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

In the Matter of

Business Data Services in an Internet Protocol Environment
Technology Transitions
Special Access Rates 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 No. 16-143
GN Docket No. 13-5
WC Docket No. 05-25
RM-10593

MOTION FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION AND SUMMARY

The Commission should stay the effective date of the rules it adopted in the order on review (the “Order”) pending judicial review. The standard for a stay is met here, where the petitioners will present substantial questions to the court of appeals, and the equities also favor the grant of a stay. If not stayed, the rules will take effect on August 1. Petitioners will treat Commission inaction on this stay request as a denial on June 30.

As the Commission knows, the business data service (“BDS”) market generates $45 billion in revenues annually. The record shows that the incumbent local exchange carrier (“ILEC”) is the only facilities-based BDS provider in 86 percent of buildings with total bandwidth demand of up to and including 50 Mbps. That is because it is almost never economically feasible to build a new last-mile connection to provide service at these lower bandwidths. Therefore, competitors must buy last-mile connections from the ILECs in order to compete with ILECs in the provision of both BDS, and communications solutions that use BDS connections as critical wholesale inputs. In addition, competitors often need to buy dedicated transport from ILECs in order to reach the competitors’ high-capacity transport networks, because the many locations served only by an incumbent channel termination frequently lack direct access to competitive transport facilities.

To address ILECs’ historic dominance of this marketplace, the Commission has for decades employed tariffs and price cap regulation to ensure just and reasonable BDS rates. After experimenting with pricing flexibility rules for many years, the Commission in 2012 concluded that the triggers it had previously adopted to lift price caps in certain areas swept too broadly by

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1 Business Data Services in an Internet Protocol Environment et al., Report and Order, FCC 17-43, WC Docket Nos. 16-143 et al. (rel. Apr. 28, 2017) ("Order").
deregulating entire Metropolitan Statistical Areas ("MSAs") based on unreliable proxies for the presence of competition that measured a competitor's sunk investment in the MSA rather than actual or potential entry into the BDS market. Accordingly, in 2016, the Commission proposed to replace the overbroad MSA-based triggers for both channel terminations and transport with a new competitive market test ("CMT") for both channel terminations and transport. The Commission proposed to develop the CMT using "traditional economic principles" to more rigorously and more specifically identify geographic and product markets where competition was sufficient to forgo price cap regulation.

The new administration then abruptly changed course without seeking further comment. Rather than devising an improved test to distinguish competitive from non-competitive areas with greater precision, the Commission adopted results-driven new rules divorced from well-established market analysis principles, precedent, and its own proposal.

For DS1 and DS3 channel terminations, the Order concludes that there is sufficient competition if, at a location with BDS demand, there is one incumbent and one so-called "nearby competitor" that the Commission asserts could compete with that incumbent in a period of three to five years. This conclusion is the basis of a new CMT for DS1 and DS3 channel terminations. The new CMT deems an entire county to be sufficiently competitive to eliminate price cap regulation if either of two prongs are satisfied: (1) when 50 percent of locations with

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2 Special Access Rates for Price Cap Local Exchange Carriers et al., Report and Order, 27 FCC Rcd. 10557 (2012) ("Suspension Order").


4 FNPRM ¶ 280.

5 Order ¶¶ 13, 120.
BDS demand for circuit-based DS1 and DS3 end-user channel terminations are within a half mile of a building served by a competitive provider; or (2) if 75 percent of census blocks in the county have a cable provider serving residential customers over coaxial connections. In so doing, the Commission deregulates more than 90 percent of the locations with BDS demand, turning its back on modern antitrust analysis, upending decades of established precedent, and ignoring extensive record evidence.

For dedicated transport services, the Commission declined to adopt a CMT at all, and instead deregulates the market nationwide. To create the illusion of robust transport competition, the Commission conducted a fatally flawed competitive analysis based on a fundamental miscomprehension of transport network architecture—an error that the public has no opportunity to correct, because the Commission never proposed to conduct that analysis.

The extensive deregulation that will result if the new rules take effect will permit the incumbents to squeeze their competitors by raising prices for essential inputs to their services. It also would cause substantial harm to businesses, especially smaller businesses in suburban and rural areas that rely on access to BDS at or below 50 Mbps, as acknowledged by the U.S. Small Business Administration. And the Order will allow ILECs to de-tariff their BDS services on August 1, 2017, and to replace discontinued BDS with higher-cost alternatives, creating the prospect of enormous disruption and uncertainty as the industry migrates to a new paradigm of Commission indifference to competition.

As the attached declarations show, the economic losses that businesses and competitive carriers will suffer if the rules take effect would be massive, imminent, and unrecoverable. A

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6 Id. ¶¶ 141-42.
stay pending appeal will serve the general public, who under the Order will be condemned to suffer the usual results of monopoly markets: higher prices, less output and lower quality. By contrast, maintaining the status quo will harm no one. Incumbents have been operating under the price cap regime for many years, and currently benefit from their ability to charge excessive rates to businesses and carriers that lack competitive options in areas previously and improperly deregulated.

As a result, Petitioners meet the requirements for a stay. They are likely to succeed on review of the merits of the Commission’s clear defiance of notice-and-comment requirements, and violation of established principles of reasoned decision-making. Moreover, a stay would not harm the ILECs, and instead would avoid massive and permanent losses that would be unrecoverable in the event of reversal, while serving the public interest.

BACKGROUND

I. REGULATORY HISTORY OF BDS

A. Rate Regulation and Tariffing Requirements

ILECs have been subject to price cap regulation since 1990, and to other forms of rate regulation prior to that year. ILECs also have long been subject to tariffing requirements (i.e., the requirements that they sell BDS to all customers on common rates, terms, and conditions published in a public schedule). These regulations apply exclusively to TDM-based BDS.

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Ethernet-based BDS is currently unregulated, even when provided by the incumbent, due to grants of regulatory forbearance provided by the Commission.8

B. Pricing Flexibility in Competitive Areas

The Commission has worked to free ILECs from these price cap and tariffing requirements in areas where competition adequately constrains ILEC rates, terms, and conditions. As the Commission has found, BDS entry conditions that determine whether a competing provider can viably serve a new location in response to monopolist rates charged by the incumbent differ dramatically across even small geographies.9

Recognizing that entry in the BDS market can occur in some places but not others, the Commission established “pricing flexibility” rules in 1999. These rules allowed ILECs to petition for deregulation in MSAs that satisfied certain “triggers” designed to predict the availability of competition based on the number of competitors with “sunk investment” in an MSA.10 The Commission predicted that the presence of sunk investment in parts of an MSA

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8 See Order ¶ 7 & n.24; see also Hyperion Telecommunications, Inc. Petition for Forbearance, Memorandum Opinion and Order, 12 FCC Rcd. 8596 (1997) (forbearing from dominant carrier regulation for non-ILEC BDS).

9 Suspension Order ¶ 36 (“Our review of the evidence suggests that demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA. This leads us to conclude that competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry.”).

10 Access Charge Reform et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14224 ¶¶ 77-83. If the ILEC established that an MSA met the trigger for “Phase I” pricing flexibility, the Commission would allow the ILEC to sell BDS through individually negotiated contract tariffs rather than public tariffs in that MSA. If the trigger for “Phase II” pricing flexibility was met, the ILEC could sell BDS through contract tariffs and at unregulated rates in the relevant MSA.
would lead to robust competitive entry throughout the MSA.\textsuperscript{11}

The Commission and the industry soon realized that this prediction was incorrect, and that the 1999 pricing flexibility triggers were flawed. In 2005, the Commission commenced a rulemaking proceeding seeking comment on whether the pricing flexibility rules accurately predicted competition, among other issues.\textsuperscript{12} In 2012, the Commission concluded that the triggers “are not working as predicted,” and suspended grants of pricing flexibility, thereby preventing ILECs from achieving further unwarranted deregulation in additional MSAs.\textsuperscript{13} More specifically, the Commission found that MSAs “do not reflect the actual scope of competitive entry,” because BDS “demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA,” and because “competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry.”\textsuperscript{14} Accordingly, the Commission initiated a data collection to help it generate more accurate and less overbroad findings of competition.\textsuperscript{15}

\textsuperscript{11} \textit{Id.}


\textsuperscript{13} \textit{Suspension Order} ¶ 1 (noting that the triggers “are not working as predicted” and the “widespread agreement across industry sectors that these rules fail to accurately reflect competition in today’s special access markets”).

\textsuperscript{14} \textit{Id.} ¶ 36.

C. The FNPRM

In the FNPRM, the Commission provided the public with the results of a competition analysis conducted using the BDS data it had collected. Based on that analysis, the Commission found that BDS competition remains “stubbornly absent,” especially at DS1- and DS3-level bandwidths (i.e., less than 45 or 50 Mbps).16

First, the Commission observed that actual BDS competition is practically non-existent in the BDS marketplace. 77 percent of all BDS customer locations are served exclusively by the ILEC.17 According to the same data, 86 percent of locations with aggregate BDS bandwidth demand of 50 Mbps or below —i.e., DS1- or DS3-levels—are served by the ILEC alone.18 Approximately 99 percent of such locations are served by at most a BDS duopoly.19

The Commission then addressed the issue of potential competition—whether, in the vast majority of locations without BDS competition, the possibility that a new, competing provider would enter the market is sufficient to deprive the incumbent of market power. The Commission found direct evidence in BDS pricing data establishing that ILECs exercise market power at DS1- and DS3-level bandwidths, corroborating substantial record evidence that, even in the face

16 FNPRM ¶ 3.
17 Id. ¶¶ 217–18.
18 Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143 et al. (filed Oct. 21, 2016) (showing that based on the Commission’s data, more than 86 percent of buildings that have aggregate demand of less than 50 Mbps have no competitive provider).
19 Id. at 5.
of higher prices, economic conditions will rarely, if ever, justify the construction of new facilities to serve lower bandwidth customers.\textsuperscript{20}

Based on this understanding of BDS competition, the Commission proposed a remedy: a CMT that would use traditional competition principles to define geographic and product markets to generate more granular and accurate competition findings than the suspended pricing flexibility triggers. The Commission proposed to apply the CMT at the level of the census block, and sought comment on using the more granular individual building location.\textsuperscript{21} The Commission explicitly stated that its goal was “to learn from past experiences and to not repeat the errors of the 1999 pricing flexibility regime by granting relief too broadly to cover areas where competition is not present or unlikely to occur.”\textsuperscript{22} The Commission also explicitly stated that the CMT would apply to both channel termination and dedicated transport elements of a TDM-based BDS circuit.\textsuperscript{23}

D. The Order under Review

Instead of targeting deregulation more precisely than the suspended pricing flexibility triggers, the Order reverses course completely—and dismantles the BDS price cap regime almost entirely.

\textsuperscript{20} Id. ¶\ ¶ 238 (“[C]ompetitive supply in a unique location is correlated in both statistically and economically significant ways with lower ILEC prices for DS1s and DS3s at that location.”).

\textsuperscript{21} Id. ¶ 289.

\textsuperscript{22} Id. ¶ 290.

\textsuperscript{23} Id. ¶ 278 (“Therefore, we propose to abandon the collocation-based competition showings for channel terminations and other dedicated transport services for determining regulatory relief for ILECs. Instead, we propose to apply a new Competitive Market Test.”).
For channel terminations, the Order adopts a two-pronged CMT applied across counties using vastly over-inclusive proxies for measuring the presence of competition. Each prong produces positive findings for competition, and therefore eliminates price caps for channel terminations, in more than 90 percent of locations across the country—amplifying the flaws of the suspended pricing flexibility triggers. And even some of the remaining 10 percent continue to be unregulated, because even where this CMT deems a county non-competitive, the Commission declines to apply price cap regulation if the county was previously deregulated under the flawed MSA-based test.

For dedicated transport, the Order completely discards the Commission’s prior proposal to adopt a CMT. Instead, it deregulates and eliminates price caps for these services on a nationwide basis.24

The Order also eliminates ILEC tariffing requirements on August 1, 2017, the day the rules become effective. Moreover, for both competitive and non-competitive counties, the Order sunsets an interim rule requiring ILECs that discontinue wholesale TDM-based BDS to offer wholesale access to replacement services on reasonably comparable rates, terms, and conditions.25 If the sunset takes effect, ILECs would be able to stop selling price capped BDS services and force their customers to switch to unregulated, and higher-priced, alternatives.

**STANDARD**

The Commission applies the D.C. Circuit’s four-factor test when evaluating petitions to stay the effective date of a Commission rule. Under that test, a petitioner must establish that (1)
it is likely to prevail on the merits; (2) it will suffer irreparable harm absent preliminary relief; (3) other parties will not be harmed by the stay; and (4) the public interest would favor a stay. 26

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The Order Contravenes Traditional Competition Principles and Judicial, DOJ, FTC, and Commission Precedent.

In the Order, the Commission concludes that in the high sunk cost BDS marketplace, sufficient competition is present if, in the appropriate geography, there is one incumbent and one so-called “nearby competitor” that the Commission asserts could compete with that incumbent in a period of three to five years. 27 In so doing, the Commission deregulates more than 90 percent of the locations with BDS demand, 28 turning its back on modern antitrust analysis, upending decades of established precedent, and ignoring record evidence. Moreover, the Commission’s failure even to apply its own newly-minted standard in a consistent manner demonstrates that the agency has entirely failed to construct a reasonable standard for distinguishing where a lack of competition warrants the traditional use of price regulation to prevent supra-competitive pricing.

1. The Order Defines a “Competitive Market” To Include Geographic Areas Where, by Established Standards, Only the ILEC Provides BDS.

The Commission’s CMT sets forth two independent prongs, neither of which is sufficient to assess whether actual BDS competitors will provide service to a geographic area in a reasonable amount of time necessary to discipline the ILEC’s pricing. 29 Specifically, the CMT

26 See Rates for Interstate Inmate Calling Services, 31 FCC Rcd. 10936 ¶ 9 (2016).
27 Order ¶¶ 13, 120.
28 Id. ¶¶ 141–42.
29 For purposes of this motion only, petitioners do not challenge the Commission’s use of a standard that draws regulatory lines that may not be accurate in 100 percent of locations; rather petitioners challenge the CMT because the Commission applies it to competitive standards that
treats a particular county as competitive, sufficient to forgo price regulation, if (i) 50 percent of locations with demand for circuit-based DS1 and DS3 end-user channel terminations are within a half mile of a building served by a competitive provider; or (ii) 75 percent of census blocks have a cable provider present. The Order’s administrable framework for price regulation is based on the Commission’s unfounded and unwarranted predicate conclusion that sufficient competition exists where there is a nearby “competitor,” which it defines as either one competitive provider with a network within a half mile of a location served by an ILEC or a cable operator’s facilities in the same census block as a location with BDS demand.30 In neither case does the Commission require even one firm to occupy the same position as the incumbent—namely to be physically present in the building with similar costs for supplying service—and in the case of cable it does not require the firm to be providing BDS at all in the relevant geography. These failings violate well-established competition principles in defining the geographic market and assessing whether a non-market entity will make a timely entry into the market.

a. The Order Defines a Geographic Market That Fails to Serve Its Intended Purpose—To Identify Practical Choices Available to Customers.

The relevant question in defining an appropriate geographic market is to consider the area within which customers can practically turn to alternative sources and within which providers can reasonably compete.31 This is critical to the Commission’s CMT because—as it explains—it defines the geographic market to identify where competition does and does not exist and,

\[\text{Order } \textit{¶} 117.\]

\[\text{Id. } \textit{¶} 39 \text{(citing } \textit{Morgenstern v. Wilson}, 29 F.3d 1291, 1296 (8th Cir. 1994)).\]
therefore, where price regulation is unnecessary and where it is needed to guard against supra-competitive ILEC pricing.  

But without explaining why such a departure is warranted with the rigor demanded by the Administrative Procedure Act (“APA”), the Commission ignores traditional competition principles and its own precedent, by concluding that a second nearby “competitor” is in the market for competitive analysis purposes. The 2010 Horizontal Merger Guidelines, relied on elsewhere by the Commission, limit market participants in a specified geography to firms that (i) currently earn revenues in the relevant market, (ii) have committed to making competitive offerings in the near future, or (iii) who can enter rapidly (i.e., “rapid entrants”). But neither of the types of “competitors” identified by the Order’s CMT fits these criteria. The Commission expressly disclaims that a second wireline provider within a half mile—the hypothetical

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32 *Id.* ¶ 130 (describing the CMT as the “methodology that we will use to determine which local markets are sufficiently competitive to warrant deregulation . . . .”).

33 *Perez v. Mortg. Bankers Ass ’n*, 135 S. Ct. 1199, 1209 (2015) (Before adopting a policy that “‘rests upon factual findings that contradict those which underlay its prior policy,’” the Commission has to confront its prior findings and “provide [a] more substantial justification” than would be required absent the conflicting prior policy) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

34 See, e.g., *SBC Communications Inc. and AT&T Corporation Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18307 ¶ 28 (2005) (“SBC AT&T Memorandum Opinion and Order”) (“Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer’s location.”). The Commission analysis rather confusingly discusses examples of where cable companies are already competing for BDS business or are describing how to do so, *Order* ¶¶ 118, n.360, 119, but, of course, this is all irrelevant to the actual terms of the CMT, which expressly do not require present-day competition.

35 *Order* ¶ 39.

competitor under the CMT’s first prong—is a rapid entrant. And the Commission never contends that cable “competitors” under the CMT’s second prong are actually in the market. Nor could it be given that cable companies qualify as “competitors” even if they do not offer BDS in the relevant geography; the only requirement is that the cable operator provide best efforts broadband to residential customers.

The only option left is for the Commission’s nearby so-called “competitor” to have committed to entering the market in the near future. But, like Einstein’s spaceship racing to the speed of light, the Commission stretches time beyond all earthly recognition. Failing to consider key evidence, the Commission surmises that “over a period of several years, such a provider will in most cases place reasonably effective competitive pressure on the incumbent.” But the application of this to cable ignores undisputed evidence provided by the cable industry itself that cable operators will not and cannot commit to using their cable networks to provide BDS in any significant quantity, let alone with the ubiquity assumed by the Commission’s test. As the cable operators warned the Commission repeatedly throughout the proceeding, offering BDS over coaxial facilities would absorb vast amounts of limited network capacity that cable companies need to reserve for their core residential TV, phone, and Internet lines of business.

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37 Order ¶ 120 n.368.
38 2010 Horizontal Merger Guidelines § 5.1.
39 Order ¶ 120 n.368.
40 See, e.g., Comments of the National Cable & Telecommunications Association at 29, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (“NCTA June 28, 2016 Comments”) (“The Commission’s assumption that cable company HFC networks are ubiquitously deployed for BDS purposes reflects a fundamental misunderstanding of how these networks operate.”); id. (“HFC plant is a shared network with limited capacity, particularly upstream capacity, which requires cable companies to carefully allocate bandwidth among their entire customer base, including residential broadband customers . . . . What this means in practice is that, notwithstanding an existing HFC network presence, it may well not be feasible to provide BDS-level services in
The requirement that prospective entry be timely is essential to an appropriately-defined geographic market because it guards against a firm harvesting monopolist prices merely on the suggestion—increasingly uncertain the longer it stretches toward the future—that someday competition will arrive.\textsuperscript{41} To sacrifice present-day competition because of some hypothesized but indefinite future entry is unacceptable, which is why contrary to the \textit{Order}, the antitrust agencies have concluded that a “competitor” that may arrive “over three to five years,”\textsuperscript{42} is not a

\begin{itemize}
\item many places due to the limited capabilities of the HFC plant.”); Comments of Comcast Corporation at 31, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (“Comcast June 28, 2016 Comments”) (explaining that EoHFC has “limited relevance to the BDS marketplace” because it “represents a very small segment of the market with little potential for significant growth”); Reply Comments of Charter Communications, Inc. at 5, WC Docket Nos. 16-143 et al. (filed Aug. 9, 2016) (“Although some commenters suggest that cable providers’ hybrid fiber coaxial (‘HFC’) networks allow them nearly ubiquitous access to business customers, that is simply incorrect.”); Comments of the American Cable Association at 28, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (“ACA June 28, 2016 Comments”) (offering dedicated bandwidth to a business customer would “subtract[] from the available shared . . . capacity” for the industry’s core residential video and broadband business); Comments of Cox Communications, Inc. at 16–17, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (explaining that the more ‘dedicated’ bandwidth is sold as EoHFC, the less bandwidth ‘headroom’ is available for all of the mass market and small businesses sharing the network and who generate substantially more revenue than EoHFC services,” and that electronics upgrades will not resolve such capacity constraints).
\end{itemize}

\textsuperscript{41} \textit{See United States v. Marine Bancorporation, Inc.}, 418 U.S. 602, 622 (1974) (holding that “in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor” and rejecting expansion of the geographic market from the Spokane area to the entire state, where the acquired firm only operated in Spokane).

\textsuperscript{42} \textit{Order} ¶13.
timely entrant. Indeed, the Commission’s own precedent makes this point plain and in the height of irony, so does its own experience with BDS. After thirteen years of waiting for “sunk investment” to result in widespread actual entry, the Commission conceded that its 1999 pricing flexibility triggers were wrong. And less than one year after committing to fix its 1999 test, the Commission has decided to set policy based on a flawed prediction of entry yet again.

**b. The Commission’s Attempt to Construct a New Standard for When a Nearby “Competitor” is in the “Market” Fails to Satisfy Basic Economic Principles and Established Competition Analysis.**

In an effort to salvage the Order’s flawed competitive market standard, the Commission asserts that there are buildout incentives in the BDS industry that justify a departure from the traditional approach to geographic market definition. But even if buildout (and thus entry to a

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43 See 2010 Horizontal Merger Guidelines § 9.1; see also F.T.C. v. Staples, Inc., 190 F. Supp. 3d 100, 133 (D.D.C. 2016) (“The relevant time frame for consideration in this forward looking exercise is two to three years.”); United States v. Bazaarvoice, Inc., 2014 WL 203966, at *70 n.19 (N.D. Cal. Jan. 8, 2014) (“The Court agrees that two years is an appropriate time-frame in this case. Entry within two years is likely to undo the anticompetitive effects created by the merger such that the merger would be unprofitable, whereas entry beyond two years is not.”); United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 73 n. 28 (D.D.C. 2011) (“For entry to be considered timely, it typically must occur within approximately two years post-merger.”); F.T.C. v. ProMedica Health Sys., Inc., 2011 WL 1219281, at *31 (N.D. Ohio Mar. 29, 2011) (noting that entry was not timely where “[i]t would take significantly longer than the two-year timeframe prescribed by the [2010] Merger Guidelines” to build a new hospital). Moreover, as a leading antitrust treatise has noted, the 2010 Horizontal Merger Guidelines shifted focus from whether competition will develop in the future to whether there have been recent examples of new entrants. See 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, Antitrust Law § 941g (4th ed. 2016).

44 See, e.g., Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp and EchoStar Communications Corp., Hearing Designation Order, 17 FCC Rcd. 20559, 20616 ¶ 140 (2002) (“2002 Hearing Designation Order”) (requiring entry to be within two years in order to make a significant market impact); Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, Report and Order, 10 FCC Rcd. 7842, 7847 ¶ 22 (1995) (“Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors . . . .”).
building) were timely (which it is not), the Commission’s analysis fails to satisfy the well-established standards for determining whether buildout is likely—namely, whether it is economically sensible to expect the investment necessary for a competitor to complete the buildout within an acceptable timeframe.

The Order concludes that wherever ILEC prices are high enough, investment will inevitably follow because the expected revenue will be more than the necessary investment.45 But established antitrust precedent asks more; it seeks to understand whether entry is “sufficient to deter or counteract the competitive effects of concern,”46 otherwise deregulation would simply be a recipe for monopoly abuse. To the extent that the Commission is arguing that the presence of other companies within a half mile of the incumbent,47 such that their presence “on the wings” exerts competitive pressure, the Commission must show that (1) the market is “highly concentrated,” that (2) the company is “perceived by existing firms in the market as a potential independent entrant,” and that (3) the company “has exercised a tempering impact on the competitive conduct of existing sellers.”48 The Commission wholly fails to conduct this analysis and thus is in no position to weigh future outcomes against current anticompetitive effects. And even on its own terms of assessing the incentive to build out, the Commission fails to ask, even at a level of generality normally employed in a rulemaking: What are the revenue opportunities? What is the likelihood that customers will actually sign up (especially important given the ILEC

45 Order ¶ 119.
46 2010 Horizontal Merger Guidelines § 9.3.
47 See, e.g., Order ¶ 50 (“buildout or even its threat would be timely enough to restrain a dominant provider”) (emphasis added).
48 Tenneco, Inc. v. FTC, 689 F.2d 346, 355 (2d Cir. 1982).
historic tactic of cutting prices where entry occurs while keeping prices artificially high where it
does not)? What are the costs of building out? Will the investment have other use if the sales
are not made after investment has been made?

Instead, the Commission assumes that high sunk network costs will incent providers to
build laterals to as many customers as possible because the incremental cost of a lateral is much
lower than the cost of other network facilities. But such assumptions do not mesh with the
market realities of the BDS industry documented in this proceeding, where a nearby
“competitor” faces substantial impediments in serving an additional location, including, most
importantly, the additional costs required for network extension and customer connection (e.g.,
the costs to build a lateral and install electronics on the connections). A nearby “competitor”
may also experience impediments to buildout when the building owner refuses to grant the
provider access or charges a high access fee, or when it is difficult or costly to obtain rights of
way to a specific building (e.g., pole access or costs of burying lines). In fact, one of the

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49 See MCI Commc’ns Corp. v. AT&T, 708 F.2d 1081, 1099 (7th Cir. 1983) (describing how
AT&T systematically lowered rates where MCI had entered to compete and raised rates where
MCI had not entered).

50 Order ¶ 54.

51 See Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe
Scattareggia, and Drew Smith ¶ 51, appended as Attachment A to Comments of Windstream
Services, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 21, 2016)
(“Windstream June 28, 2016 Comments”); Comments of TDS Metrocom, LLC at 20, WC
Docket No. 05-25, RM-10593 (filed Jan. 27, 2016); Declaration of James Butman on Behalf of
TDS Telecommunications Corporation ¶ 12, appended to Letter from Thomas Jones, Counsel for
TDS Telecommunications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No.
05-25 et al. (filed Mar. 26, 2015); Reply Comments of Birch, BT Americas, EarthLink, and
Level 3 at 4–11, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016).

52 Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special
authorities cited by the Commission recognizes exactly that: “[L]inking those last-mile connections through a wired distribution network, is a costly endeavor.”

And it is even worse for cable. The Commission likes the notion that entities will have a greater incentive to invest where they face high sunk costs, and the Commission limits its definition of sunk costs to an “investment that has no value in an alternative use.” Yet the Ethernet-over-Hybrid Fiber-Coaxial Cable (“EoHFC”) facilities that meet the second prong of the CMT are not “sunk” in that sense; they are valuable precisely because they are being used to provide a host of residential data, video programming, and voice services that represent cable operators’ core business. Indeed, a cable operator “may want to deploy as many new services as possible since there exists a significant scope economy.” Regardless, cable cannot sell EoHFC in any significant quantity, because the capacity used by such services is shared with—and would swamp the necessary industry capacity to provide—core residential TV, Internet, and phone service.

14, 2016) (“Baker Declaration”); Declaration of David Schirack and Mike Baer ¶ 18, appended as Attachment A to Windstream June 28, 2016 Comments (“Schirack/Baer Declaration”).


54 Order ¶ 120 n.370; see id. ¶¶ 120–21.

55 Id. ¶ 127 n.392.

56 See ACA June 28, 2016 Comments at 28 (explaining that “dedicating HFC bandwidth to BDS subtracts from the available shared network capacity” for residential video and broadband services).

Most fundamentally, however, the Commission fails to consider the economic value of the demand associated with the low bandwidth DS1s and DS3s that are the subject of the CMT. While low bandwidth connections are numerous, they generate substantially lower revenue than high bandwidth counterparts.\(^{58}\) As participants in the rulemaking emphasized to the Commission repeatedly, there was substantial record evidence, including an economic model developed by CostQuest,\(^{59}\) documenting that buildout would be infeasible at DS1 and DS3 bandwidths because of the low anticipated revenues.\(^{60}\) The Commission fails to address the bulk of this evidence in the Order. It notes only the CostQuest model—and then summarily dismisses it in a footnote.\(^{61}\)

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58 The Commission summarily dismisses in a footnote the cost study conducted by Windstream as not persuasive. Order ¶ 119 n.363.

59 CostQuest White Paper #1 at 2, appended as Attachment A to Letter from Jennie B. Chandra, Vice President of Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al. (filed June 8, 2015) (“CostQuest White Paper”) (“[A]n economically rational CLEC will not self-deploy to serve a single customer with less than 1 Gbps of capacity per building even if [the] building offers a more attractive option than wholesale lease payments . . . because the revenue hurdle is higher than the cross-over point in the build-versus-buy analysis.”).

60 Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 6, appended to Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (noting that it is “infrequently the case that Level 3 can deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or below . . . because the distance between a customer location and a splice point . . . usually exceeds the construction feasibility limits”); Reply Comments of TDS Metrocom, LLC at 2, 15, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) (“[A] fiber lateral build to any customer located 100 to 1,000 feet from the nearest splice point on TDS CLEC’s fiber network is not competitive at speeds ranging from 10 to 100 Mbps because TDS CLEC could not recover its required revenue and compete with lower RBOC retail rates.”); Schirack/Baer Declaration ¶ 16 (“[A] single 100 Mbps circuit almost never generates the amount of revenue required to justify deployment of a new last-mile connection by its competitive carrier operations, even when Windstream has already deployed fiber feeder in the customer’s vicinity.”).

61 Order ¶ 119 n.363.
Even assuming that a perfunctory footnote on such a key issue could ever satisfy the strictures of the APA, the Commission’s reason for dismissing the CostQuest study only underscores another fatal defect with the CMT. The Commission claims (incorrectly) that the study is not persuasive because it assumes revenues from a single customer, whereas there could be multiple customers to aggregate sufficient demand to justify building out.\(^6^2\) CostQuest’s study analyzed the revenue that a provider must generate at each location in order to recover its costs of building a fiber network necessary to provide BDS, and specifically considered the scenario in which “multiple lower capacity circuits are sold at each location.”\(^6^3\) In any event, the CMT makes no effort to determine the likelihood that this kind of demand would actually be present before concluding that a nearby “competitor” would build out—despite having identified the present business demand as a critically important factor that any test should consider, and seeking comment on an “appropriate business density metric for the competitive market test” in the \textit{FNPRM}.\(^6^4\) Indeed, if the Commission’s reasoning in the \textit{Order} were correct, and only distance mattered when assessing incentives and ability to build out, then high-speed broadband would be as prevalent in less-densely-populated rural areas in America as in its cities. But of course, where the expected demand is greater, so is the expected revenue, and thus there is a greater incentive to build out and a lower per-building cost for doing so.\(^6^5\) Without measuring

\(^{6^2}\) \textit{Id.}

\(^{6^3}\) CostQuest White Paper at 8.

\(^{6^4}\) \textit{FNPRM} \(\ ¶ \) 293. \textit{See also id.} \(\ ¶ \) 210 (“The Commission stated that competitive entry is considerably less likely to occur in areas of low demand, regardless of whether other areas within the MSA contain sufficient demand to warrant competitive entry.”) (citing \textit{Suspension Order} \(\ ¶ \) 36).

\(^{6^5}\) \textit{See FNPRM} \(\ ¶ \) 16 (modeling the decline in per-building buildout costs as potential customer demand, as measured by business density, increases); CostQuest White Paper \(\ ¶ \) 14 (“[A]s
demand, the Commission is left with a test that treats rural areas with few businesses in exactly the same manner as the most concentrated urban business district: a conclusion that itself is unsupportable.66

In any event, as explained above,67 the Commission simply glossed over the substantial evidence in the record submitted by the cable operators themselves explaining the unsuitability of their facilities for providing BDS.68 The Commission further failed to analyze rationally the entry barriers that would apply to cable providers that seek to overbuild their HFC facilities with business density increases, then at a given level of market share (i.e., held constant), the average cost of a served building falls, and thus the revenue hurdle level also falls.”).

66 Even in a rulemaking context, it would be easy for the Commission to build an approximation of demand into its test, either by distinguishing between places with very different business density or by using a proxy for demand, like the number of businesses or employees in a place. See Ofcom Business Communications Market Review ¶ 5.51 (2013), http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity/statement/Section5.pdf. Indeed, the Commission relied on business density analysis in concluding, in the 2012 Suspension Order, that its competitive showing triggers—also based on a proxy for sunk investment—were irredeemably flawed. See Suspension Order ¶ 51 (“Based on an analysis of the individual ZIP code areas, the probability that the carriers’ location decisions in these metropolitan areas were not tied to business establishment density is exceedingly small.”). But the Order fails to take any steps to approximate demand; nor does it take into account the findings in the 2012 Suspension Order.

67 See supra n.40 & accompanying text.

68 See, e.g., Comcast June 28, 2016 Comments at 20 (“Comcast’s Ethernet services provided over its HFC network are not competitive substitutes for the vast majority of BDS customers; even where HFC facilities are present, demand for HFC-based services has been limited.”); Letter from Michael H. Pryor, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 05-25, 16-143 (filed Mar. 24, 2017) (confirming that Ethernet over HFC services “are not BDS”); Letter from Samuel L. Feder, Counsel to Charter, to Marlene H. Dortch, Secretary, FCC, at 4 n.18, WC Docket Nos. 16-143 et al. (filed Oct. 3, 2016) (noting “the significant record evidence that Ethernet over coax is not a comparable service” to fiber-based BDS); NCTA June 28, 2016 Comments at 28 (explaining that the performance commitments of Ethernet provided over HFC “often are well below the performance commitments offered with TDM or fiber-based Ethernet services.”).
the fiber necessary to offer BDS. In short, when faced with the commercial realities of the BDS marketplace, the Commission’s CMT does not—and cannot—explain why a nearby “competitor” would typically have the incentive to build out and thereby provide a competitive constraint on the ILEC.

2. The Order’s Fallback Conclusion that Duopoly Markets are Competitive Ignores Well-Established Precedent and Results in a CMT that Conspicuously Fails to Eradicate the Existence of Market Power Sufficient to Maintain Supra-competitive Prices.

The courts and antitrust agencies have long recognized the competitive harms that may arise from unregulated duopolies, including supra-competitive prices and decreased consumer welfare. Indeed, under the Commission’s analysis, the antitrust agencies should never

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69 See Order ¶ 31 (asserting that “the underlying facilities used to provision best-efforts services, even over legacy media such as HFC, can be and are being repurposed to provide business data services”) (citing Letter from Matthew A. Brill, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143 et al. (filed Mar. 13, 2017) (“Comcast Mar. 13, 2017 Ex Parte')). But see Comcast Mar. 13, 2017 Ex Parte at 2 (noting that extending a fiber lateral to the customer’s location is a “capital-intensive construction project[]” that would be subject to an “evaluation of incremental investment opportunities”).

70 See, e.g., FTC v. H.J. Heinz Co., 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (“In a duopoly, a market with only two competitors, supra-competitive pricing at monopolistic levels is a danger.”); id. at 715 (“[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”); FTC v. CCC Holdings, 605 F.Supp.2d 26, 67 (D.D.C. 2009) (noting that tacit coordination is a concern[w]ith only two dominant firms left in the market’); United States v. H&R Block, Inc., 833 F.Supp.2d 36, 44 (D.D.C. 2011) (enjoining an acquisition which would result “in an effective duopoly”); Amendment of the Commission’s Space Station Licensing Rules and Policies, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 10760, 10789 ¶ 64 (2003); 2002 Hearing Designation Order ¶¶ 170–74; Application of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc. for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA, Hearing Designation Order, 17 FCC Rcd. 5423, 5432 ¶ 27 (2002) (“In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination.”); SBC AT&T Memorandum Opinion and Order ¶¶ 65-78; Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20008–09 ¶ 37 (1997); Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile
challenge a three-to-two merger in a high sunk cost market—the Commission clearly suggests that its new “nearby competitor” standard be applicable outside of the realm of BDS, in which case, the Commission itself was wrong in 2014 to conclude unanimously that duopolistic bargaining by big broadcast stations for retransmission consent fees should be outlawed—a result speedily codified by Congress.

After all, the DOJ and the FTC have specifically challenged mergers that result in only two competitors in markets with high sunk costs on the grounds that the transactions would substantially lessen competition and diminish consumer welfare. The Commission’s attempt to establish a new safe harbor for duopoly, which it suggests could be applied outside of the BDS context, perhaps when the next merger or rulemaking opportunity appears, is unconvincing.


71 See, e.g., Order ¶ 120 n.369 (“[A] recent study of the U.S. residential broadband market finds that entry of a fourth competitor in a zip code has almost no effect on price.”) (citation omitted).

72 Amendment of the Commission’s Rules Related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) (limiting joint bargaining by the top four stations, including if the four stations create two broadcast sellers of programming to local cable operators).

73 See, e.g., Complaint at 7 & 32, United States v. Halliburton Co., No. 1:16-cv-00233 (D. Del. Apr. 6, 2016) (challenging acquisition where “customers would effectively face a duopoly after the transaction” where sunk costs included “substantial resources dedicated to product development”); Complaint at 2 & 14, United States v. AB Electrolux, No. 1:15-cv-01039 (D.D.C. July 1, 2015) (challenging “duopoly” where sunk costs included the “time and cost of developing a brand recognized for major cooking appliances” and “building effective manufacturing capabilities”); Plaintiff’s Memorandum of Law at 1 & 4, F.T.C. v. Ardagh Group, S.A., No. 1:13-cv-01021 (D.D.C. Aug. 28, 2013) (asserting that the “merger to duopoly” was “presumptively unlawful” where sunk costs included factories that “cost hundreds of millions of dollars” to construct); Complaint at 6-7, United States v. Signature Flight Support Corp., No. 1:19-cv-00248 (D.D.C. Feb. 5, 1997) (challenging acquisition resulting in a “duopoly” where “a new entrant would not achieve a large enough share of market revenues to be able to cover the fixed (including sunk) costs of entry”).

74 See Order ¶ 120 n.369.
a. The Order Ignores Well-Established Commission Precedent.

The Order’s conclusion that the mere presence of a “nearby competitor” will lead to competitive outcomes is plainly inconsistent with well-established Commission precedent.\textsuperscript{75} Most telling, the Commission disregards \textit{Qwest Phoenix}, where it raised significant concerns about the competitive nature of a duopoly and established that two competitors are insufficient to constrain ILEC pricing.\textsuperscript{76}

Incredibly, the Commission does not even acknowledge its significant departure from the \textit{Qwest Phoenix Order}. Perhaps sensing that it would have no reasonable basis to do so, the Commission spuriously claims that the BDS market now meets “certain conditions” identified in the \textit{Qwest Phoenix Order} under which “duopoly will yield a competitive outcome.”\textsuperscript{77} This attempt to distinguish the \textit{Qwest Phoenix Order} fails, and exposes yet another example of the unreasoned decision making that is endemic to the Commission’s \textit{Order}. Specifically, the Commission claims that the high sunk cost nature of the BDS market gives providers the incentive to extend their network facilities to new locations with demand.\textsuperscript{78} But the \textit{Qwest Phoenix Order} did not mention the sunk cost nature of the BDS market. Instead, the \textit{Qwest Phoenix Order} merely acknowledged that under the Bertrand Model of duopoly behavior,

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\textsuperscript{75} See supra n.71.
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\textsuperscript{77} Order ¶ 121 (citing \textit{Qwest Phoenix Order}).
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\textsuperscript{78} Id.
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duopoly can yield a competitive outcome assuming homogeneous products and no capacity constraints.\(^7\)

Here, the Order conspicuously omits any reference to the Bertrand Model and fails to identify—because it cannot—any structural factors of the BDS market that would make such a model applicable. The Commission also neglects the substantial record evidence that BDS is exactly the type of market in which a duopoly would fail to produce adequate competition.\(^8\) As a result, the Order fails to make a serious effort to explain the Commission’s departure from Qwest Phoenix with the substance and detail required by law.

The Commission also claims that the Qwest Phoenix Order is “inapposite” because “providers of fixed wireless last-mile services, including providers of emerging 5G last-mile transmission technology,” “promise[]” to bring “widespread” BDS competition at some unspecified point in the future.\(^9\) But this is futuristic hand-waving; indeed, 5G facilities are conspicuously absent from the Commission’s geographic market definition analysis because conjectures about their deployment are too gauzy and speculative to support the Order. Here, too, the Commission does not seriously attempt to distinguish its previous finding in the Qwest Phoenix Order that duopolies do not provide effective competition. Instead, the Commission

\(^7\) Qwest Phoenix Order ¶ 30 n.88 (emphasis added) (citations omitted). Of course, as noted above, cable faces real capacity constraints: cable cannot sell EoHFC in any significant quantity, because the capacity used by such services is shared with—and would swamp the necessary industry capacity to provide—core residential TV, Internet, and phone service.

\(^8\) See, e.g., Baker Declaration ¶ 49 (explaining that high marginal costs reduce the “incentive to compete aggressively . . . on price”); Declaration of Stanley M. Besen and Bridget M. Mitchell ¶ 48, appended as Attachment 1 to Comments of Sprint Corporation, WC Docket No. 05-25 (filed Jan. 27, 2016) (revised public version filed Apr. 11, 2016) (explaining that because competitors lack the footprint of incumbent providers, they “may be limited in their ability to absorb customers who wish to shift their special access purchases from an ILEC”).

\(^9\) Order ¶ 122.
appears to claim that BDS duopolies should be tolerated, notwithstanding competitive concerns, because they will not persist forever if 5G technologies take shape in precisely the pattern the Commission expects. Of course, the Commission’s bare assertion that 5G wireless systems—which are likely years away from development and have yet to be proven commercially—may one day bring ubiquitous BDS competition is insufficient to justify decision making of any kind, let alone to explain the significant departure from the *Qwest Phoenix Order* with the level of detail required by the APA.82

b. The Commission Fails to Demonstrate a Lack of Market Power in Markets With Two Competitors.

Flying in the face of well-established Commission and antitrust precedent condemning the competitive ills of an unregulated duopoly, the Commission concludes that there is substantial pro-competitive effect when a single wireline competitor is present to discipline rates, because there is a “general expectation” that the presence of a second provider produces the largest competitive benefits.83 Even if the Commission’s geographic market were justifiable on its own terms, which it is not, the mere presence of a nearby “competitor” for DS1 and DS3 end-user channel terminations is inadequate by itself to demonstrate competition or—more precisely—the absence of market power over the provision of BDS. As the D.C. Circuit has explained, “the existence of a substitute does not necessarily preclude market power.”84 That is why, in a similar regulatory context, the D.C. Circuit held that “the mere existence of some

82 See *Perez*, 135 S. Ct. at 1209; *Fox*, 556 U.S. at 515.

83 *Order*, ¶ 117.

alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure."\(^\text{85}\)

The Commission attempts to duck this obvious conclusion by asserting that “a combination of either one competitive provider with a network within a half mile from a location served by an ILEC or a cable operator’s facilities in the same census block as a location with demand”\(^\text{86}\) will result in a competitive market with just and reasonable rates. But the Commission’s conclusion fundamentally misunderstands the nature of market power and is not supported by economic theory, the market realities of the BDS industry, or empirical evidence.

Economic theory recognizes that markets with more than one significant competitor do not necessarily perform competitively, and that firms will likely exercise market power in markets with few market participants, with greater concentration resulting in higher prices.\(^\text{87}\) The Commission’s attempt to sidestep this accepted oligopoly theory falls flat. Indeed, the slender reed of authorities cited by the Commission in support of its proposition that a second provider\(^\text{88}\) has the largest competitive impact contradicts the Commission’s conclusion. These authorities

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\(^{86}\) Order ¶ 117.


\(^{88}\) See Timothy F. Bresnahan & Peter C. Reiss, Entry and Competition in Concentrated Markets, 99 J. of Pol. Reporter 977, 1006–07 at Figure 4 (1991) (showing that most of the increase in competition comes with the entry of the second and third firms) (Order ¶ 120 n.369); Allan Collard-Wexler, Demand Fluctuations in the Ready-Mix Concrete Industry, 81 Econometrica 1003, 1006 (2013) (“The first three competitors have a noticeable effect on prices”) (emphasis added) (Order ¶ 120 n.370).
either find additional competitive benefits from additional entrants beyond the second provider or, to the extent they rely on high sunk costs as an incentive for buildout, assume that the incremental cost of providing service to each additional customer is low. But, as demonstrated above, a so-called nearby “competitor” faces substantial incremental costs and impediments to serve an additional location, which the Commission wholly fails to take into account.

Thus, the question is not whether the ILEC’s prices could be higher, but whether they are high enough to be treated as supra-competitive. As the D.C. Circuit has explained, “in a competitive market, the price of the product is supposed to approach its marginal cost.” That is why “[a] basic principle used to ensure that rates are ‘just and reasonable’ is that rates are determined on the basis of cost.” But the Commission did not analyze ILEC costs to determine whether prices are competitive when a “nearby competitor” is present. Absent a cost analysis, the Commission’s conclusion that the mere presence of a “nearby competitor” for DS1 and DS3 end-user channel termination will lead to competitive outcomes cannot stand.

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89 See Howard A. Shelanski, Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy, 24 Yale J. on Reg. 55, 85 (2007) (“fixed costs of building and maintaining a network are very high while the marginal costs of serving any customer are very low”) (Order ¶ 120 n.369); Jonathan E. Nuechterlein and Philip J. Weiser, Digital Crossroads: Telecommunications Law and Policy in the Internet Age, at 9 (2nd ed. 2013) (“In contrast [to initial fixed sunk costs], once a network is up and running, the marginal cost of providing service to each additional customer is often tiny by comparison, particularly for wireline networks.”) (emphasis in the original) (Order ¶ 120 n.370); Jerry Hausman and J. Gregory Sidak, Telecommunications Regulation: Current Approaches with the End in Sight, in Economic Regulation and Its Reform: What Have We Learned? 345, 403 (Nancy L. Rose, ed., 2005) (“given the high fixed cost and relatively low marginal costs of new customers (especially for telephone service”) (Order ¶ 120 n.370).

90 “Supra-competitive prices are those above what a competitive market can sustain.” Order ¶ 14 n.44.

91 NetCoalition, 615 F.3d at 537 (internal citation omitted).

Nor does the Commission rely on any empirical data in support of its conclusion that a single BDS competitor has a substantial competitive effect on prices.\textsuperscript{93} To the contrary, the Commission found that the pricing data were too noisy to draw any firm conclusions regarding ILEC DS1 and DS3 price changes.\textsuperscript{94} Simply put, without any empirical data indicating that a second provider produces the largest competitive benefits or any economic theory consistent with the market realities of the BDS industry, the Commission’s conclusion has no leg on which to stand.

3. The Order Fundamentally Miscomprehends the Nature of Transport Competition.

The Order eliminates existing regulation of all TDM-based transport services based on its conclusion that “competition for TDM transport services is sufficiently pervasive at the local level to justify relief from pricing regulation nationwide.”\textsuperscript{95} This conclusion is fatally flawed.

The Commission’s primary support for its finding of nationwide transport competition is that a significant percentage of BDS customer locations are located within a half mile of competitive fiber transport facilities.\textsuperscript{96} But the Commission fails to acknowledge that the distance between a customer location and competitive transport facilities is entirely irrelevant to the question of whether that customer has access to competitive transport facilities. This is because transport services, by definition, carry traffic to and from an end office, not to and from an end-user location, as the Commission correctly observes elsewhere in the Order.\textsuperscript{97} As a

\textsuperscript{93} Order ¶ 120.
\textsuperscript{94} Id. ¶ 74.
\textsuperscript{95} Order ¶ 91.
\textsuperscript{96} Id.
\textsuperscript{97} Id. ¶¶ 77, 79 n.258 (acknowledging that the term “transport . . . refers to interoffice facilities”).
result, the distance between a competitive fiber transport facility and an end-user location has no bearing on the cost of providing that end user with an alternative to incumbent transport, because the distance between the end office that serves the end-user location, and the end office where a transport facility might interconnect with a competitor’s network, could be and often is dramatically larger.

Although commenters raised this point to the Commission, the Commission failed to consider the difference between the relevant distances required to analyze channel termination as opposed to transport competition. Instead, the Commission explicitly conflates the two, explaining that it relied on the same “foregoing market analysis” of channel terminations to conclude that “reasonable proximity of a single competitor’s facilities” also provides evidence of transport competition. The Commission’s express neglect of the differing functions that channel termination and transport circuit elements play in TDM-based wireline networks renders its conclusion of nationwide transport competition arbitrary on its face. If the Commission wishes to examine the possibility of deregulating transport services nationwide, it should first devise a reasonable method for analyzing transport competition—and seek comment on the analysis it proposes to conduct, as discussed in further detail below.

4. The Commission’s Failure to Apply Its Own Test in a Logical Manner Demonstrates That It Does Not Believe It to Be Reliable.

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98 See, e.g., Letter from Paul Margie, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 17, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017); Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, at 25, WC Docket Nos. 16-143 et al. (filed Mar. 27, 2017).

99 See infra Section I.B.2 (discussing the Commission’s failure to provide notice of and seek comment on nationwide transport deregulation and the rationale underlying its decision).
Even accepting the Order’s illogical findings and conclusions—which Petitioners do not—the Commission fails to apply its own conclusions in a uniform manner even under the terms the Commission itself proposes. As a result, the Commission’s results-oriented application of the CMT is a one-way ratchet of deregulation, stripping away price caps nearly across the board.

First, given the Order’s reliance on packet-based services as substitutes for TDM-based services, including DS1s and DS3s, there is no basis for the Commission to refuse to apply its CMT for DS1 and DS3 end-user channel terminations to packet-based services of the same bandwidths and higher bandwidth (i.e., above DS3) in circumstances where its test would otherwise mandate price regulation. Applying a different competitive standard for services in the same relevant product market not only undermines the Commission’s conclusions and analysis, it defies logic.

Second, the Order does not even apply its own test to all DS1 and DS3 end-user channel termination services; the Commission fails to apply price cap regulation in non-competitive counties that were previously granted Phase II pricing flexibility. There is simply no rational basis for the Commission’s refusal to apply price regulation to counties where there is no competitive choice. The Commission’s one-sentence dismissal of this possibility, citing

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100 Order ¶¶ 21–26.
101 Id. ¶ 86.
102 Id. ¶ 181.
administrative costs to ILECs associated with billing and information technology,\textsuperscript{103} does not equate with reasoned decision-making or the requirements under the APA.\textsuperscript{104}

Third, the Order’s internal inconsistencies create obvious loopholes, which further undermine the Commission’s analysis and administrative framework. More specifically, the Order’s conclusion that transport is competitive presents rate-evasion opportunities for ILECs in locations where DS1 and DS3 end-user channel terminations are not competitive and therefore subject to price regulation. Thus, if the ILEC is the only DS1 or DS3 provider available, and therefore subject to price regulation, it can still charge supra-competitive prices for the finished connection because, as the Order notes, ILECs “do not typically offer consumers BDS by charging a customer separately for transport, last-mile access, and channel mileage,” offering instead “packaged communications solutions that include a transmission component.”\textsuperscript{105}

B. The FNPRM Failed to Provide Sufficient Notice as Required by the APA.

Disclosing the content and basis for a proposed rule in advance of adoption is a core element of the APA’s notice requirement.\textsuperscript{106} While an agency may adopt final rules that differ

\begin{itemize}
\item \textsuperscript{103}Id. ¶ 181 n.485.
\item \textsuperscript{104}See United Techs. Corp. v. U.S. Dep’t of Defense, 601 F.3d 557, 565 (D.C. Cir. 2010) (agency failed to provide reasoned basis for conclusion because “[a] naked conclusion . . . is not enough”).
\item \textsuperscript{105}Order ¶ 90 n.289 (citation omitted).
\item \textsuperscript{106}Conn. Light & Power Co. v. Nuclear Regulatory Comm’n, 673 F.2d 525, 530 (D.C. Cir. 1982) (“The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.”) “Enforcing the APA’s notice and comment requirements” accordingly entails that the agency must “reveal . . . the technical basis for a proposed rule in time to allow for meaningful commentary.” Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 236–37 (D.C. Cir. 2008) (internal citation omitted). The agency need not “assiduously lay out every detail of a proposed rule for comment,” but it must “provide sufficient detail and the rationale for the rule to permit
“in some particulars” from its proposal under this standard, its final rules must in all cases reflect “a logical outgrowth of the one[s] proposed.”\textsuperscript{107} In addition, the notice must “provide an accurate picture of the reasoning that has led the agency to the proposed rule,” so that “interested parties [are] able to comment meaningfully upon the agency’s proposals.”\textsuperscript{108} If the agency fails to reveal the “basis for a proposed rule in time to allow for meaningful commentary,” it “may operate with a one-sided or mistaken picture of the issues . . . .”\textsuperscript{109}

That is precisely what happened here. As explained below, the Commission performed an about-face from the 2016 \textit{FNPRM}’s proposal without publicly advancing any rationale or analysis to support the new rules until just weeks before the final order. As a result, both prongs of the CMT fail the “logical outgrowth” test that the courts have developed to enforce the requirements of notice and comment. The same is true with respect to the Commission’s new rule deregulating transport services nationwide. Critically, the Commission did not disclose its rationale and analytic basis for the change in direction until it released a draft version of the \textit{Order} a mere two weeks before the Commission’s rules prohibited further input from the public. Of course, the draft \textit{Order} did not \textit{propose} or \textit{seek comment} on anything—and did not provide parties enough time to digest and challenge the Commission’s analysis before the Commission adopted the \textit{Order}.


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\textsuperscript{108} \textit{Horsehead Res. Dev. Co.}, 16 F.3d at 1267 (internal quotation marks omitted).

\textsuperscript{109} \textit{Conn. Light & Power}, 673 F.3d at 530.

\textsuperscript{109} \textit{Id.} at 530–31.
The FNPRM identified explicit market failures and proposed a regulatory remedy designed to address those failures. Specifically, it found that “competition is lacking in BDS at or below 50 Mbps in many circumstances.”\textsuperscript{110} It also found that its 1999 pricing flexibility triggers “failed to reflect the scope of competitive entry” because they applied MSA-wide regulatory relief based on inaccurate proxies of competition, which measured a competitor’s sunk investment rather than entry or ability to enter the BDS market.\textsuperscript{111} Against this backdrop, the FNPRM “propose[d] a test” designed to ensure that regulatory relief was not granted “too broadly to cover areas where competition is not present or unlikely to occur.”\textsuperscript{112} In short, the FNPRM proposed a new CMT designed to achieve greater sensitivity to local conditions in its effort to more accurately analyze competition, and to do so consistent with “traditional economic principles.”\textsuperscript{113}

The Order moves sharply in the opposite direction. Instead of requiring greater specificity in determining where and for which products to grant regulatory relief, the Order adopts a two-pronged CMT, each of which dismantles the price cap regime for virtually all incumbent channel terminations in the country. In doing so, the Order relies extensively on reasoning and analysis that it failed to include in the FNPRM, and which commenters had no meaningful opportunity to test or critique.

As discussed above, the CMT’s first prong deems an entire county competitive if 50 percent of buildings with businesses with BDS demand are within a half mile of a building

\textsuperscript{110} FNPRM ¶ 271.
\textsuperscript{111} Id. ¶ 287.
\textsuperscript{112} Id. ¶¶ 271, 290.
\textsuperscript{113} Id. ¶ 280.
served by a competitive provider. The Commission did not propose this approach in the *FNPRM*. Nor does this approach reflect a logical outgrowth of the test the Commission did propose—in fact, the final test departs from the test proposed at every turn.

To begin with, while the *FNPRM* proposed a test that would provide regulatory relief on a granular, targeted basis, the CMT’s first prong deregulates almost the entire country.114 Moreover, as detailed above,115 this prong departs from the “traditional economic analysis” the *FNPRM* proposed to apply, because it treats providers that are not timely, likely, and sufficient entrants as “competitors,” and falsely equates hypothetical BDS duopolies with actual BDS competition.116

In addition, the Commission never explained the rationale for its test prior to adoption. While the Commission might have developed a model predicting that a competitor serving a building within a half mile would constrain ILEC pricing, it only explained the basis for its prediction in the draft *Order* itself—and there was hardly sufficient time for commenters to perform a thorough economic analysis in the two weeks between circulation of the draft and sunset in this proceeding. Indeed, while agencies are required to provide notice of “the assumptions and methodology used in preparing [a] model”—and offer a “complete analytic defense” to the extent “the methodology is challenged”117—no challenge was even possible in the proceeding here, because no relevant model or analysis was ever provided.

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114 *Order* ¶ 142.
115 See supra Section I.A.
116 *Order* ¶ 120 n.368.
The same is true with the CMT’s second prong, which deems a county competitive if 75 percent of census blocks in the county have a cable provider providing service according to data reported on the Commission’s Form 477. Again, this test was not proposed in the *FNPRM*. And, again, this test is not a logical outgrowth of the *FNPRM*.

First, the CMT’s second prong sweeps just as overbroadly as the first prong, in contradiction to the *FNPRM*’s proposal to develop a test more sensitive to local competition.118 Moreover, the *FNPRM* explicitly stated that “mass marketed ‘best efforts’ broadband” are not in the same product market as BDS,119 leaving commenters with no reason to anticipate that the Commission would construct a test that deems a market competitive based exclusively on the presence of facilities used for mass market, best efforts broadband services. Nor did the *FNPRM* explain the Commission’s rationale for the second prong—the flawed theory that cable companies are willing and generally able to convert best efforts facilities to fiber.120 Once again, if the Commission modeled cable operators’ ability to fundamentally repurpose their networks, it did not share that analysis in advance of releasing the *Order* as the APA requires.121 Indeed, the only data on which the Commission apparently did rely in adopting the cable prong of its test—

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118 *Order* ¶ 142 (confirming that the second prong deregulates nearly 90 percent of BDS locations).
119 *FNPRM* ¶¶ 190–196.
120 *See infra* pp. 13, 18-19 and notes 40, 56 (discussing record evidence indicating that cable operators cannot provide Ethernet-equivalent services at scale because of the shared nature of cable capacity and the need to maintain that capacity for core residential video and broadband business).
121 *Air Transp. Ass’n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (“[M]aterial that is used to support the agency’s position” must be “made public in the proceeding and exposed to refutation.”); *see also Owner-Operator Indep. Drivers Ass’n*, 494 F.3d at 201 (invalidating rule because the agency had failed to disclose “the model and methodology” it used to assess the “regulatory options”).
Form 477 data—likewise have not been subject to scrutiny. The FNPRM simply never suggested that Form 477 data could or would be used for this purpose.122

The Commission’s decision to “grandfather” counties deemed non-competitive under either prong of its own CMT123 further demonstrates the chasm between the FNPRM and the Order. While the FNPRM specifically sought to correct both over- and under-regulation that resulted from MSA-wide determinations of regulatory relief,124 the one-way ratchet adopted by the Commission does no such thing.

Nor does the final CMT reflect a logical outgrowth of the agency proposal.125 For example, in Agape Church, Inc. v. Commission, 738 F.3d 397 (D.C. Cir. 2013), the D.C. Circuit found that the Commission’s rule requiring cable operators to provide equipment to analog customers to “downconvert” digital signals was a logical outgrowth of the relevant notice of proposed rulemaking. That notice sought comment on whether to extend the pre-existing rule requiring cable companies to downconvert and supply analog signals. But the notice did not stop there. It explicitly acknowledged that equipment “would be required in the absence of an analog

122 Far from proposing Form 477 data as a lynchpin of the CMT, the FNPRM contains only a single reference to Form 477 data in the context of future data collection efforts based on Form 477s modified to include information about BDS facilities. FNPRM ¶ 524.

123 Order ¶ 181; see also id. at Appendix A, § 1.776.

124 FNPRM ¶ 28 (noting that the pricing flexibility “triggers were . . . both over- and under-inclusive as predictors of competition,” and proposing a CMT to function as “a permanent reliable replacement approach to measure the presence of competition for special access services” (quoting Suspension Order ¶ 6); see also id. ¶¶ 274–75 (noting that the triggers resulted in under-regulation and over-regulation).

125 See, e.g., Letter from Bryan N. Tramont, Counsel to CenturyLink, Inc. and Frontier Communications Corp, to Marlene H. Dortch, Secretary, FCC at 12-14, WC Docket Nos. 16-143 et al. (filed Apr. 6, 2017).
carriage requirement.”126 Against this backdrop, the court correctly ruled that the final rule was a “logical outgrowth” of the notice, because the final rule merely settled on an equipment-based method specifically identified as a possible approach in the notice.127

Here, on the other hand, the Order does not select from alternatives proposed—it altogether replaces the Commission’s previous proposal. Instead of remedying market failures with a CMT that analyzes competition with greater sensitivity, the final Order largely disclaims such failures exist—and turns to a CMT even less sensitive than the blunt 1999 triggers the FNPRM sought to correct. Along the same lines, while some courts have allowed agencies to opt for only “partial adoption of the proposed comprehensive rule,”128 the present case involves no such thing. Far from pursuing a “partial adoption” that “differs in some respects from [the] proposed regulation” of the FNPRM, the Commission chose a complete reversal.129

2. The FNPRM Did Not Even Suggest that Transport Might be Deregulated Completely, and in Fact Proposed Just the Opposite.

The procedural deficiencies of the Commission’s decision to deregulate transport services nationwide are even more appalling. In the FNPRM, the Commission did not propose, or even suggest, that transport might be entirely deregulated. Nor is nationwide deregulation a logical outgrowth of the FNPRM.

As an initial matter, and as noted above, the FNPRM proposed to provide regulatory relief across markets smaller than an MSA. The entire country, of course, represents a much

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126 Agape Church, Inc., 738 F.3d at 412 (quotation omitted).
127 Id.
128 Miami-Dade County v. EPA, 529 F.3d 1049, 1059 (11th Cir. 2008) (quotations omitted).
129 Id. (confirming that “[n]otice is inadequate . . . if the interested parties could not reasonably have anticipated the final rulemaking from the draft rule”) (quotation omitted).
larger geographic unit. Moreover, the Commission expressly “propose[d] to abandon” the 1999 pricing flexibility triggers “for channel terminations and other dedicated transport services” in favor of “a new Competitive Market Test.”\textsuperscript{130} Nationwide deregulation, however, reflects a logical inconsistency with the Commission’s proposal to apply a CMT, not a logical outgrowth. The purpose of a CMT is “to determine whether a relevant market is competitive or non-competitive.”\textsuperscript{131} But if the “relevant market” were the entire country, there would be no need to apply a CMT at all.

Nor did parties have an opportunity to comment on the competitive analysis and rationale supporting the Commission’s unanticipated deregulatory step for transport. First, the Commission found transport services generally competitive based primarily on the number of buildings located within a half mile of competitive fiber transport facilities.\textsuperscript{132} But it did not propose to analyze transport competition on this basis in the \textit{FNPRM}. Had it done so, commenters would have had a meaningful opportunity to critique that analysis and suggest alternatives that do not fundamentally miscomprehend the role of transport connections.\textsuperscript{133} Second, the Commission’s rationale for deregulating transport nationwide, notwithstanding its acknowledgment that transport services were non-competitive in some parts of the country, was its belief that “the alternative would . . . impose significant regulatory burdens on all participants

\textsuperscript{130} \textit{FNPRM} ¶ 278 (emphasis added) (“[W]e propose to abandon the collocation-based competition showings for channel terminations and other dedicated transport services for determining regulatory relief for ILECs. Instead, we propose to apply a new Competitive Market Test.”). \textit{See also id.} ¶ 5 (calling the Competitive Market Test the “core” of the Commission’s proposal).

\textsuperscript{131} \textit{Id.} ¶¶ 270, 292.

\textsuperscript{132} \textit{Order} ¶ 91.

\textsuperscript{133} \textit{See} Section I.A.3, \textit{supra}.
in the market with an additional layer of regulatory complexity that would undermine predictability and ultimately hinder investment, including in entry, and growth.”\(^{134}\) This reflects a fundamental departure from the rationale of the \textit{FNPRM}, which viewed it as the “government’s role” to identify non-competitive areas with greater precision, and ensure that those markets remain subject to pricing regulation.\(^{135}\)

**II. THE BALANCE OF THE EQUITIES FAVORS A STAY.**

The \textit{Order}’s seismic changes to the Commission’s longstanding regulatory regime will fundamentally disrupt the $45 billion BDS industry. If the \textit{Order} takes effect, petitioners will

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They also will have to negotiate, under conditions newly favorable to the ILEC, long-term agreements that will cement ILEC price increases for years to come, and influence the marketplace even if the Commission’s rules are later struck down. These harms are substantial, imminent, and certain to occur, and petitioners would have no means to recover them if the Court ultimately vacates the \textit{Order}. Maintaining the status quo pending review, on the other hand, would not harm anyone, and would serve the public interest.

**A. Petitioners Will Suffer Irreparable Harm if the \textit{Order} Takes Effect.**

The \textit{Order} threatens to dismantle incumbent pricing regulation and tariffing requirements. Unconstrained by price caps, ILECs will increase rates substantially as they have in the past in response to deregulation, and as they have threatened to do in response to this

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\(^{134}\) \textit{FNPRM} \(\S\) 93.

\(^{135}\) \textit{Id.} \(\S\) 5 (“But where competition does not exist, government’s role is to ensure that non-competitive market conditions do not disadvantage business customers and their ability to compete and innovate in downstream markets.”).
Order. These price increases will be cemented into multiyear contracts negotiated in the shadow of the Commission’s new rules. The result will be ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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In addition, the petitioners and many other buyers of BDS will have to individually negotiate agreements for ILEC BDS that are detariffed under the Order. None of these harms can be remedied if a reviewing court ultimately invalidates the Order.

BT, Windstream, and similarly situated members of INCOMPAS sell retail communications solutions in competition with ILECs or their wholly-owned affiliates. These retail services ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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that are the subject of the Order’s deregulatory action.136 The costs of these crucial inputs—for which the ILEC is often the only supplier—***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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The Order will also result in ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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136 Declaration of Jennifer Artley ¶ 5, appended as Attachment A hereto (“BT Decl.”); Declaration of Joseph Harding ¶ 9, appended as Attachment B hereto (“WIN Decl.”).

137 BT Decl. ¶ 18; WIN Decl. ¶ 8.
Although the United States is the largest and most target-rich market in the global network services marketplace, and BT must commence taking steps to that, absent the imminent change in rate regulation, BT during the pendency of the review of the Order are unrecoverable. Moreover, the Order’s removal of pricing regulation for access to more than 90 percent of U.S. buildings with BDS demand would permit ILECs to tighten their price squeeze on the petitioners.

138 BT Decl. ¶ 27.
139 Id. ¶ 28.
140 Id.
On the margin side of the squeeze, increased DS1 and DS3 input prices will drive up petitioners’ costs substantially. Because petitioners purchase their DS1 and DS3 inputs from ILECs pursuant to term and volume agreements, these costs will continue to govern well past the pendency of this appeal. Moreover, these costs cannot ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** ***END HIGHLY CONFIDENTIAL INFORMATION*** Thus, petitioners must absorb the full brunt of ILEC price increases for affected customer locations, resulting in millions of dollars of unrecoverable added costs for services that petitioners are contractually required to provide.

For example, ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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141 Id. ¶¶ 16, 18; WIN Decl. ¶ 25.
142 BT Decl. ¶ 19; WIN Decl. ¶¶ 6, 13.
143 Of course, to the limited extent that costs can be passed through to customers, the result would be harm to the public more generally, including to petitioners Ad Hoc and INCOMPAS, which represent BDS end users.
144 BT Decl. ¶ 19; WIN Decl. ¶ 11.
145 WIN Decl. ¶ 27.
Petitioners will be—even if they ultimately prevail on appeal.148

Of course, the price squeeze works because petitioners would have no choice except to pass along higher input costs in their own retail rates for potential new customers, and for existing customers seeking to renew their multiyear deals. Needless to say, this would place them at a severe competitive disadvantage to the ILEC.149 The ILECs do not face a similar prospect of increases to their own BDS input costs because they own the underlying facilities, which are fully depreciated or close to it150 and because they are selling themselves the service—as one part of the business makes an intra-corporate transfer to another. Thus, ILECs will undercut their competitors’ retail prices—perhaps long enough to drive them from the market completely. This outcome is even more certain to occur

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146 Id. ¶ 27.
147 BT Decl. ¶¶ 18–20.
148 WIN Decl. ¶ 27.
149 BT Decl. ¶¶ 27–28; WIN Decl. ¶ 25.
150 WIN Decl. ¶ 25.
For example, over the next 12 months alone, “Windstream expects to ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***152 Because these lost customers will enter into multiyear contracts with another provider—most likely the ILEC—this loss to the petitioners will also long outlive the pendency of this appeal.153 No remedy exists for such forgone opportunities and lost competition caused by regulatory changes, even those as arbitrary, capricious, and contrary to law as the rules adopted in the Order.

Past and recent experience demonstrates these harms are certain, imminent, and have already begun to occur. In the past, the industry suffered “ILEC price increases routinely if not always following the FCC’s grant of pricing flexibility in a given” MSA.154 Recent experience demonstrates ILECs are certain to raise rates again here. First, the Commission’s own data demonstrate that ILECs currently charge between 99.7 percent and 99.9 percent of their current price cap indices, proving that the price caps the Order would dismantle are working to keep ILEC rates at bay.155 Second, in the current market, Windstream faces more extensive price

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151 BT Decl. ¶ 19.
152 WIN Decl. ¶ 27.
153 Id.
154 Id. ¶¶ 17–18.
155 FNPRM ¶¶ 240–41 & Tbl. 6.
squeezes on unregulated BDS as compared to price-capped DS1 and DS3 services—a pattern corroborated by record evidence of similar current ILEC pricing behavior. Third, the ILECs have all but informed the Commission that a rate increase is imminent, by complaining repeatedly throughout this proceeding that current price caps are too low, and by raising rates on private line services that are similar to BDS just days before the Commission adopted the Order. Fourth, the broader marketplace has already begun to price in ILEC rate increases in response to the Order. Because ILECs sell by far the most DS1s and DS3s, and because these services typically are sold through contracts with multiyear terms, the expectation of price increases in the short term—during the pendency of the appeal—drives immediate rate increases throughout the market. 

156 WIN Decl. ¶ 17.  

157 Using rates made public by the ILEC, and internal data on actual rates paid, participants in the Commission’s rulemaking demonstrated that (1) ILECs charge as much as 109 percent more for DS1 and DS3 services in areas where they are not subject to price caps as compared to price cap areas, and (2) ILECs consistently charge more than CLECs for BDS services of similar types. See Letter from Paul Margie, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 17, WC Docket Nos. 16-143 et al. (filed Nov. 9, 2016); Letter from Charles W. McKee, Vice President, Government Affairs, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 5, WC Docket Nos. 16-143 et al. (filed Oct. 17, 2016).  

158 See Letter from Russell P. Hanser, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 et al. (filed Oct. 28, 2016). Of course, if below-cost pricing were truly a concern, the Commission’s existing price cap rules provide ILECs the option to apply for rate-of-return regulation, which guarantees rates above the ILEC’s costs. 47 C.F.R. § 61.41(e).  


160 BT Decl. ¶ 15.
Windstream likewise projects ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

The Commission itself has recognized that this kind of price squeeze is a serious impediment to competition. It has explained that ILECs have an incentive to “initiate a price squeeze to gain additional market share.”

It has recognized circumstances in which “a price squeeze is evident, such as when a monopolist’s wholesale rates exceed retail rates.”

In addition to facing rate increases on deregulated DS1s and DS3s, petitioners will suffer an additional form of irreparable harm. This is because, under the Order, they can no longer expect that ILECs will continue to provide them with these TDM-based inputs at all. Faced with the risk that ILECs will summarily withdraw TDM access, BT will ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***

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161 Id.

162 WIN Decl. ¶¶ 16, 26.


The process is also time-consuming, to migrate each access circuit. Switching to EoHFC is not possible in most locations, would not meet customers’ performance demands even if it were available, and

Finally, the Order permits ILECs to detariff on day one, raising the specter of industry-wide, individual negotiations over services previously sold by tariff. Not only will these negotiations cement higher rates for the reasons discussed above, they also will produce enormous and wasteful transaction costs that are unrecoverable, and that would have been

\[\text{BT Decl. ¶¶ 22–24.}\]
\[\text{Id. ¶ 23.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. ¶ 24–26.}\]
completely unnecessary in the event of a decision vacating the Order. These harms, too, are certain and imminent. In fact, AT&T has already met with the Commission to clarify that it can begin to detariff on August 1, 2017.170

Precedent makes clear that stays are appropriate in cases involving rules that fundamentally alter the telecommunications regulatory landscape, and that would have immense and long-lasting pricing impacts that influence the marketplace well after an appeal concludes. Indeed, the D.C. Circuit recently stayed the Commission rules that impact the rates charged by telecommunications providers, recognizing the irreparable nature of the losses sustained as a result of regulatory changes that affect telecommunications rates.171 The D.C. Circuit also stayed the effective date of a Commission order that would result in industry-wide detariffing, based on arguments that the negotiations that would become necessary in the absence of tariffs would foist enormous and unrecoverable costs on the industry.172 Like the orders in those D.C. Circuit cases, the Order at issue in this appeal would affect rates industry-wide, force onerous and potentially unnecessary individual negotiations, and alter the competitive landscape for BDS and BDS-enabled services for years to come.

170 Letter from Caroline Van Wie, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 et al. (filed June 15, 2017) (“Bureau staff informed us that the rules governing permissive detariffing adopted in the Order do not require review by the Office of Management and Budget (‘OMB’) and that price cap ILECs may therefore begin detariffing on a permissive basis on August 1, 2017, the effective date of the Order.”).


172 See Per Curiam Order, MCI WorldCom, Inc. v. FCC, No. 96-1459 (D.C. Cir. Feb. 13, 1997).
Courts also have recognized that decisions which threaten a party’s ability to cover the costs of doing business warrant a stay, especially when such losses cannot be recovered later. 173

As explained above,**begin highly confidential information**

**end highly confidential information** 174

B. A Stay Will Not Harm Other Parties and is in the Public Interest.

Granting a stay here will maintain the status quo, allowing all parties—including the ILECs—to avoid expending significant and potentially unnecessary costs to conform to a fundamentally different regulatory regime. No harm would befall the ILECs. The status quo currently allows ILECs to exercise extensive market power over DS1s and DS3s, and there is no evidence that existing price caps are too low—indeed, the Commission saw no need to increase them in the Order. The Commission’s order supports this conclusion, finding that it “expect[s] that competition will continue to keep prices in check” and disagreeing with some parties that “prices at the cap demonstrate that incumbent LECs generally would have set materially higher prices wherever their process were capped and that prices for business data services will increase significantly as a result of [the Commission’s] actions in th[e] Order.”175 Any notion that the

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174 BT Decl. ¶ 18.
175 Order ¶ 76.
new framework presents the only path for an ILEC to charge rates above its costs is simply incorrect as a matter of law.\textsuperscript{176}

By contrast, the public interest would benefit from a stay. BDS services pervade the American economy.\textsuperscript{177} They are necessary for the day-to-day operation of retailers, financial institutions, hospitals, wireless carriers, schools and libraries, and government agencies.\textsuperscript{178} Unconstrained, ILEC price hikes for BDS will flow downstream to these BDS purchasers and, ultimately, consumers of their services.\textsuperscript{179} Less competition in the retail market leads to increased prices, less choice, decreased innovation and customization, and lower quality services for commercial subscribers.\textsuperscript{180}

Indeed, 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.\textsuperscript{181} 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

\begin{footnotesize}
\textsuperscript{176} 47 C.F.R. § 61.41(e) (allowing ILECs to switch from price cap to rate-of-return regulation).
\textsuperscript{177} Declaration of David J. Malfara Sr. ¶ 5, appended as Attachment C hereto (“INCOMPAS Decl.”). 
\textsuperscript{178} See Letter from Mark Cooper, Director of Research, Consumer Federation of America, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Mar. 30, 2017) (“CFA and PK Letter”). 
\textsuperscript{179} INCOMPAS Decl. ¶¶ 6–7. 
\textsuperscript{180} Id. 
\textsuperscript{181} Id. ¶ 4. 
\end{footnotesize}
build-out. The higher the BDS pricing in market, the proportionately lower the likelihood of build-out, and the more likely subscribers will suffer the harms of a lack of competition.

The Order also reduces carrier choice for multi-location commercial subscribers, who require communications services to be provided at dozens, hundreds or even thousands of physical locations where the corporation has a presence. As competitive providers leave the market, multi-location subscribers may not have a single competitive alternative to the ILEC because of the need to support offices in a wide geographic territory, including satellite offices where only an ILEC facility may exist.

Absent a stay, business and community institutions will lack alternatives and face supra-competitive prices for DS1 and DS3 services. This is particularly problematic for small and emerging businesses—primary purchasers of DS1 and DS3 services. Affordable ILEC BDS allows competitors to provide these subscribers with what is often their first access to BDS at entry-level prices where, absent the competitive offering, they would have no access to such

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182 *Id.* ¶¶ 8–9.
183 *Id.* ¶ 10.
184 *Id.* ¶ 13.
185 *Id.* ¶¶ 14, 16.
186 *Id.*; *see also* Declaration of Susan M. Gately ¶¶ 7, 10–11, appended as Attachment D hereto (explaining that businesses continue to rely on lower bandwidth DS1 and DS3 services, and that BDS customers’ experience shows that prices will increase absent a stay).
187 *See* Letter from Major L. Clark III, Acting Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017).
services at all. In the end, the Order’s harms will be borne by the public in the form of higher consumer prices.

Respectfully Submitted,

/s/Christopher J. Wright

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June 23, 2017

188 INCOMPAS Decl. ¶ 18.
189 See CFA and PK Letter.