DECLARATION OF DAVID J. MALFARA, SR.

I, David J. Malfara, Sr., hereby declare:

1. My name is David J. Malfara, Sr. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the motion of COMPTEL d/b/a INCOMPAS (“INCOMPAS”) for stay pending judicial review of the Federal Communications Commission’s Business Data Services Report and Order (“BDS R&O”). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I have been an active participant in the continuing evolution of the telecommunications industry for more than 30 years. Currently, I am President/CEO of ETC Group, LLC (“ETC Group”), a business management and engineering consulting company founded in 2008. ETC Group specializes in advising communications service providers, among others, on issues related to the management, operation and deployment of emerging strategies.
and business models based on the introduction of new technologies. Additionally, I am retained by INCOMPAS as a subject matter expert on matters of emerging technology and service provider business models, and I am a Council Member of Gerson Lehrman Group, Inc. (“GLG”), providing subject matter expertise to GLG’s capital markets clients on telecommunications and broadband industry issues.

3. Previously, I served for over 10 years as a Director, and for 5 years on the Executive Committee, of INCOMPAS, and chaired the association’s Technology Task Force. I also founded and served as the President, Chief Executive Officer, and/or Chief Technology Officer for numerous competitive local exchange carriers, including Remi Communications Holdings, LLC, Z-Tel Network Services, Inc., and Pennsylvania Alternative Communications, Inc. (d/b/a Pace Long Distance and Pace Network Services).

Background

4. Business data services (“BDS”) provided by incumbent local exchange carriers (“ILECs”) have long been used by competitive providers as a mechanism to bring innovative, low-cost communications services to commercial subscribers, where direct subscriber connection to the competitive provider’s network is either not economically or technically feasible. In this capacity, BDS functions as an important “stepping stone” for subscribers and competitive carriers alike in reducing the risk of deployment when the demand for a new service or the viability of a new market cannot be quantified, and so the cost of facilities-based deployment would present an unacceptable risk.

5. ILEC BDS performs this valuable role because in region, ILEC BDS is ubiquitously available and generally the only way to reach the subscriber for which it is used. Functioning in this way, ILEC BDS acts not only as a near-term solution for subscriber
connectivity, it provides a means for competitive providers to quickly bring innovative, and often unique and customized, services to subscribers in entirely new markets well ahead of any possible network facilities deployment.

6. The BDS R&O puts these strategies at risk by removing price-cap regulation for low bandwidth, time-division multiplexing (“TDM”) inputs (or circuits) and eliminating the previous requirement that incumbent telecommunications companies provide reasonably comparable telecommunications inputs when they retire or eliminate existing TDM access circuits. These effects will cause increases to the costs to competitive carriers in providing their services, and lead to an immediate decrease or, worse, elimination of competition for commercial communications services, such as voice, video teleconferencing, cloud, private virtual networking and Internet access services, in certain markets where the use of ILEC BDS as a wholesale input to a competitor’s retail service is necessary. Less competition in the retail market leads to increased prices, less choice, decreased innovation and customization, and lower quality services for commercial subscribers, harming these customers. This harm to commercial communications subscribers is direct, immediate, and significant.

7. The BDS R&O directly and significantly harms commercial subscribers by: (1) reducing competitive carrier expansion into new markets; (2) reducing carrier choice for multi-location commercial subscribers; and (3) preventing smaller commercial subscribers from accessing advanced communications technologies. These harms will occur immediately upon the effective date of the BDS R&O.

Reduced Competitive Expansion – Longer Broadband Deployment Timeframes

8. Competitive carriers often use ILEC BDS as a surrogate for their own facilities in order to test their acceptance by potential subscribers in new markets. Using ILEC BDS, they can test-market their product portfolio in the new area without incurring the capital
expense and build-out timeframes necessary to support a facilities-based model. If the market proves successful, the carrier can displace these ILEC BDS facilities with their own network facilities, confident in the knowledge that the market finds their product portfolio attractive enough to hit their market-share goals. Without affordable ILEC BDS, this “stepping-stone” test-marketing strategy would not be possible.

9. Competitive carriers prioritize new markets by the cost of market entry and the time necessary to build a substantial enough subscriber base to support the deployment of its own network facilities. Markets with lower ILEC BDS pricing are more attractive to competitive entrants because these carriers may be able to reach subscribers at a lower cost and, thereby, quickly capture enough market share to support their own network build-out. These early subscribers are able to enjoy the lower price and availability of the entrant’s product portfolio far earlier than would otherwise be possible, solely because ILEC BDS provides an acceptable means of delivery.

10. Markets with somewhat higher ILEC BDS pricing occupy a proportionately lower priority in competitive expansion plans because the retail price of service in those markets may need to be adjusted upward (covering more of the ILEC BDS cost). Higher retail prices, of course, negatively affect subscriber acquisition in both sales cycle time and volume, increasing the carrier’s risk of market entry.

11. The BDS R&O will cause the cost of ILEC BDS to go up. If the price of deregulated ILEC BDS services should increase 10% over current rates, I believe the effect will be manifested in a slowdown of competitive new market entry, as the focus shifts to harvesting greater market share in markets where the competitor has already deployed its own network facilities. Should the rates soar by 25%, I would expect the use of ILEC BDS as a competitive
market entry tool to stop and for service providers to immediately adjust retail pricing upward for current subscribers served by ILEC BDS facilities.

12. At rates 50% or higher than current ILEC BDS rates, I believe competitive carriers will begin to exit certain immature markets where facilities-based network deployment is not imminent. The result to commercial subscribers in those markets (and other markets not yet considered for entry) is that the market itself may suffer higher prices because the entry risk is simply too high for competitors to absorb and, therefore, the ILEC’s service and pricing remains unchallenged. Competitive expansion will be slowed significantly and may not happen in certain markets at all. Because competitive carriers will need to adjust their business models and expansion plans immediately upon the effective date of the BDS R&O, this harm to retail subscribers served with ILEC BDS facilities is also immediate.

Multi-Location Commercial Subscribers May Not Have Competitive Choice

13. Competitive carriers offer multi-location subscribers optimized pricing based on scale economies. Global corporations require communications services to be provided at dozens, hundreds or even thousands of physical locations where the corporation has a presence, however, no provider of global or domestic service has a physical network that reaches all of the locations of their global or national domestic corporate customers. Such providers supplement their own facilities with ILEC BDS services to reach those off-network subscriber locations.

14. Multi-location subscribers often have modest requirements in their satellite locations. A healthcare institution, for example, may comprise 2-3 large hospitals, 30-40 out-patient clinics, and 10 or more testing labs. These facilities are usually dispersed throughout a wide geographic territory to provide uniform health services to patients in urban, suburban, and rural areas of the served community. The hospitals may reside within the urban
area, or on the urban/suburban edge, with the out-patient clinics and testing labs located in the suburban and rural areas of the served community.

15. A competitive service provider network may cover the urban area completely, suburban areas at 80%, and rural areas at 40%. In such cases, ILEC BDS may be used to provide the last-mile reach to the off-network locations. Even under current rules, if affordable ILEC BDS is not available for even a small number of these outlying locations, the cumulative impact may be sufficient to deter the competitor from bidding on the healthcare institution’s multi-location contract at all.

16. Post-effective date of the BDS R&O, increases in the cost of ILEC BDS resulting from deregulation would certainly foreclose such subscribers from almost all competitive options. The reality is that, even though competitors may exist in any given market, they are not ubiquitous. In such cases, absent affordable ILEC BDS, multi-location subscribers such as the healthcare institution in this example may not have a single competitive alternative to the ILEC because of the need to support satellite offices where only ILEC facilities exist.

**Smaller Business Subscribers May Be Shut Out of Advanced Communications Technologies**

17. Many ILECs choose to offer services based on advanced technologies only to larger commercial subscribers. A case in point is Ethernet service. Most ILECs choose not to use Ethernet-over-TDM and TDM bonding technologies, which are capable of supporting Ethernet on TDM facilities at speeds up to 100Mb/s. Instead, ILECs choose to offer Ethernet services only over optical fiber facilities at far higher transmission rates, commanding far higher minimum prices. By limiting Ethernet availability in this way, ILECs can ensure that the overhead cost of customer support for advanced services such as Ethernet is justified by the high “average revenue per user” commanded by such service.
18. Conversely, competitive carriers are willing to employ these TDM-based technologies in order to provide a “stepping stone” approach to allow subscribers to grow at their own rate. Affordable ILEC BDS allows competitors to provide these subscribers with what is often their first access to advanced Ethernet services at entry-level prices where, absent the competitive offering, they would have no access to such services at all. Later, as these subscribers grow, fiber deployment to their location may be justified by their increased demand. Rather than being forced to absorb the high entry cost of fiber service capacities they cannot use, these subscribers are afforded the opportunity to “right size” their service, while still taking full advantage of the increased business efficiencies made possible by advanced communication services such as Ethernet.

19. Additionally, ILECs often offer their advanced, unified communication services using a pricing structure that demands a high fixed monthly fee plus an incremental cost per user. In many cases, the high fixed monthly fee places the ILECs’ service out of the reach of smaller businesses. Competitive carriers, on the other hand may offer the equivalent advanced, unified communication service at a somewhat higher monthly cost per user but without the fixed monthly fee.

20. Because the BDS R&O will result in an immediate increase in the costs of ILEC BDS to competitive carriers, these competitive carriers must begin taking immediate remedial actions, including refraining from targeting smaller commercial subscribers. The resulting harm to these smaller commercial subscribers—the lack of an alternative to the ILECs’ more expensive, less beneficial service offerings and service model—is also immediate.
Conclusion

21. The BDS R&O poses immediate and significant financial and operational risk to commercial subscribers. By any measure, the BDS R&O results in increased costs to competitive carriers in providing their services to commercial subscribers. These costs are directly and indirectly passed along to such subscribers, preventing them from accessing critical, affordable competitive services. In addition, to the extent that competitive carriers exit the market, commercial subscribers in that market will not be able to purchase and benefit from these unique and valuable service offerings, based on both pricing and non-pricing availability metrics, which these competitive carriers provide.

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

Executed on the 23rd day of June, 2017.

[Signature]

David J. Malfara, Sr.