

Before the
Federal Communications Commission
Washington, D.C.

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

**REPLY COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

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SUMMARY

Since 1999, the Commission has made several attempts to address the persistent incumbent control and lack of competition in the marketplace for Business Data Services (“BDS”). After the Commission’s initial predictions proved inaccurate and incumbents further entrenched their control, the Commission opened this proceeding pursuant to a request from a previous incarnation of AT&T in 2005. After over a decade of delay, the Commission is finally taking action to promote competition and usher in a new era for BDS.

Businesses, competitive network providers, data centers, factories, hospitals, and universities all rely on BDS as critical links providing guaranteed transmission of high volumes of data. These circuits are critical to our economy and will become more important as mobile usage continues to grow and consumers demand more data. Moreover, as fifth generation, or “5G”, mobile technology develops and carriers seek deployment by the end of the decade, BDS will continue to be an important means for densifying and building out networks. However, the status quo for the provision of BDS could unnecessarily forestall American competitiveness in the race to 5G. Incumbent carriers (ILECs) have exercised out-sized market power, overcharging an estimated \$20 billion per year for BDS.

The Commission’s proposal will help promote competition and advancements in network capabilities through a technology-neutral regulatory framework that focuses on the economic realities and simply at which provider is using which technology. The proposed three-tier approach will protect customers from price gouging in areas that are noncompetitive, and it will encourage the deployment of faster speeds through a light-touch regulatory framework. When analyzing the market for mid-tier services, the Commission should take a granular, focused approach that looks at the economic realities and whether providers are actually offering competing products and services. In the *FNPRM*, the Commission also took a critical step in banning certain contract terms and conditions that ILECs used to artificially restrain competition and reap out-sized profits. Removing these anti-competitive restraints on competition help the U.S. comply with its international commitments.

After conducting the most comprehensive data collection in the Commission’s history, the Commission is ready to set new rules for the BDS marketplace. The Commission should continue its oversight of the marketplace, monitoring BDS offerings and ILEC contract terms and conditions, to make sure that regulations do not remain outdated or stale and that they adapt to advances in the marketplace. This will create cost-savings for consumers, foster the deployment of 5G, and it will promote greater economic growth.

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CCIA respectfully submits these reply comments in the above-referenced proceeding regarding the Commission's proposed regulatory framework for BDS. Communications networks and Internet access are significant drivers of prosperity and growth for the U.S. economy. However, for too long, this critical broadband input has been subject to incumbent control, costing anchor institutions, competitive network providers, and ultimately consumers billions of dollars. The Commission, after more than a decade of delay and the most extensive review of the marketplace in its history, now has an opportunity to foster competition with a new

¹ CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA's members is available online at <http://www.cciagnet.org/members>.

regulatory environment. CCIA has long advocated for competition in the telecommunications marketplace and believes that the Commission’s reforms proposed in the *FNPRM*² will help lower prices for this crucial broadband input, facilitate competition among providers of BDS and other telecommunications providers, and that it will help speed deployment of next generation, or “5G” services.

I. The *FNPRM* Will Help Facilitate the Deployment of Next Generation Networks.

Chairman Wheeler recently outlined his vision for a 5G future.³ Wheeler framed the importance of 5G to global competitiveness and the challenges of bringing that technology to market, stating: “if the United States is going to continue to be a world leader in wireless, we need to speed the deployment of 5G, here, on our shores.”⁴ Next generation networks will require additional facilities, and not just tall, macrocell towers with large antennas.⁵ Mobile network operators will need to deploy small cells and other unique solutions to densify their networks so they can handle increased traffic from areas of high demand. As Wheeler noted, backhaul will be key to the deployment of small cells and next generation networks.⁶

² *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. 15-27; *Special Access Rates 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, Tariff Investigation Order and Further Notice of Proposed Rulemaking (rel. May 2, 2016) (*FNPRM*).

³ Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, Prepared Remarks of FCC Chairman Tom Wheeler at National Press Club: “The Future of Wireless: A Vision for U.S. Leadership in a 5G World” (June 20, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0620/DOC-339920A1.pdf [hereinafter Wheeler Future of Wireless Speech].

⁴ *Id.*

⁵ See Richard Adler, *Preparing for a 5G World*, THE ASPEN INSTITUTE at 38 (2016), available at <http://csreports.aspeninstitute.org/documents/PreparingFor5G.pdf> (“One of the most distinctive challenges of building out 5G networks will involve extending the current practice of ‘densifying’ 4G networks by deploying much small cells. With 5G, there will be a need to deploy an unprecedented number of small cells in addition to deploying additional cellular towers that provide wide area wireless coverage. Network providers will need greater access to individual buildings, and very likely to multiple locations within buildings—to install high performance network points of presence which will need to be supported by high capacity backhaul facilities.”).

⁶ See Wheeler Future of Wireless Speech (“In addition, all these small cell sites will need to be connected, so we’ll need a lot more backhaul.”); see also Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Dkt. No. 15-25, *Eighteenth Report*, at ¶ 69

With global IP traffic projected to grow at an annual rate of twenty-two percent from 2015 to 2020, and mobile data traffic projected to grow at an annual rate of fifty-three percent over the same time period,⁷ network operators, particularly wireless carriers, are facing increasing pressure to build out new facilities and further densify their networks. The Commission has noted that backhaul “will be even more critical as the advent of 5G wireless drives the creation of the dense thicket of cell sites that will be needed to deliver high bandwidth wireless services.”⁸ With network operators needing to connect additional facilities to core networks, backhaul options could become more limited.⁹ Siting and connecting new facilities will also create new challenges when operators seek connections for backhaul.¹⁰

The deployment of next generation networks could be delayed significantly by a critical factor – cost. As Wheeler noted, backhaul can amount to as much as thirty percent of a wireless network’s operating cost, and that could rise to nearly fifty percent.¹¹ A key driver of that cost is the lack of competition for BDS. We agree with Sprint: “The numbers are staggering.”¹² An estimated seventy-three percent of BDS locations are served by just one incumbent, and “almost

(rel. Dec. 23, 2015) (“Backhaul connections are an integral component of a wireless service provider’s network, and the cost of backhaul is approximately 30 percent of the operating cost of providing wireless service.”).

⁷ VNI Forecast Highlights, CISCO.com, http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (last visited Aug. 9, 2016).

⁸ *FNPRM* at ¶ 5.

⁹ Adler, *Preparing for a 5G World* at 15 (“Another looming problem is a shortage of backhaul—the side of the network that connects wireless users (usually by a wired connection) to the core network”); *id.* at 24 (“A related challenge is expanding backhaul capacity to keep pace with the growth of wireless connectivity. Beyond simply establishing 5G points of presence in multiple locations, backhaul requires pathways to link these POPs with the core network, which will require additional investment. (Part of the solution for providing sufficient backhaul capacity may be to use portions of lower frequency bands to provide fixed wireless ‘infill backhaul.’)”).

¹⁰ *Id.* at 40 (“The introduction of new higher performance access that depends on high-frequency, shorter-range technologies will raise additional issues: the economics will change and potentially contribute to increased subscriber costs; mechanical access to premises becomes more complicated, as do demands on access devices; and backhaul becomes more expensive. As a result, developing business cases for use, particularly by ‘ordinary’ consumers, will become more difficult, and we are likely to see more uneven deployment of 5G networks based on highly localized needs.”).

¹¹ Wheeler Future of Wireless Speech.

¹² Comments of Sprint Corp., WC Dkt. No. 05-25, RM-10593, at iii (filed Jan. 27, 2016).

all purchaser locations, 97 percent, are served by only one or two suppliers.”¹³ Real competition for BDS is present in “only a tiny number of locations [and] . . . only where reasonably efficient competitive carriers can be expected to deploy connections to a customer location.”¹⁴ By one estimate, in ninety-nine percent of commercial buildings, there are only one or two BDS providers, and only 0.2 percent have four or more options.¹⁵ Incumbents face little incentive to compete on price and buyers often have no choice but to pay the incumbent’s high costs and abide by its often onerous terms.¹⁶ Under such conditions, competitive carriers face significant difficulty in deploying new facilities and densifying their networks as they are artificially restrained by the ILECs’ prices and terms.

The composition of the BDS marketplace and the current regulatory regime also pose problems for competitive providers of enterprise services. On top of the already significant barriers to entry of the high cost of deploying wireline networks, wireline providers face additional barriers to entry. For example, a wireline provider of enterprise services to a business in one city may not have facilities in a city where that business decides to open another location. The competitive provider usually has to find another means to service a client business out of its area, which often leaves the competitive provider with just one choice for BDS – usually the incumbent. As a result, competitive providers often cannot service that business in multiple locations because of the cost of BDS. Furthermore, businesses with multiple locations but demands for high and low bandwidth services often have no option but the incumbent because

¹³ *FNPRM* at ¶¶ 181.

¹⁴ Comments of Birch Communications, Inc., EarthLink, Inc., and Level 3 Communications, LLC, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593, at 4 (filed June 28, 2016) [hereinafter “Joint CLEC Comments”].

¹⁵ Joint CLEC Comments at 40.

¹⁶ *See generally FNPRM* at Sec. IV (concluding that “all-or-nothing”, certain shortfall, and early termination penalties are unjust and unreasonable).

the competitive provider does not have the requisite facilities.¹⁷ As Windstream explains, “[E]ven the largest competitive providers have not been able to build their own last-mile facilities to more than a small fraction of all the business buildings to which the ILECs have connectivity by virtue of their incumbency.”¹⁸ Furthermore, “widespread CLEC last mile build-outs to business customers remain economically infeasible today.”¹⁹

Increased competition and reduced prices for BDS will promote the deployment of 5G. For example, deployment of advanced small cells will require increased backhaul and the high-cost of backhaul impedes the development of next generation networks. Wheeler said that “we must reject any notion that the 5G future will be the sole province of urban areas. The 5G revolution will touch all corners of this country.”²⁰ However, it will be hard for competitive network providers to reach those areas of need if there continues to be a lack of competition. Frontier and CenturyLink claim that “price regulation will distort and deter competition in the BDS market”,²¹ but if there were more competition in the marketplace for BDS, then costs for BDS would come down. For example, “as the number of last-mile facilities-based business data services providers serving a location (building) rises, ILEC prices tend to fall.”²² With lower prices, it will be more feasible economically for a competitive carrier to connect small cells or other necessary facilities. Carriers will be able to dedicate more money to building out their networks, and, more specifically, connecting small cells that will be necessary for facilitating

¹⁷ Joint CLEC Comments at 19, 35; *see* Comments of XO Communications, LLC, WC Dkt. No. 05-25, RM-10593, at 14 (filed Jan. 27, 2016) (“[A]dditional and unexpected costs or hurdles arising from public ROW access and dealing with building owners and landlords often lead XO to cancel a build that otherwise may be economic.”)

¹⁸ Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593, at 36, 39 (filed Jan. 27, 2016).

¹⁹ *Id.*

²⁰ Wheeler Future of Wireless Speech.

²¹ Notice of Ex Parte Presentation from Mike Saperstein, Frontier Commc’ns, to Marlene H. Dortch, Sec’y, Fed. Commc’ns Comm’n, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593 (filed Aug. 5, 2016).

²² Declaration on Competition and Market Power in the Provision of Business Data Services on behalf of Level 3 and Windstream, Jonathan Baker, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593, at 2 (filed July 14, 2016) [hereinafter Baker Declaration].

5G. Contrary to CenturyLink's claims,²³ the reduced cost of backhaul, of which BDS is a critical component, would accelerate the buildout of networks in rural and other high-cost areas.

II. Toward a Better Regulatory Framework.

Through the *FNPRM*, the Commission can establish a flexible regulatory framework that can adjust to developments in the marketplace. It is notable that an ILEC, and one of the nation's biggest carriers, Verizon, has publicly supported the *FNPRM* and offered constructive solutions. Verizon has recognized the need for a change because BDS regulation has been so fundamentally uneven for so long.²⁴ The lack of a "coherent framework" and different regulatory regimes for different technologies over the past few decades has promoted uncertainty.²⁵ Instead, in the *FNPRM*, the Commission has put forward a framework that is better-suited to fostering competition.

A. Technology-Neutral Framework.

The *FNPRM* seeks a technology-neutral framework, discarding the previous paradigm of classification by services or company. This will enhance competition and incentivize the deployment of next generation networks. The Commission rightly notes that its regulations should not differ by technology, for TDM over packet-based services can be provided over coaxial cable or fiber.²⁶ Fiber, copper, and coaxial cable should not fall under different regulatory regimes. Similarly, the Commission is correct that best efforts BIAS should not be

²³ Notice of Ex Parte Letter from Melissa Newman, CenturyLink, to Marlene H. Dortch, Sec'y, Fed. Comm'n's Comm'n, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593, at 2 (filed Aug. 1, 2016).

²⁴ See Sean Buckley, *Verizon's Silliman on creating regulatory balance for special access, privacy, net neutrality*, FIERCETELECOM, <http://www.fiercetelecom.com/special-report/verizon-s-silliman-creating-regulatory-balance-for-special-access-privacy-net> (last visited Aug. 9, 2016) (explaining how there are different regulatory regimes for copper facilities, Ethernet, and cable).

²⁵ *Id.*

²⁶ *FNPRM* at ¶ 50.

included in the definition of BDS or in the new regulatory framework.²⁷ BDS offerings are a different service. Best efforts is typically offered to residential end users (e.g. single family homes or apartments) and usually does not include symmetrical transmission speeds or performance guarantees that BDS does. We agree with Jonathan Baker that best efforts is not a competitive substitute for BDS.²⁸ The Commission should also periodically review its definition of BDS to ensure that it continues to accurately reflect the offerings and advances in technology so that the regulations do not become static or stale.

B. Bandwidth Thresholds.

The *FNPRM* seeks to chart a different course in regulating BDS. In keeping with its technology-neutral goal, the Commission intends to use bandwidth thresholds to determine regulatory treatment. CCIA believes that the non-competitive threshold should be higher than 50 Mbps because, even at 100 Mbps, there can still be a marked lack of competition.²⁹ However, in the near-term, this should be an effective threshold. ILECs face very little competition at lower bandwidths, and can often exercise market power charging prices well above competitive levels.³⁰ As Sprint stated, “competitive locations at or below 50 Mbps remain incredibly

²⁷ *FNPRM* at ¶¶ 13-14.

²⁸ See Baker Declaration at ¶ 6.

²⁹ See *id.* at ¶ 3 (arguing that ILECs “exercise market power at high bandwidths (above 45 or 50 Mbps). Prices of high-bandwidth connections are likely substantially in excess of competitive levels. (For example, the presence of four or more in-building and four or more in-block high-bandwidth rivals lowers the prices of highbandwidth connections by 43% according to one estimate and by 25% according to another.) This evidence does not support the suggestion that all business data services markets at bandwidths above 50 Mbps are competitive.”); Joint CLEC Comments at 5 (“Market conditions are mixed above 100 Mbps. There is strong evidence that the market is not competitive at capacities above 100 Mbps in many situations. Mr. Merriman’s build feasibility analysis indicates that Level 3 can sometimes deploy connections to end users that demand Business Data Services products with capacities above 100 Mbps when those customers are located sufficiently near a splice point in the Level 3 network. Moreover, Level 3 finds that it is generally feasible to build loops to locations where a customer demands Business Data Services above one Gbps in areas served by the Level 3 network.”).

³⁰ Baker Declaration at ¶ 5 (“ILECs are likely able to exercise market power in the provision of business data services in most markets, and would be expected to charge prices above competitive levels unless prevented by regulation. That conclusion is based on the structure of business data services markets, and is consistent with my analysis of the business data services data provided through the FCC’s 2015 Data Collection.”).

scarce.”³¹ Because ILECs only face significant competition for their BDS offerings in a small percentage of locations, they have often been able to charge prices that are higher than competitive levels.³² One important reason for the lack of competition at lower speeds is that it behooves competitive providers to offer customers faster options.³³ It is often not feasible for competitive providers to offer low-bandwidth services at new buildings where they do not already have facilities or customers.³⁴ Demand for higher speeds and better service will continue to grow, so competitors need to increase their speeds and capacity to attract customers. Similarly, to the extent it currently exists, competition at speeds below 50 Mbps is not likely to develop any more in the future. Due to the lack of competition at higher speeds, and the ubiquity of ILEC facilities, *ex ante* regulation is necessary so ILECs do not abuse their positions by charging monopoly rates that are above what would prevail in a competitive marketplace. CCIA agrees with Sprint and the Joint CLECs that the Commission should impose a one-time reduction of TDM rates, which would counteract the freeze in the price caps and technological gains that have occurred during that time.³⁵ Furthermore, the Commission should also provide a “common sense backstop rule that wholesale BDS rates offered by an incumbent LEC in all areas must be lower than its lowest retail rates for comparable services.”³⁶

CCIA also supports the competitive threshold of 1 Gbps for all geographic areas as it reflects market realities. Demand for higher speed connections should encourage more operators

³¹ Comments of Sprint Corp., WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593, at iii (filed June 28, 2016) [hereinafter Sprint *FNPRM* Comments]

³² Baker Declaration at ¶ 2.

³³ Baker Declaration at ¶ 22 n. 37.

³⁴ Sprint *FNPRM* Comments at iii-iv.

³⁵ *Id.* at v; Joint CLEC Comments at 2-3.

³⁶ Sprint *FNPRM* Comments at vi.

to build out faster networks.³⁷ For example, competitive providers are more likely to deploy next generation, fiber networks at speeds above 1 Gbps.³⁸ By not subjecting the highest tier (above 1 Gbps) to regulation, more providers will be encouraged to deploy new facilities or upgrade their existing facilities to these higher speeds.

C. Competitive Market Test for Mid-Bandwidth Services.

In between the non-competitive and competitive thresholds, the Commission has proposed that regulation would depend on a determination of whether a market is non-competitive based on a number of factors.³⁹ The Competitive Market Test is necessary because “the level of competition for Business Data Services above the 100 Mbps capacity threshold is mixed, and there is strong evidence that the market is not competitive in many situations.”⁴⁰ Indeed, even above 100 Mbps, “a competitive provider’s ability to economically deploy a loop to a customer’s location varies widely on the basis of, among other things, the capacity demanded, connection length, and the demographic characteristics of the geographic market in which the customer is located (e.g., inside or outside a central business district).”⁴¹ Therefore, a geographic market-by-geographic market determination is necessary to account for variations that can exist in different marketplaces.

³⁷ *Accord* Comments of Verizon, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593, at 3 (filed June 28, 2016) (“Market forces in those areas, and the Commission’s general Title II authority, are sufficient to ensure availability of Business Data Services at reasonable rates.”).

³⁸ *See* Joint CLEC Comments at 7 (“[B]ecause competitive carriers can generally deploy a connection to serve a customer that demands Business Data Services of greater than one Gbps, the Commission should classify Business Data Services of a capacity above one Gbps as competitive in all geographic areas.”).

³⁹ *See FNPRM* at ¶¶ 270-71 (“bandwidth, different customer classes, business density, and the number of providers in areas consisting of census blocks where each block in the relevant market meets the specified criteria.”).

⁴⁰ *See* Joint CLEC Comments at 28 (“The available evidence demonstrates that the level of competition for Business Data Services above the 100 Mbps capacity threshold is mixed, and there is strong evidence that the market is not competitive in many situations.”).

⁴¹ *Id.* at 47-48.

i. Market Definition Should be Narrow and Specific.

For a geographic market-by-geographic market analysis to sufficiently incorporate the real dynamics of BDS offerings, at the very least, the relevant market should be determined at the census block level.⁴² A more granular level (e.g. building, cell site) would be preferable as it would provide a better picture of business demand in a given area and the ability of providers to service those customers.⁴³ For example, the record reflects how at the building level, the presence of competitors leads to decreases in ILEC pricing for DS1 and DS3 lines.⁴⁴ However, the census block determination can show the marketplace realities and the decisions that wireline providers have to make when deciding to deploy facilities or make business agreements. Although an imperfect metric, as the Joint CLECs explained, “[c]ensus blocks are generally small enough that if a competitor has deployed a connection to one location in a census block the competitor may well be able to deploy a connection to a second location in the same census block.”⁴⁵ Furthermore, in determining whether a market is competitive, we echo Level 3’s assertion that “the Commission should therefore only classify a relevant business data services market as competitive where reasonably efficient competitive carriers can deploy connections to customers that demand the relevant services.”⁴⁶

⁴² *Id.* at 8.

⁴³ See Declaration of Stanley M. Besen and Bridger M. Mitchell, WC Dkt. No. 05-25, RM-10593, at 15 (filed Jan. 27, 2016) (“The provision of service to some purchasers in a census block is not necessarily an indication that a competitor can serve all buildings in that census block, or even that the “potential competitor” provides the same special access service as the ILEC.”).

⁴⁴ *FNPRM* at ¶ 288; Baker Declaration at ¶ 2 (“We both find that prices tend to decline as rivalry increases: as the number of last-mile facilities-based business data services providers serving a location (building) rises, ILEC prices tend to fall.”).

⁴⁵ Joint CLEC Comments at 8.

⁴⁶ Notice of Ex Parte from Thomas Jones, Willkie Farr & Gallagher LLP to Marlene H. Dortch, Sec’y, Fed. Comm’n Comm’n, WC Dkt. Nos. 16-143, 15-247 & 05-25, RM-10593 (filed July 14, 2016).

ii. *The Presence of Fiber Alone Does Not Make a Market Competitive.*

The Commission should not overestimate competition, as it has previously for special access. The competitive market test should analyze actual competition, not just the potential for competition. AT&T declares that “existing competitive facilities are materially constraining prices virtually everywhere there is special access demand” because competitive fiber facilities were within half a mile of 98.7 percent of buildings with BDS demand.⁴⁷ However, Susan Gately noted that “the data does not support the ILEC’s presumption that fiber in the ground in a location indicates a CLEC’s ability – or indeed even its intent – to compete with last mile special access facilities.”⁴⁸ Just because there is fiber in a census block does not mean that it reaches all buildings in that census block. As the Joint CLECs noted, “the presence of fiber in the vicinity of a customer location provides no indication as to whether the carrier has any ability to, or interest in, using the fiber facility to serve the customer.”⁴⁹ Furthermore, the Joint CLECs found that “there are more than 540,000 census blocks with four or more competitors with fiber in which no customer purchased even a single Business Data Service circuit as of 2013”.⁵⁰ The presence of fiber in part of a census block does not mean that it contributes significant pressure in the area of the same census block where the competitor’s fiber does not reach but where the ILEC has facilities.

⁴⁷ Comments of AT&T Inc., WC Dkt. Nos. 16-143 & 05-25, RM-10593, at 2 (filed June 28, 2016) (“The Commission’s data collection reveals that, as of 2013, virtually all buildings with special access demand were either connected to, or within one half mile of, competitive fiber, even without taking into account cable HFC facilities.”); *id.* at 12.

⁴⁸ *FNPRM* at ¶ 179.

⁴⁹ Joint CLEC Comments at 50; *see also id.* at 8 (“[A] competitor that has deployed fiber in a location may not have a splice point on its fiber network near enough to the customer to justify deployment of a connection to that customer.”).

⁵⁰ *Id.* at 51.

D. U.S. Compliance with WTO Obligations.

The Commission's new regulatory framework would help the U.S. to fully comply with its trade commitments with the WTO and the Basic Telecom Agreement.⁵¹ Under the WTO, the U.S. has committed to taking certain measures to ensure that major circuit and packet-switched BDS providers do not engage in anticompetitive behavior. Article 1 of the Reference Paper outlines the competitive safeguards of the provision of BDS.⁵² Article 2.2 of the Reference Paper requires that packet and circuit-based BDS is provided under non-discriminatory terms and conditions that are transparent and reasonable.⁵³ Banning "all-or-nothing" provisions, shortfall penalties, and early termination penalties, as the Commission did in the *FNPRM*,⁵⁴ and banning additional anti-competitive terms and conditions,⁵⁵ will help ensure that the U.S. is complying with those commitments.⁵⁶

⁵¹ See WTO Secretariat, The United States of America, Schedule of Specific Commitments, GATS/SC/90 (April 15, 1994); see also WTO Secretariat, The United States of America, Schedule of Specific Commitments, Supp. 2, GATS/SC/90/Supp.2, available at <https://www.citizen.org/documents/GATS98.pdf> [hereinafter *Reference Paper*].

⁵² *Reference Paper* at ¶ 1.1, available at https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm ("Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.").

⁵³ *Id.* at ¶ 2.2 ("(a) under non-discriminatory terms, conditions . . . and rates and of a quality no less favorable than that provided for its own like services or for like services of . . . its subsidiaries or other affiliates; (b) in a timely fashion, on terms, conditions . . . and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled . . . ; (c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.").

⁵⁴ See *FNPRM* at Sec. IV (concluding that "all-or-nothing" provisions, certain shortfall penalties, and early termination penalties are unjust and unreasonable).

⁵⁵ See *infra* Sec. II.F. (identifying certain terms and conditions that the Commission should investigate and ban).

⁵⁶ See generally *Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, at ¶ 40 (1997) (recognizing that "[t]he success of the WTO Basic Telecom Agreement depends on implementation of the market-opening commitments of our trading partners. The United States must lead the way in prompt, effective implementation of our commitments. If the United States is perceived as failing to implement its commitment, other countries would likely limit implementation of their own commitments. We find such a result would deny the benefits of open global markets and increased competition to U.S. carriers and consumers, and is not in the public interest.").

E. Periodic Review of Regulations.

After promulgating a new regulatory framework for BDS, the Commission must ensure that its regulations do not become stale or outdated as technology evolves.⁵⁷ Although determinations made pursuant to the *FNPRM*'s competitive market test could be accurate today, the availability of BDS offerings in a certain area can change over time, and would certainly change if competition proves more fulsome. As technology advances and providers upgrade their networks, the low and high-bandwidth thresholds proposed in the *FNPRM* could become out of date. Furthermore, as 5G technology comes to market later this decade, and demand for backhaul increases, BDS providers could build out into new markets that were previously noncompetitive. Therefore, the Commission must conduct systemic, periodic reviews at least every three years, continue to collect data on the market, and be flexible with the imposition of regulations.⁵⁸ To be truly effective and ensure that the Commission can act on the most accurate data possible, it should prohibit non-disclosure agreements from restricting from the Commission's view, information related to terms and contracts in BDS contracts.⁵⁹ A periodic review will help promote the Commission's goals of facilitating next generation networks, competition, and just and reasonable rates.

F. Additional Terms and Conditions.

The Commission took a major and much-needed step in the *FNPRM* by singling out certain ILEC pricing practices as anti-competitive.⁶⁰ However, just as the Commission should

⁵⁷ See *FNPRM* at ¶ 272 (“[W]e seek comment on whether the Commission should reapply the test every three years for example, with updated data to reflect changes in business density or the number of providers in a geographic area.”).

⁵⁸ Joint CLEC Comments at 9-10.

⁵⁹ *FNPRM* at ¶ 313; Sprint *FNPRM* Comments at 85.

⁶⁰ See generally *FNPRM* at Sec. IV (concluding that “all-or-nothing” provisions, certain shortfall penalties, and early termination penalties are unjust and unreasonable).

continue to review and update its low and high-bandwidth thresholds and its determinations based on the competitive market test, it should also continue to review the ILECs' practices to ensure that they are not anti-competitive. Although the practices have now been banned, due to the lack of competition in at least seventy-three percent of locations, ILECs could continue to exercise market power and develop new terms and conditions that on their face seem innocuous but in reality would limit the ability of customers to pursue other providers.⁶¹ CCIA suggests the Commission review the following pricing practices with an eye toward banning them as unreasonable: percentage commitments, tying, and long-term commitments.⁶²

i. Percentage Commitments.

The Commission should deem unreasonable the practice of imposing percentage commitments where an ILEC requires a customer to reup for at least fifty percent of the previous spend. Under these terms, a customer could end up paying more in penalties than the savings it could obtain from switching to another BDS provider. Customers should be free to contract again with the BDS provider or seek another provider at the end of the contract.

ii. Tying.

The Commission should investigate tying arrangements where ILECs "tie" the sale of discount BDS in a noncompetitive market to the sale of the ILEC's BDS (or another ILEC product or service) in an area where there is competition. We agree with the Joint CLECs that if a market is reclassified as competitive, after being deemed noncompetitive previously, then the customer should be able to adjust the volume commitment to the volume of BDS purchased in

⁶¹ See Joint CLEC Comments at 15 ("Accordingly, it is critical that the Commission complete the work it began in the Tariff Investigation by adopting a comprehensive bulwark against exclusionary conduct by incumbent LECs (or any other leading competitor).").

⁶² See generally *FNPRM* at ¶ 88 (requesting comment on other whether the Commission should investigate other terms and conditions, like "percentage commitments, upper percentage commitments and term commitments").

the reclassified area.⁶³ Similarly, the Commission should investigate the extent to which ILECs tie volume commitments between packet-based and circuit-based BDS, and the extent to which ILECs leverage their relationships and dominance in circuit-based BDS to the sale of packet-based BDS.⁶⁴

iii. Long-Term Commitments.

We agree with Sprint that ILECs offering long-term commitments of multiple years should also offer short-term commitments.⁶⁵ As the Joint CLECs explain, long-term commitments “require that a customer predict the volume of Business Data Services that it will need to purchase from the incumbent LEC many years into the future. Where a customer experiences unanticipated declines in demand, it incurs shortfall penalties.”⁶⁶ Long-term commitments can insulate an ILEC from the threat of competition if it has locked in customers for a long period of time. This harms competition because such long-term commitments can tie up demand at a location or in a larger area for many years, preventing new entrants from having an opportunity to contract with another provider. Some purchasers may prefer the certainty of having a long-term contract, but some purchasers may want shorter terms so they can assess other opportunities or adjust based on their finances.⁶⁷

G. ILEC BDS Providers Could Actually Increase their Revenue Under the *FNPRM*.

Contrary to the assertions of some ILECs, they may actually see their revenues increase as a result of the Commission’s new framework. The WIK-Consult Report found that a

⁶³ Joint CLEC Comments at 16-17.

⁶⁴ *FNPRM* at ¶ 455; Joint CLEC Comments at 96.

⁶⁵ Sprint *FNPRM* Comments at 83.

⁶⁶ Joint CLEC Comments at 17.

⁶⁷ *See, e.g.*, Sprint *FNPRM* Comments at 84-85 (explaining that Sprint may prefer longer term contracts for cell phone towers, but for enterprise data services it prefers having more flexibility to “match” the terms of Sprint’s retail customers).

reduction in BDS prices could have a limited effect on ILEC revenues, and it could actually lead to an increase in revenues as “any price reductions would tend to be offset by increased volumes.”⁶⁸ For example, even though BT’s unit prices were reduced by a quarter from 2012-2015 in the U.K., but its gross revenue actually increased by eleven percent.⁶⁹ The WIK-Consult Report also predicts that the U.S. market would benefit as savings would be passed on to consumers, and because of high price elasticity of demand for TDM and Ethernet BDS, BDS providers would likely experience increased revenues resulting from higher demand.⁷⁰

III. Conclusion.

After over a decade of delay, the Commission is finally taking action to promote competition and usher in a new era for BDS.⁷¹ BDS is a crucial broadband input for businesses, competitive network providers, data centers, factories, hospitals, and universities that need guaranteed transmission of high volumes of data.⁷² As mobile usage continues to grow, and 5G mobile technology develops, BDS will continue to be critical for providing backhaul. The Commission’s proposed technology-neutral regulatory framework will promote competition and advancements in network capabilities by focusing on economic realities. The Commission

⁶⁸ J. Scott Marcus, *Welfare effects of reductions in the price of leased line equivalents in the U.S.*, WIK-CONSULT at 26 (July 26, 2016).

⁶⁹ *See, e.g., id.* at 2 (“Over the period 2012-2015, this has resulted in decreases in permitted unit prices of 25% for the services; however, gross revenue has increased by 11% (as shown in the following figure).”).

⁷⁰ *Id.* at 3-4.

⁷¹ *See, e.g. AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-80, *FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES* (Nov. 2006), <http://www.gao.gov/assets/260/254069.pdf>; (finding a lack of competition and recommended reform because “facilities-based competitive alternatives for dedicated access are not widely available”); *The National Broadband Plan*, FED. COMM’NS COMM’N, Mar. 17, 2010, <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/> (Chapter 4 on Broadband Competition and Innovation Policy) (“The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.”).

⁷² *FNPRM* at ¶ 10 (“Companies change their strategies, but commercial customers do not change their need for the benefits of competition – among them lower prices, higher quality, greater output and faster innovation.”)

should continue monitoring BDS offerings and ILEC contract terms and conditions, to make sure that regulations adapt to advances in the marketplace. By ushering a new era for BDS, the Commission will foster the deployment of 5G, competitive providers will have more incentive and resources to build out faster facilities', and economic growth will result as businesses and consumers realize cost-savings.

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Respectfully submitted,

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