

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

In the Matter of	)	
	)	
Business Data Services in an Internet	)	WC Docket No. 16-143
Protocol Environment	)	
	)	
Special Access Rates for Price Cap Local	)	WC Docket No. 05-25
Exchange Carrier	)	

**OPPOSITION OF CCA, CCIA, FREE PRESS,  
INCOMPAS, OTI AND PUBLIC KNOWLEDGE  
TO THE REQUEST FOR EXTENSION OF TIME**

Competitive Carriers Association (“CCA”), Computer & Communications Industry Association (“CCIA”), Free Press, INCOMPAS, Open Technology Institute (“OTI”) and Public Knowledge, hereby oppose the request of the National Cable & Telecommunications Association (NCTA) for the Federal Communications Commission (“FCC” or “Commission”) to extend the deadlines in the upcoming comment and reply comment cycle for the *Further Notice*<sup>1</sup> in the above-referenced proceeding by “at least” 45 and 30 days, respectively.<sup>2</sup> NCTA argues that they need more time because the Commission allegedly “radically” expanded the scope of the proceeding;<sup>3</sup> cable operators had, up until now, opted to only participate through their trade

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<sup>1</sup> *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, (rel. May 2, 2016) (Further Notice).

<sup>2</sup> Motion for Extension of Time of the National Cable & Telecommunications Association, WC Docket Nos. 16-143 and 05-25 at 5 (filed May 13, 2016) (“Motion”).

<sup>3</sup> *Id.* at 5.

associations;<sup>4</sup> and, incredulously, NCTA claims “that the Commission is not really interested in a full and complete record.”<sup>5</sup> As explained below, the Commission should reject these arguments and deny NCTA’s Motion and, instead, finally conclude the above-referenced proceeding and fix the broken special access *aka* business data service (“BDS”) market.

## DISCUSSION

In its Motion, NCTA suggests that the Commission—after repeatedly soliciting extensive comments and *ex partes* for more than a decade, conducting the most comprehensive data collection the Commission has ever undertaken in a rulemaking proceeding, reviewing a full round of comments on that data, and now soliciting yet another round of comments on the analysis set forth in the *Further Notice*—would lack a sufficient record to finally act unless cable operators have a little more time to put their comments together in this next comment cycle. This assertion is of course ludicrous. NCTA’s true aim in filing its Motion is obviously to further delay the conclusion of this proceeding. However, additional delay will only cause American businesses and mobile broadband providers to continue to pay unreasonably high prices for BDS, which ultimately increases the prices all of their customers and end-users pay for goods and services. The Chairman knows this, which is why he is determined to finally conclude this proceeding. Doing so will result in significant benefits for the economy as a whole. The Commission must therefore deny this latest attempt at a delay.

NCTA’s purported justifications for prolonging this proceeding have no merit. NCTA argues that it needs more time because the Commission “dramatically expanded the scope of the

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<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 3.

proceeding” in the *Further Notice*.<sup>6</sup> It is the policy of the Commission that extensions of time shall not be routinely granted.<sup>7</sup> As the FCC has stated, “Commission proceedings often involve novel and important issues, yet granting an extension is not the norm.”<sup>8</sup> The ample time provided for comments (60 days) and reply comments (30 days) is more than sufficient to address whatever new issues the Commission has raised in the *Further Notice*. Further, the Commission has set similar comment deadlines in comparable proceedings,<sup>9</sup> and there is no need to deviate from that precedent, especially in this case.

Moreover, NCTA mischaracterizes the extent to which the *Further Notice* expanded the scope of this proceeding. For example, NCTA asserts that the special access rulemaking has until now concerned only the revision of the pricing flexibility triggers, whereas the *Further Notice* proposes a comprehensive review of the price cap system for BDS.<sup>10</sup> This is incorrect. In the opening paragraph of the *2005 NPRM*, that commenced this proceeding more than 10 years ago, the Commission described its objective as follows:

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

<sup>7</sup> 47 C.F.R. § 1.46 (It is “the policy of the Commission that extensions of time shall not be routinely granted.”)

<sup>8</sup> *Protecting Privacy of Customer of Broadband and Other Telecommunications Services*, Order, WC Docket No. 16-106, DA 16-473, ¶ 6 (rel. Apr. 29, 2016).

<sup>9</sup> See *Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8870 (2014) (releasing item on July 23, 2014 and setting comment and reply comment filing deadlines as Sept. 15, 2014 and Sept. 30, 2014, respectively); *Rates for Interstate Inmate Calling Services*, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 FCC Rcd 12763 (2015) (setting comment and reply comment filing deadlines 30 days and 45 days after publication in the Federal Register, respectively).

<sup>10</sup> NCTA Motion at 5.

In this Notice of Proposed Rulemaking (NPRM), we commence a broad examination of the regulatory framework to apply to price cap local exchange carriers' (LECs) interstate special access services after June 30, 2005. In conducting this examination, we seek comment on the special access regulatory regime that should follow the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules for special access services.<sup>11</sup>

The Commission made it clear on multiple occasions since the release of its 2005 NPRM that it was conducting a comprehensive review of the regulatory scheme for BDS.<sup>12</sup>

NCTA also claims that the *Further Notice* for the first time introduced the question of how to ensure that BDS regulation is technology neutral, including how packet-based BDS should be regulated. But again this rulemaking proceeding has encompassed the proper

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<sup>11</sup> *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 05-18, ¶ 1 (2005) (2005 NPRM).

<sup>12</sup> See e.g., *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, RM-10593, 22 FCC Rcd 13352, 13352-53 (2007) (*Refresh the Record Public Notice*) ([T]he Commission invites interested parties to update the record pertaining to the *Special Access NPRM*, which the Commission adopted in January 2005. In the *Special Access NPRM*, the Commission commenced a broad examination of the regulatory framework to apply to price cap local exchange carriers' (LECs) interstate special access services, including whether the special access pricing flexibility rules which the Commission adopted in 1999 have worked as intended... Parties should include any new information or arguments that may be relevant to the Commission's consideration of what action, if any, may be appropriate in this proceeding. We also ask parties to address the specific questions below, which were not raised in the *Special Access NPRM*.); Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 12-153 at ¶ 16 (2102) ("The *Special Access NPRM* initiated a broad examination of what regulatory framework to apply to price cap LECs' interstate special access services following the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules for special access services."); Report and Order, WC Docket No. 05-25, DA 13-1909, Appendix A ("With the data, the Commission will conduct a comprehensive analysis of special access markets to . . . update its rules to ensure that they reflect the state of competition today and promote competition.")

regulatory treatment of packet-based special access services, including IP-based Ethernet services, since its inception. In the *2005 NPRM* the Commission stated as follows:

We note that, in the *LEC Price Cap Order*, the Commission excluded packet-switched services from price cap regulation because they were not included in its study of LEC productivity. We seek comment on whether such services should be included in price caps today. If not, what is the proper regulatory treatment of these services?<sup>13</sup>

The appropriate treatment of Ethernet services has been a central issue throughout this proceeding and related special access proceedings. In 2012, Ad Hoc *et al* filed a Petition in this rulemaking<sup>14</sup>—for which there was a full comment cycle—to reverse the grant of forbearances from the existing price regime that applied to certain packet-based services to ensure the inclusion of these services in this proceeding. And, as previously raised in this proceeding, the forbearances granted by the Commission from dominant carrier regulation did not preclude the adoption of new regulations pursuant to the Commission’s statutory authority for packet-based services for which the Commission granted forbearance.<sup>15</sup> Multiple parties—including cable operators—have filed numerous pleadings and *ex partes* on the inclusion of packet-based services in this proceeding.<sup>16</sup> Indeed, NCTA’s comments discuss competitors’ argument “that the same

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<sup>13</sup> 2005 NPRM at ¶ 52.

<sup>14</sup> Petition of Ad Hoc Telecommunications Users Committee, BT Americas, CBeyond, Computer & Communications Industry Association, Earthlink, Megapath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs’ Non-TDM-based Special Access Services, WC Docket No. 05-25, RM-10593 (filed Nov. 2, 2012) (“Petition”).

<sup>15</sup> See Letter of Karen Reidy, INCOMPAS, to Marlene H. Dortch, FCC, WC Docket No. 05-25, filed Jan. 12, 2016. See also, 47 U.S.C. §§ 201 and 202 (“The Commission may prescribe such rules and regulation as may be necessary in the public interest to carry out the provisions of this Act,” which includes ensuring just, reasonable and nondiscriminatory rates terms and conditions for dedicated services.)

<sup>16</sup> See, e.g., Letter from Michael H. Pryor, counsel to Cox Communications, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Apr. 22, 2016); Letter from Kathryn A. Zachem, Senior Vice President, Regulatory and State Legislative Affairs, Comcast Corporation,

data proves that competition is practically non-existent and virtually all special access services, including new IP-based services, should be subject to strict rate regulation.”<sup>17</sup>

Moreover, in its *Emerging Wireline Order*, adopted in this rulemaking proceeding last August, the Commission firmly established that the comprehensive evaluation of the special access market is not limited to TDM DS1 and DS3 special access services.<sup>18</sup> Indeed, if this proceeding were limited to an analysis and reform of the rates, terms and conditions for TDM-special access services, as NCTA claims, the proceeding would have no impact on, or relevance to, the situation the Commission sought to resolve in the *Emerging Wireline Markets Order*—namely, the rates, terms and conditions for wholesale access when TDM services are discontinued—and the interim nature of the condition on discontinuance would be nonsensical. As the Commission stated in that Order, it “preserve[d] a clear path to transition to IP and the benefits of competition, and provide[d] the Commission with the flexibility to adopt

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to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Apr. 21, 2016); Letter from Steven F. Morris, National Cable & Telecommunications Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (Apr. 20, 2016).

<sup>17</sup> Reply Comments of the National Cable and Telecommunications Association, WC Docket No. 05-25 at 3 (filed Feb. 19, 2016) (NCTA Reply Comments).

<sup>18</sup> The Commission had provided sufficient notice even prior to the *Emerging Wireline Order*. See Letter of Thomas Jones, to Marlene Dortch, WC Docket No. 05-25 (filed Aug. 28, 2015) (“Nor is there any question that incumbent LECs have been on notice that the Commission could (1) reverse forbearance and (2) adopt rate regulation of their packet-based special access services. . . . [T]he agency has provided more than sufficient notice under APA to take both these actions.”) See also AT&T Public Policy Blog, “The War on Infrastructure Investment, posted by Bob Quinn on Nov. 3, 2015 (“ . . . the massive special access review the Commission opened back in 2012 to examine the level of competition in the special access services marketplace (including asking for enormously broad amounts of data on pricing) – even for services like Ethernet . . .”).

long-term rules best suited for the future as a result of its review of the special access data.”<sup>19</sup> As such, it is untenable for NCTA to be surprised or unprepared for the Commission’s proposed technology neutral approach that includes the regulation of packet-based services such as Ethernet services.

NCTA also asserts that the *Further Notice* expands the scope of this proceeding to include the question of whether it is appropriate to subject BDS offered by non-incumbent LECs to rate regulation.<sup>20</sup> But, again, cable operators knew they would be impacted by the outcome of this proceeding. In the recent comment cycle and *ex parte* letter, NCTA expresses “concerns” regarding proposals of rate regulation in geographic areas where cable operators and other competitive providers serve business customers because it would impact the rates cable operator could charge.<sup>21</sup> Moreover, the Commission defined providers for purposes of this proceeding as *any entity* subject to the Commission’s jurisdiction under the Communications Act that provides special access services or provides a connection that is capable of providing special access

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<sup>19</sup> *Technology Transitions*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, GN Docket No. 13-5, WC Docket No. 05-25, FCC 15-97 at ¶ 6 (rel. Aug. 6, 2015).

<sup>20</sup> NCTA Motion at 10.

<sup>21</sup> NCTA Reply Comments at 6 [“any attempt to price above [the incumbent carrier’s] rates will be frustrated by an immediate loss of service.”]; *See also*, Letter of Steven F. Morris, NCTA, to Marlene H. Dortch, WC Docket No. 05-25, p. 2, filed Mar. 22, 2016 [“Proposals from certain competitive LECs to regulate rates in any building with fewer than four facilities-based providers would essentially compel rate regulation of all business services on a nationwide basis, which would result in substantial harm by discouraging all providers (incumbents and competitors) from investing in new facilities.”]

services,<sup>22</sup> specifically noting the inclusion of cable operators in the term providers.<sup>23</sup> Verizon has been *repeatedly* calling on the Commission to “not single out one set of competitors — the companies it still regulates as incumbent LECs — for special regulation, and instead any regulation should apply even-handedly.”<sup>24</sup> NCTA CEO Michael Powell would seem to agree, as he finds “most troublesome [] an emerging government view that the communications market is bifurcated and should be regulated differently.”<sup>25</sup> In comments, NCTA discussed the significance of cable operators’ presence in the market for special access services, providing “business customers a wide variety of high-capacity services including state-of-the-art Ethernet services.”<sup>26</sup> So it is disingenuous for cable operators now to claim they were unaware of a potential impact of this proceeding on their business operations.

In a further attempt to demonstrate how the Commission expanded the allegedly previously “narrow” scope of the proceeding, NCTA provides a litany of issues the questions in

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<sup>22</sup> *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 05-25, FCC 12-153, ¶ 20 (2012).

<sup>23</sup> *Id.* ¶ 21.

<sup>24</sup> Comments of Verizon, WC Docket No. 05-25 at 1 (filed Jan. 27, 2016); Reply Comments of Verizon, WC Docket No. 05-25 at 1 (filed Feb. 19, 2016); Letter of William H. Johnson, Verizon, to Marlene H. Dortch, FCC, WC Docket No. 05-25 (filed Mar. 10, 2016) (“FCC should adopt a regulatory framework that ensures a level playing field for all providers that offer the same or similar services.”); *see also* Comments of CenturyLink, WC Docket No. 05-25, RM-10593, at 33-34 (filed Jan. 28, 2016) (“The goals of regulatory and competitive neutrality between similarly situated competitors cannot be met if ILECs, and ILECs alone, are saddled with wholesale access obligations that their competitors do not bear.”).

<sup>25</sup> Michael Powell, President & CEO, Nat’l Cable and Telecomm. Ass’n, Keynote Address at the Opening General Session of INTX 2016 (May 16, 2016).

<sup>26</sup> NCTA Reply Comments at 4.

the *Further Notice* are meant to address.<sup>27</sup> But the issues it identifies have been raised in this proceeding as far back as the *2005 NRPM*.<sup>28</sup> Assessing the state of the market and determining what is just and reasonable rates, terms and conditions for BDS, are relevant regardless of which carriers the Commission ultimately decides to regulate. For the most part, these “complex” issues are not being introduced for the first time by this *Further Notice*.

## CONCLUSION

In short, the Commission has provided sufficient time to address the issues raised in the *Further Notice*. Moreover, NCTA and individual cable operators, have had notice of the possible types of issues being raised by the *Further Notice*. The services at issue are still dedicated services and the entities directly impacted are still the providers and purchasers of those services. Cable operators have had ample opportunity to participate and, in fact, have been participating in this proceeding. To the extent they had previously opted to participate through an association, or not at all, is not now a reason to delay the proceeding. The Commission cannot extent comment cycles because parties previously choose not to vigorously participate in a proceeding. The Commission must deny this Motion and act expeditiously to address the market failure in the BDS marketplace for immediate and economic and consumer benefits.

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<sup>27</sup> See NCTA Petition at 3 (noting that the *Further Notice* seeks comment on how to define the market, the appropriate geographic area to use for analysis and regulation, the test for determining if a market is competitive, the new regulatory regime for TDM and non-TDM services, and the potential for regulation of non-price terms and conditions, *etc.*).

<sup>28</sup> See *e.g.*, *2005 NRPM* at ¶¶ 73 and 119 (The Commission in commencing this proceeding to establish a new regulatory regime and ascertain the appropriate triggers for determining if a market is competitive, states that in analyzing the state of competition “both the product or service market [] and the relevant geographic market should be well-defined...in evaluating the terms and conditions associated with a price cap LEC tariff offering, parties should identify the special access products and geographic markets.”)

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