alternative facilities-based provider that,

⁷² See *Order* ¶¶ 96, 103, 126, 129, 148.

⁷³ See Windstream BDS FNPRM Comments at 45 (comparing AT&T "rack" rate of \$678 per month for 2 Mbps on a 36-month term against AT&T rate of \$126 per month for DS1 service on a 36-month term); see also Reply Comments of AT&T Inc., WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 27 n.87 (filed Aug. 9, 2016) ("[T]he actual rates paid by U.S. customers are generally negotiated at discounted levels dramatically below those in the service guides."); *id.* at 60 ("[W]holesale customers generally negotiate prices well below those listed in the Guidebook.").

even after the deregulatory *BDS Order*, ILECs will remain subject to Sections 201 and 202, as well as the complaint process in Section 208.⁷⁴ Even assuming the Section 208 complaint process is an adequate backstop remedy, which it is not, customers will have little hope of prevailing if the Commission has already approved these lock-in provisions by reversing the *Order*.

The ILECs will be able to exploit their status as the only current provider in 86 percent of locations with low-bandwidth BDS demand during this “near term,” and lock customers into long-term contracts using the same terms and provisions that the *Order* had found to be unjust and unreasonable. As a result, even under the Commission’s purported conditions for build-out, nearby providers will not have enough available demand to generate the revenue needed to construct their own facilities. Rather than enabling a growth of competition in the medium term predicted by the Commission in the *BDS Order*, reversal of this Order will permit ILECs to carry forward their dominance of the market for DS1 and DS3 services into the market for lower-bandwidth Ethernet services.

V. THE COMMISSION SHOULD NOT ENABLE THE REINSTITUTION OF PRACTICES THAT VIOLATE SECTION 2 OF THE SHERMAN ACT

As explained above, reversal of the *Order* permits the reinstitution of terms that the Commission found to be anticompetitive for preventing customers from switching to a potential competitor. Given the ILECs’ current dominance in the market for lower-bandwidth BDS services, i.e., at or below 50 Mbps, their use of the terms and conditions at issue in the *Order* to exclude potential rivals would constitute an unlawful abuse of monopoly power under Section 2 of the Sherman Antitrust Act. The Commission has previously concluded “the policy behind the

⁷⁴ *BDS Order* ¶ 162.

. . . prohibitions in the antitrust laws is useful in analyzing what constitutes an ‘unreasonable practice’ that violates Section 201(b) of the Communications Act.”⁷⁵ Those policy goals articulated in the *Order*, and upon which the *BDS Order*’s predictions rely, are the same as those underlying Section 2 of the Sherman Act. Because the all-or-nothing provisions at issue in the *Order*, if reinstated, would constitute a violation of Section 2, the Commission should affirm the *Order*’s finding that they are unjust and unreasonable.

A violation of Section 2 of the Sherman Act requires two elements: (1) possession of monopoly power; and (2) willfully maintaining that power, such as by engaging in conduct “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.”⁷⁶ Monopoly power is the “power to force a purchaser to do something that he would not do in a competitive market.”⁷⁷ The existence of monopoly power “may be inferred from the predominant share of the market.”⁷⁸ Illegal exclusionary conduct by a monopolist is conduct “other than competition on the merits, or restraints reasonably ‘necessary’ to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.”⁷⁹ Exclusionary conduct that involves an agreement with a purchaser, rather than strictly

⁷⁵ See *AT&T’s Private Payphone Commission Plan*, Memorandum Opinion and Order, 3 FCC Rcd. 5834, 5837 ¶ 23 (Comm. Carrier Bur. 1988), *rev. denied*, *AT&T’s Private Payphone Commission Plan*, Memorandum Opinion and Order, 7 FCC Rcd. 7135 (1992). The *BDS Order* also cited to antitrust principles in its market analysis. See *BDS Order* ¶¶ 19, 49.

⁷⁶ See, e.g., *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 (1992); *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1279 (8th Cir. 1981).

⁷⁷ *Kodak*, 504 U.S. at 464.

⁷⁸ *Id.*; *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

⁷⁹ *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 230 (1st Cir. 1983) (Breyer, J.) (quoting 3 Areeda & Turner, *Antitrust Law* ¶ 626 at 83 (1978)); see also *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) (stating that exclusive dealing arrangements

unilateral conduct by the monopolist, can give rise to a Section 2 violation.⁸⁰ Agreements that are not expressly exclusionary may still have the same foreclosing effect.⁸¹ The reinstitution of the all-or-nothing provisions at issue in the *Order* by respective ILECs would satisfy both elements of a Section 2 violation.

A. ILECs Currently Have Monopoly Power Over the Provision of BDS in the Vast Majority of Markets

The Commission’s data collection and analyses show that in the geographic and product markets as defined by the Commission, the ILEC has monopoly power. For purposes of the competitive market test, the *BDS Order* used a geographic market of within one half-mile of the customer location,⁸² and a product market consisting of “circuit- and packet-switched business data services that offer similar speed, functionality, and quality of service characteristics.”⁸³ The Commission’s data collection shows that in 86 percent of customer locations with only lower-bandwidth BDS demand, the ILEC is the only provider offering service.⁸⁴

Other measures of market concentration in traditional antitrust analysis similarly show dominance by the ILEC. ILECs control 82 percent of the BDS market by revenue, according to

are unlawful where “the probable effect of the arrangement is to substantially lessen competition”).

⁸⁰ See, e.g., *LePage’s Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003) (“Even though exclusivity arrangements are often analyzed under § 1, such exclusionary conduct may also be an element in a § 2 claim.”); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 (1st Cir.1993) (observing that exclusivity may also “play a role ... as an element in attempted or actual monopolization”).

⁸¹ See *LePage*, 324 F.3d at 157 (“3M also disclaims as exclusive dealing any arrangement that contained no express exclusivity requirement. Once again the law is to the contrary.”).

⁸² See *BDS Order* ¶ 39.

⁸³ *Id.* ¶ 26.

⁸⁴ Letter from John T. Nakahata to Marlene H. Dortch, WC Docket Nos. 16-143, 05-25, RM-10593, at 3 (filed Mar. 27, 2017) (“Windstream Ex Parte”).

an estimate that “overstates” competitor shares.⁸⁵ Economists’ analysis of the data collection also shows that the ILEC accounts for 100 percent of the BDS bandwidth in 82 percent of census blocks with demand in which the ILEC has an active DS1 or DS3 customer.⁸⁶ In addition, in 99 percent of census blocks with BDS demand, the Herfindahl-Hirschman Index exceeds 2,500, the threshold set by the Horizontal Merger Guidelines issued by the Department of Justice and the Federal Trade Commission.⁸⁷ In the *BDS Order*, the Commission concluded that the presence of nearby providers, and its deregulatory policies, will produce competition in the medium term. Even assuming that is correct (which it is not, and which conclusion the undersigned have challenged in the United States Court of Appeals), the Commission is still faced with a highly concentrated market dominated by the ILECs at present. Of course, in the counties deemed non-competitive by the *BDS Order*, customers with BDS demand lack even one nearby potential provider. In these markets, the ILECs’ monopoly status is even clearer.

The ILECs’ overwhelming share of the BDS market applies at both the wholesale level of sales to carriers such as Windstream,⁸⁸ and at the retail level of sales of finished communications solutions to end users. As Professors Areeda and Hovenkamp have explained, “when considering foreclosure offenses, market share acquires independence significant from its general antitrust use as a surrogate for power.”⁸⁹ This is because foreclosure—the monopolist’s ability to deny market access to rivals—“is a function of share itself, not of the power for which

⁸⁵ See *Order* ¶ 217.

⁸⁶ See *id.* ¶ 185.

⁸⁷ See *id.* ¶ 183.

⁸⁸ See *id.* ¶ 75 (observing that the “overwhelming majority of the expenditures [by carrier BDS customers] were for services provided by incumbent LECs”).

⁸⁹ 11 Areeda & Hovenkamp, *Antitrust Law* ¶ 1802d at 77 (3d ed. 2011).

share is merely a surrogate.”⁹⁰ Thus, the ILECs’ being the sole connection to the vast majority of locations with only low-bandwidth demand is a direct indication of their ability to foreclose potential rivals by locking up demand.

B. The All-or-Nothing Provisions Amount to Illegal Exclusionary Conduct

Reinstituting the all-or-nothing provisions that the *Order* had declared unlawful into the volume commitment plans would constitute illegal exclusionary conduct because it would harm precisely the “competitive process” described in both the *BDS Order* and the *Order*.⁹¹ Until the facilities-based competition predicted by the *BDS Order* emerges, ILECs could use the all-or-nothing provisions in multiyear volume plans to foreclose a substantial portion of the BDS market from potential competitors. Nearby providers, deprived of potential customers, would lack the revenue necessary to recoup the costs of extending their facilities to the customer locations even under the Commission’s theory of competition. By itself, this discourages the construction of new and the extension of existing facilities by the ILEC’s competitors, including those on which the Commission relied to conclude that competition would be available to nearly all of the 86 percent of customer locations with less than 50 Mbps in BDS demand that are currently served by only one provider. Consequently, the ILECs will be able to maintain their monopoly over DS1 and DS3 services, and carry over that monopoly into Ethernet-based BDS as well.

⁹⁰ *Id.*

⁹¹ *See Rambus Inc. v. FTC*, 522 F.3d 456, 463 (D.C. Cir. 2008) (“[T]o be condemned as exclusionary, a monopolist’s act must have ‘anticompetitive effect.’ That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.” (quoting *United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) (internal quotation marks omitted))).

First, the all-or-nothing provisions found to be unlawful in the *Order* are likely to foreclose potential competitors in the BDS market. The *BDS Order* recognized that facilities-based providers faced “high barriers to entry,”⁹² and profitability “depends on projected expenditures required for construction and anticipated revenues from the customer and potential customers.”⁹³ As the Commission found in the *Order*, these provisions foreclose potential providers from customers by restricting customers’ ability to reduce their volume commitment levels and by imposing unreasonable penalties that exceed the ILECs’ expectation damages.⁹⁴ The record in the *BDS* proceeding, including filings from cable companies, confirms that the availability of sufficient revenue is essential for competitive entry.⁹⁵

Second, the anticompetitive effect of foreclosure is significant, especially considered in the context of the ILECs’ current market share dominance. The Commission’s data collection shows that TDM-based services purchased through plans that were subject to the tariff investigation constituted 30 percent of all TDM revenue from the four large ILECs.⁹⁶ This is a sufficiently large portion of the market that, if foreclosed by a monopolist’s conduct from competitors, constitutes a Section 2 violation. The D.C. Circuit has held that “a monopolist’s use of exclusive contracts, in certain circumstances, may give rise to a §2 violation even though the

⁹² *BDS Order* ¶ 18.

⁹³ *Id.* ¶ 51.

⁹⁴ *See, e.g., Order* ¶ 117.

⁹⁵ For example, Comcast stated that “areas of low BDS demand” may not present enough revenue to overcome its costs of network construction—even though Comcast, unlike competitive carriers, has the ability to leverage its own legacy infrastructure and has substantial scale in its customer base to unlock build cases, unlike traditional CLECs. *See* Comments of Comcast Corporation at 19, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (filed June 28, 2016) (quoting *Order* ¶ 227).

⁹⁶ *See BDS Order* ¶ 90.

contracts foreclose less than the roughly 40% to 50% share usually required to establish a §1 violation.”⁹⁷ In *Microsoft*, for example, the court explained that exclusive agreements with downstream purchasers had “a significant effect in preserving its monopoly” because they kept purchases from the competition “below the critical level necessary for [the competitor] or any other rival to pose a real threat to Microsoft’s monopoly.”⁹⁸ Microsoft’s exclusionary conduct had an anticompetitive effect even if it did not foreclose a majority of the market because it deprived competitors of the scale necessary to serve as a competing platform.⁹⁹

Foreclosing a large portion of the demand in BDS markets likewise deprives potential entrants of the demand necessary to support facilities construction, particularly to the 86 percent of low-bandwidth demand locations where the ILEC is currently the only provider. In the Commission’s prediction in the *BDS Order*, nearby providers are more likely to extend their facilities if doing so allows them to reach other potential customers beyond those who have already agreed to purchase their service.¹⁰⁰ The Commission stated in the *BDS Order* that “even when demand is too low to justify the buildout” to a building, competitive providers “may take a more circuitous route in anticipation of additional demand from businesses along the route.”¹⁰¹ However, assuming this is true, when enough of the “businesses along the route” are foreclosed from the potential competitor because the BDS purchasers cannot contract with the entrant without effectively paying twice, it would not be economical for the competitor to extend its

⁹⁷ *Microsoft*, 253 F.3d at 70.

⁹⁸ *Id.* at 71.

⁹⁹ *See id.*

¹⁰⁰ *See BDS Order* ¶ 52 (finding that competitive providers generally do not build on the speculation of winning customers).

¹⁰¹ *Id.* ¶ 42.

facilities to reach *any* customer along that route. Put another way, the all-or-nothing provisions would foreclose enough of the demand in any given geographic market to deprive potential competitors of the *density* that would be required to support entry even under the Commission’s theory of competitive entry.¹⁰²

Third, the all-or-nothing provisions go well beyond term and volume discounts that, on their own, would not ordinarily constitute exclusionary conduct.¹⁰³ The Commission had already rejected the ILECs’ generalized procompetitive justifications for those provisions.¹⁰⁴ Rather, the all-or-nothing provisions prevented customers from lowering their commitment levels by purchasing some circuits under different plans, even if the customers were willing to accept a lower discount for those off-plan purchases.¹⁰⁵ Because the ILECs’ commitment plans set the minimum volume based on historical purchase levels, all-or-nothing provisions inflate the volume that a customer is required to purchase from the ILEC, as opposed to a competitive provider.¹⁰⁶ In addition, excessive shortfall and early termination penalty provisions further lock in customers by preventing otherwise efficient switching to alternative suppliers.¹⁰⁷ As noted above and in the record, Windstream and other wholesale customers have had to forgo lower-

¹⁰² Cf. XI Areeda & Hovenkamp, *Antitrust Law* ¶ 1802d5 at 84 (observing that the effect of “exclusive dealing foreclosing off a sufficient number of local markets . . . might be to impair [competitors’] ability to expand, thus becoming more effective competitors with the dominant firm”).

¹⁰³ See, e.g., *Barry Wright Corp.*, 724 F.2d at 238.

¹⁰⁴ Order ¶¶ 108-09, 131, 150-51.

¹⁰⁵ See Order ¶ 103.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* ¶¶ 96, 103, 126, 129, 148. By comparison, the First Circuit in *Barry Wright* concluded that the defendant’s discount plan’s “noncancellation” clauses were not exclusionary because they are liquidated damages provisions that “reasonably reflect [defendant’s] likely actual damages”). 724 F.2d at 239.

priced alternatives because of lock-in provisions and penalties in ILEC plans.¹⁰⁸ Given the likely anticompetitive impact, the Commission should not enable ILECs to maintain their monopoly by reinstating all-or-nothing provisions.

¹⁰⁸ See *supra* 20-21; *Order* ¶ 105 & n.273.

VI. CONCLUSION

For the reasons discussed above, the Commission should build on and expand the remedies implemented in the *Order* or, at a minimum, affirm the *Order* in its entirety.

Respectfully submitted,



Karen Reidy
INCOMPAS
1200 G Street NW
Suite 350
Washington, DC 20005
(202) 872-5745

John T. Nakahata
Henry Shi
HARRIS, WILTSHIRE & GRANNIS, LLP
1919 M Street, NW, Eighth Floor
Washington, DC 20036
(202) 730-1320
jnakahata@hwglaw.com

*Counsel to Windstream Services, LLC
and Sprint Corporation*