

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

In the Matter of		
Business Data Services in an Internet Protocol Environment		WC Docket No. 16-143
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans		WC Docket No. 15-247
Special Access for Price Cap Local Exchange Carriers		WC Docket No. 05-25
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)		RM-10593

COMMENTS OF NASUCA AND THE MARYLAND PEOPLE'S COUNSEL
ON FURTHER NOTICE OF PROPOSED RULEMAKING
FOR BUSINESS DATA SERVICES

David Springe, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

David C. Bergmann
Counsel
3293 Noreen Drive
Columbus, OH 43221
Phone (614) 771-5979
david.c.bergmann@gmail.com

Paula M. Carmody
Maryland Office of People's Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202
(410) 767-8150

June 28, 2016

EXECUTIVE SUMMARY

NASUCA and the Maryland People’s Counsel (“Consumer Advocates”) applaud the FCC for addressing rates and rate structure for business data services (“BDS”), formerly referred to as “special access” services. Consumers all across the country depend on reasonable BDS rates – for their wireless services, and for the reasonable prices of other services that depend on BDS – like ATMs, credit card transactions and, indeed, long-distance telephone calls. Based on the extensive data the FCC has collected, however, it appears that BDS prices have been inflated, to the tune of at least \$40 billion a year siphoned off to the profit margins of the incumbent local exchange carriers (“ILECs”).

Thus, Consumer Advocates urge the Commission to immediately re-impose price cap regulation on all DS1 and DS3 services (indeed, on all BDS below 50 Mbps, regardless of platform), where the Commission has previously granted pricing flexibility. This immediate action is necessary. Consumer Advocates are concerned that the actions the FCC proposes in the FNPRM will delay relief for the competitors and companies that use BDS, and the consumers who use the companies’ services far longer than necessary. This will only perpetuate the current over-pricing regime. These proposals are for immediate action; longer term review is also necessary.

The FNPRM asks many questions – not inappropriately, given the magnitude of the issues here. Consumer Advocates, like other parties with limited resources, will be able to address only a few of the areas set forth for comment. The bottom line is that the FCC should take action now, justified by the record as it exists, to benefit consumers by reducing – not simply freezing – BDS rates. And the Commission should adopt public disclosure and other

rules applicable to all BDS markets, whether or not they have been found competitive under the previous process.

The competition test the FCC proposes is appropriately stringent. Certain minor adjustments to the formula are necessary, however. For example, the Commission should not define markets by customer class, and should use relatively small areas for geographic markets: census blocks or individual buildings. But under the new competition test, few areas could be designated “competitive.” If these areas are **in fact** competitive, then competition should be able to make rates for BDS services just and reasonable, but it should be up to the ILECs alleging competition to demonstrate the competition under the new test. The FCC should not presume competition, as it did with the earlier regime. BDS, like other Title II services, are subject to the enduring values of U.S. telecom law.¹

Public disclosure of BDS terms and conditions is vital. Under such circumstances, the proposed forbearance from tariffing is reasonable. The other forbearances discussed in the FNPRM are unnecessary.

¹ GN Docket No. 13-5, et al., FCC No. 14-5 (rel. January 31, 2014) (“Transitions Trials Order”), ¶ 9, citing, *inter alia*, 47 U.S.C. §§ 201 and 254. See *United States Telecom Ass’n v. FCC*, D.C. Cir. Case No. 15-1063 (June 14, 2016) (“*USTA III*”).

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FOR BUSINESS DATA SERVICES**

I. INTRODUCTION

On May 2, 2016, the Federal Communications Commission (“FCC” or “Commission”) issued a Tariff Investigation Order and Further Notice of Proposed Rulemaking (“FNPRM”)² for business data services (“BDS”), which used to be called “special access” services. The National Association of State Utility Consumer Advocates (“NASUCA”)³ and the Maryland Office of the

² WC Docket No. 16-143, et al., Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54 (rel. May 2, 2016)

³ NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. The Maryland People’s Counsel is a NASUCA member.

People’s Counsel (“People’s Counsel”)⁴ (together, “Consumer Advocates”) submit these comments on the FNPRM.

In the Tariff Investigation Order (“Order”), the Commission “[d]eclares unlawful ... those terms and conditions in tariff pricing plans under investigation that we find unjust and unreasonable and have the effects of decreasing facilities-based competition and the transition to newer technologies.”⁵ Such terms and conditions include

so-called “all or nothing” contracts that require a customer to make all of its purchases through a single supplier plan during the term of commitment. These contracts can last up to seven years and may contain excessive penalties to punish customers when they fall short of their volume commitments or when those customers terminate their agreements, e.g., when the purchaser wants to switch from TDM to another provider’s IP-based business services. The Tariff Investigation Order finds these excessive fees to be improper, while emphasizing that BDS suppliers retain the ability to recover shortfall fees and early-termination fees that ensure them the benefit of their original bargain.⁶

Doing away with such burdensome terms – whether in tariffs or contracts – is a key step toward ensuring that the BDS services on which so many consumers rely are justly and reasonably priced, as required by 47 U.S.C. § 201(b).

Revising the rates for the services themselves, rather than the ancillary fees and conditions addressed in the Order, is even more important for BDS, which, including packet-switched, are all telecom services per the Open Internet Order.⁷ The proposals in the FNPRM aim at such reform.

⁴ The Maryland Office of People’s Counsel (OPC), created in 1924, is the oldest utility consumer advocacy office of its kind in the United States. The People’s Counsel is appointed by the Attorney General, with the advice and consent of the Senate, and acts independently of the Maryland Public Service Commission (PSC) and the Office of Attorney General. OPC is a State of Maryland agency, yet works independently to represent Maryland’s residential consumers of electric, natural gas, telecommunications, private water and certain transportation matters before the PSC, federal regulatory agencies and the courts.

⁵ FNPRM, ¶ 11.

⁶ Id.

⁷ The Open Internet Order was affirmed in *USTA III*.

On behalf of consumers, Consumer Advocates stress the importance of BDS services, and the rates for those services. As the FCC states,

BDS is an important building block for creating private or virtual private networks across a wide geographic area and enabling the secure and reliable transfer of data between locations. Point-to-point BDS lines can also provide dedicated access to the Internet and access to innovative broadband services. Mobile wireless providers purchase BDS to backhaul voice and data traffic from cell sites to their mobile telephone switching offices. Branch banks and gas stations use BDS connections for ATMs and credit card readers. Businesses, governmental institutions, hospitals and medical offices, and even schools and libraries use BDS to create their own private networks and to access other services such as Voice over IP (VoIP), Internet access, television, cloud-based hosting services, video conferencing, and secure remote access. Carriers buy BDS from providers as a critical input for delivering their own customized, advanced service offerings to end users.⁸

The direct purchasers of BDS are vitally interested in BDS rates. But the consumers who use and pay for the services that BDS customers – carriers and others – purchase are also very much interested.

The FCC describes in detail the current regulatory regime for BDS services (under their earlier name of “special access”),⁹ but does not adequately discuss the consistent opposition to many of those FCC deregulatory actions, including from carriers, customers and consumers.¹⁰ It is well past time for the FCC to reform this pricing structure, which never really reflected the true state of the market, but certainly conflicts with the state of the market in 2016.¹¹

Thus these comments focus on the extent to which the FCC can, based on the record, find that current BDS rates are unjust and unreasonable and should be reduced. They also address actions the Commission can take, going forward, to ensure that BDS rates remain just and

⁸ Id., ¶ 12.

⁹ FNPRM, ¶¶ 16-27.

¹⁰ See, e.g., CC Docket No. 01-92, NASUCA Reply Comments (February 1, 2007) at 2, 4-5. See also WC Docket No. 05-25, NASUCA Reply Comments (August 15, 2007).

¹¹ See FNPRM, ¶ 269.

reasonable. These comments also show that the FCC is well within its statutory powers to take such actions.

II. THE ORGANIZATION OF THESE COMMENTS

Consumer Advocates' comments are organized as follows: First, Consumer Advocates provide a summary of the FNPRM, and indicate support for many of its provisions. Consumer Advocates support an immediate reduction in DS1 and DS3 rates, and all rates for services 50 Mbps and below, regardless of platform (TDM or packet-switched). Second, we discuss generally the FCC's statutory authority over BDS, including forbearance.

Then Consumer Advocates discuss the definition of BDS and technological neutrality. That is followed by comments on rules, especially public disclosure of rates, terms and conditions, that should be applicable for all BDS markets.

Then Consumer Advocates discuss the competitive market test ("CMT") that allows identifying competitive and non-competitive markets. Consumer Advocates support a rigorous test, to ensure that consumers receive the benefits that would be produced by a truly competitive market.

With most markets being non-competitive, there must be pricing rules for BDS providers. Consumer Advocates support an improved price cap regime rather than a benchmarked price system. Consumer Advocates also discuss the rules that apply in markets that pass the CMT.

Consumer Advocates then discuss the transition to a new regulatory framework – more precisely, a return to consumer protections that previously applied – for BDS. This will involve an ongoing collection and review of data.

III. SUMMARY OF THE FCC PROPOSALS, AND INITIAL CONSUMER ADVOCATE RESPONSES

At the heart of the FNPRM is the new Competitive Markets test (“CMT”). BDS services are defined consistent with current usage.¹² BDS service in markets that pass the CMT will be treated differently than in those that fail the test. As discussed at greater length below, the FCC should presume that all BDS service 50 Mbps and below are not competitive, and should subject them to price caps.

The proposed CMT is appropriately stringent. Based on the record in this proceeding, few areas – especially areas where the FCC previously granted pricing freedom, thus areas where the ILECs have reaped supracompetitive profits – will have such flexibility.¹³ In other areas, those where competition is not shown, i.e., the majority of the country, BDS will be subject to pricing regulation.

To ensure that prices are restored to just and reasonable levels it is appropriate that the FNPRM delves deeply into the details of price cap regulation. Unlike what would be expected in competitive markets, however,¹⁴ telecom price cap regulation has consistently resulted in price increases.¹⁵ So it is crucial that any price cap rules for vital BDS be rigorous and well-enforced.

Specifically, the FCC should not divide customer markets by customer class. On the other hand, geographic markets should be as small as a single building.

¹² FNPRM, ¶ 279.

¹³ Id., ¶¶ 160-165.

¹⁴ Id., ¶ 355.

¹⁵ See Juan M. Roldan, “Local Telephony Rates: Has Deregulation Lead to Higher Competition and Lower Rates?” (August 15, 2014) (“Roldan”) (emphasis added), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431518.

The price cap issues that the Commission sets out for comment include a productivity-based “X factor,”¹⁶ a consumer dividend for the X factor,¹⁷ a growth factor,¹⁸ low- and high-end adjustments,¹⁹ and baskets.²⁰ These are common issues with price cap regulation. These adjustments are designed to ensure customers benefit as they would in a competitive market. The issues may be complex, but, in the absence of effective competition, such adjustments are needed for a price cap regime. They are necessary to prevent harm to consumers by preventing carriers with market power from exercising that power. Consumer Advocates support such measures, but the rate reductions proposed here should not be delayed until the Commission can arrive at final decisions on the proper price cap structure.

The FCC also proposes to use “anchor” or “benchmarking” price regulation as both an initial state for, and ultimately a replacement for, price caps.²¹ Consumer Advocates can understand the superficial appeal of benchmarking, given the complexity of a price cap regime. However, benchmarking’s uncertainties outweigh its convenience, so Consumer Advocates support the use of price caps, as detailed below. Likewise, the Commission proposes standards for wholesale pricing.²² Consumer Advocates support such standards.

In addition to pricing rules, there are rules that should be applied to all BDS services. These include the prohibitions on non-disclosure provisions in BDS agreements, based on the

¹⁶ FNPRM, ¶ 364.

¹⁷ Id., ¶ 384.

¹⁸ Id., ¶ 389.

¹⁹ Id., ¶ 393.

²⁰ Id., ¶ 397.

²¹ Id., ¶ 422.

²² Id., ¶ 443.

Tariff Investigation Order. Indeed, as discussed further in the FNPRM and below, public disclosure of BDS rates, terms and conditions²³ is crucial for this market.

Other appropriate rules include limitations on “all or nothing” provisions,²⁴ “one-time-limit” provisions,²⁵ shortfall penalties,²⁶ and early termination fees.²⁷ The Commission also proposes limitations on tying arrangements²⁸ and penalty offsets,²⁹ but asks whether its prior non-regulation of percentage commitments should continue.³⁰ The Commission also asks for comment on term commitments,³¹ upper percentage thresholds,³² and overage penalties.³³ These do need controls. On the other hand, automatic renewal provisions³⁴ and “evergreen” provisions³⁵ are of less concern, because they are more likely acceptable to both parties to an arrangement. Here again, final decisions on these principles should not delay the immediate rate relief proposed here.

Then there are the forbearance issues.³⁶ Consumer Advocates support reversal of previous forbearances, but except for forbearance from tariffing,³⁷ urge caution in further forbearance.³⁸

²³ Id., ¶ 436.

²⁴ Id., ¶ 324.

²⁵ Id., ¶ 326.

²⁶ Id., ¶ 329.

²⁷ Id., ¶ 337.

²⁸ Id., ¶ 454.

²⁹ Id., ¶ 456.

³⁰ Id., ¶ 464.

³¹ Id., ¶ 469.

³² Id., ¶ 475.

³³ Id., ¶ 480.

³⁴ Id., ¶ 484.

³⁵ Id., ¶ 489.

³⁶ Id., ¶ 503.

The Commission should not become swallowed by the details, but should act quickly to prevent consumers from continuing to having to pay the inflated current BDS rates. That means a staged process such as that recommended here.

IV. THE COMMISSION'S LEGAL AUTHORITY OVER BDS

The decision in *USTA III* gives the Commission great authority over BDS. In the FNPRM, released pre-*USTA III*, at a number of points, the Commission sought comment on whether its statutory authority permits the proposals made therein.³⁹ In brief response, especially in light of *USTA III*, given that BDS is a redefinition of Title II telecom special access,⁴⁰ the Commission's authority over BDS is as extensive as its authority over special access. And just as the Commission's authority over special access allowed it to make the misplaced decisions to give ILECs the power to charge excessive special access rates,⁴¹ that same authority over BDS allows it to establish a regime to limit such supracompetitive rates.⁴²

The key to the law, 47 U.S.C. § 201(b), is the requirement that “charges” and “practices” be just and reasonable.⁴³ The alternative, of course, is charges and practices that are **unjust** and **unreasonable**. The Commission asks, at ¶ 265 of the FNPRM, whether §§ 201(b) and 202

³⁷³⁷ The Commission notes the carriers' loss of shelter when they detariff. *Id.*, ¶ 508. Such risks are part of any competitive market.

³⁸ The D.C. Circuit gave the FCC's forbearance declarations great deference in *USTA III*.

³⁹ E.g., FNPRM ¶¶ 263, 265, 267, 268.

⁴⁰ See *Id.*, ¶ 257.

⁴¹ See, generally, *Texas Office of Public Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (finding the CALLS plan to be within FCC authority), *cert. denied*, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002); see also *Ad Hoc v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

⁴² FNPRM, ¶ 257.

⁴³ 47 U.S.C. § 201(b).

extend both to the rates for and the terms and conditions of BDS. The answer is affirmative, especially in light of *USTA III*.

The Commission also asks whether the “savings clause” in § 251⁴⁴ gives it the power to address wholesale/resale issues under § 201(b), despite the fact that § 251 itself addresses resale.⁴⁵ The fact that § 251 sets forth a long list of duties for carriers and LECs and ILECs (with each bearing greater responsibilities) – duties such as interconnection; resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation; and negotiation, additional interconnection, unbundling, additional resale, notice of network changes, and collocation – does not limit the FCC’s regulatory capabilities under § 201(b). Regulating wholesale BDS rates fits into this scheme.

Section 201(b) is itself sufficient to support the Commission’s authority over BDS as proposed in the FNPRM. Section 202 adds to that support. So the Commission need not go looking for additional support, although it is available: Section 706 specifically allows “price cap regulation” as a means of “encourag[ing]” deployment of advanced services,⁴⁶ which is a key aspect of the Commission’s plans here.⁴⁷

Finally, a major part of the FCC’s proposals is the reversal of previous forbearance grants – along with some expanded forbearance. The statute⁴⁸ does not contain an explicit provision for withdrawal of a previously-granted forbearance. The Commission asserts its authority, but asks whether such reversals are allowed.⁴⁹

⁴⁴ 47 U.S.C. § 251(i).

⁴⁵ FNPRM, ¶ 267.

⁴⁶ 47 U.S.C. § 1302(a).

⁴⁷ FNPRM, ¶ 10.

⁴⁸ 47 U.S.C. § 160.

⁴⁹ FNPRM, ¶ 520.

In brief response, the grant of forbearance for a regulation is premised on three

Commission determinations:

- 1) That the regulation is not necessary to ensure that charges and conditions for a service are just and reasonable;
- 2) That enforcement is not necessary for consumer protection; and
- 3) That forbearance is consistent with the public interest.⁵⁰

Based on the current record, the conditions previously found – that justified the forbearances for BDS⁵¹ – no longer obtain (if they ever actually did). Congress could not have intended that all forbearances would be permanent, **especially** if the conditions precedent no longer exist. The Commission’s reversal of forbearance – especially the Verizon “deemed grant” – is eminently reasonable under *Chevron*.⁵²

V. COMMENTS ON ISSUES FROM THE FNPRM

A. The definition of BDS

As the FCC states, “[a] definition for BDS is critical to any new regulatory framework.”⁵³

The Commission proposes

to define BDS as a telecommunications service that: transports data between two or more designated points at a rate of at least 1.5 Mbps in both directions (upstream/downstream) with prescribed performance requirements that typically include bandwidth, reliability, latency, jitter, and/or packet loss. BDS does not include “best effort” services, e.g., mass market BIAS such as DSL and cable modem broadband access.⁵⁴

⁵⁰ 47 U.S.C. §160(b).

⁵¹ See FNPRM, ¶¶ 24-25.

⁵² *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁵³ FNPRM, ¶ 259.

⁵⁴ *Id.*

Consumer Advocates support this definition and specifically the distinction from best efforts services.

B. Technology neutrality and the IP transition

Throughout the FNPRM, the Commission emphasizes the importance of a technology-neutral framework, so as not to artificially advantage or disadvantage TDM vs. packet-switched BDS services. Thus, the Commission states:

[T]he new regulatory framework should be technology-neutral. Technological distinctions must not be allowed to obscure economic reality or distort future regulatory policy. Business data services are a quintessential form of telecommunications services under the Communications Act of 1934, as amended (the Communications Act or the Act), transmitting data for a fee from user to user without change in the form or content of the information sent or received. Thus, differences in technology between circuit-switched and packet-switched services do not mean that they now exist in different markets.⁵⁵

Consumer Advocates strongly agree with this principle. The Commission should adhere to it with respect to all aspects of the regulatory framework for BDS, including market classification, terms and conditions, and rate-related rules. Consumer Advocates also agree that it is important for the Commission to reverse previous forbearance actions that were inconsistent with this principle (e.g., the Verizon “deemed grant” forbearance),⁵⁶ as discussed in Part III above. Technological neutrality will require some parties to be “fully included” in this regulatory scheme over their objections.⁵⁷

The Commission is also strongly committed to “remov[ing] barriers that may be inhibiting technology transitions.”⁵⁸ Consumer Advocates support both of these principles and believes that they can co-exist. But at times in the Order, the Commission

⁵⁵ Id. ¶ 6.

⁵⁶ Id., ¶¶ 11, 24.

⁵⁷ Id., ¶ 257.

⁵⁸ Id., ¶ 7.

shortchanges technology neutrality in its attempt to promote a technology transition.

Generally speaking, the Commission should not deviate from technology neutrality in the application of any of its rules without a compelling reason. In most cases, if customers see obvious advantages to obtaining packet-based BDS over TDM-based services, they will make the transition without additional incentives. Similarly, carriers that consider packet-based BDS to be a more efficient way of providing service will find ways to make the service more attractive to their customers, without the FCC placing its thumb on the scales.

The Commission goes into great detail about the importance of a well-specific price cap plan to ensure just and reasonable rates, terms, and conditions for TDM-based BDS, but then attempts to justify not using the same approach for packet-based BDS. Consumer Advocates strongly disagree that price cap regulation, by virtue of having been applied to TDM-based BDS, can be relegated to the status of “legacy” regulation.⁵⁹ Price caps were adopted, with an extensive vetting process, as a replacement for rate-of-return regulation (which focused on cost of service). In the context of this renewed attempt to ensure that prices for BDS remain at just and reasonable levels in non-competitive pricing flexibility markets, now is not the time for the Commission to experiment with a new and untested alternative to price cap regulation for any BDS offered in a non-competitive market, regardless of its technology platform.

⁵⁹ At ¶ 507 of the FNPRM, the Commission states: “The price cap structure is a legacy form of regulation for dominant carriers that would only apply to the TDM services that are being phased out in the technology transition.” Later in that paragraph, however, the Commission comments, “We believe our regulatory framework can and should take account of legitimate differences in the provision of these services. We seek comment on how to do so and how to harmonize our goal of technological neutrality with the application of price cap regulation? Are there other methods of regulation that we should consider applying to these services or packet-based BDS to achieve our goals?”

C. Rules applicable in all BDS markets

Such technological neutrality also requires key BDS rules to apply ex ante in all markets, regardless of whether the market is found to be competitive or non-competitive. It is notable that the Verizon/INCOMPAS Joint Letter supports ex ante regulation for this market, given Verizon's historical opposition to ex ante rules.⁶⁰

1. The key rule for all BDS markets is public disclosure; non-disclosure agreements for BDS must be prohibited.

Public disclosure of BDS rates, terms and conditions is absolutely necessary. In non-competitive markets, disclosure will help ensure that consumers do not pay rates, or get service on conditions, that allow providers to exercise their market power. Consumer Advocates thus strongly support the Commission's proposals to make BDS rates, terms and conditions publicly available.⁶¹ The Commission's determination to strictly limit NDAs⁶² is appropriate.

On the other hand, the idea that rates, terms and conditions would be publicly available only if parties voluntarily agree to the release⁶³ (presumably **both** parties to an agreement must agree) would unduly restrict access to that information, and allow the exercise of market power. The presumption should be for disclosure. As the Commission states, "Requiring BDS providers to disclose their rates, terms, and conditions publically would provide a clear check as to whether they are compliant with our anchor pricing requirements."⁶⁴

⁶⁰ See Verizon/INCOMPAS ex parte (April 7, 2016) at 1. It appears that, on June 27, 2016 – the day before comments are due in this proceeding – Verizon and INCOMPAS filed an ex parte letter that presents "an outline for a new framework for Business Data Services." Given this timing, Consumer Advocates will address this "outline" in reply comments.

⁶¹ E.g., FNPRM, ¶¶ 313, 436, 511.

⁶² Id., ¶¶ 317-319.

⁶³ Id., ¶ 319.

⁶⁴ Id., ¶ 435.

The public disclosure of BDS rates, terms and conditions would allow forbearance from the tariffing requirements for those services.⁶⁵ The Commission should rely on commercial negotiations⁶⁶ only if the results of those negotiations among network owners and customers are public. The Commission asks “whether any reporting requirements should be imposed to ensure that providers comply with our rules and that those rules serve the purposes for which they were designed.”⁶⁷ There must be such requirements: Voluntary disclosure is insufficient; a provider of Title II BDS that does not disclose must be required to do so.

Because public disclosure should be required regardless of the results of a Competitive Market Test (“CMT”), the timeline for implementing these disclosure rules should not be tied to the results of a CMT.⁶⁸ Any transition period for these rules⁶⁹ should be minimal: The beneficiaries of the rule changes would be consumers, who could enjoy lower prices for services that use BDS as a result of the disclosure. Any negative impact will come to those who have been overcharging for BDS.

As the Commission notes, “Under the *Sierra-Mobile* doctrine, the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful, and to modify other provisions of private contracts when necessary to serve the public interest.”⁷⁰ Thus the Commission should require that all BDS contacts comply with the new rules.

⁶⁵ Id., ¶ 434.

⁶⁶ Id.

⁶⁷ Id., ¶ 439.

⁶⁸ Id., ¶ 437.

⁶⁹ See, e.g., id., ¶ 325.

⁷⁰ Id., ¶ 438, citing *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). .

2. Other terms and conditions

The Commission discusses tying arrangements,⁷¹ “all or nothing” provisions,⁷² shortfall penalties⁷³ term commitments,⁷⁴ and upper percentage thresholds.⁷⁵ By and large, these arrangements are the result of the use and abuse of market power, and should not be allowed. On the other hand, evergreen provisions⁷⁶ and automatic renewal⁷⁷ are more likely to benefit both parties to an agreement, so may be allowed.

D. The competitive market test

Key to the Commission’s rules that differentiate between competitive markets and noncompetitive markets is the CMT. And key to that key is the definition of BDS,⁷⁸ as discussed above.

This test should be performed on all areas that have previously been deemed competitive. As discussed above, however, **the test should be preceded by BDS rate reductions.**

1. The FCC has appropriately excluded best effort services from its definition of BDS.

Consumer Advocates concur with the FCC’s proposal to exclude “best efforts” services, e.g., mass market broadband Internet access services (“BIAS”) such as DSL and cable modem broadband access, from the BDS definition.⁷⁹ As Consumer Advocates explained in earlier

⁷¹ FNPRM, ¶¶ 447, 456.

⁷² Id., ¶¶ 324-328.

⁷³ Id., ¶¶ 329-336.

⁷⁴ Id., ¶ 469, 488.

⁷⁵ Id., ¶ 475-476.

⁷⁶ Id., ¶ 482.

⁷⁷ Id., ¶ 484.

⁷⁸ Id., ¶ 279.

⁷⁹ Id., ¶ 279.

comments,⁸⁰ for the reasons the FCC sets forth (in ¶¶ 191 through 195 of the FNPRM), and as users and competitors have also demonstrated, best effort services cannot be considered BDS because they lack the reliability and symmetry that customers seek when they purchase specialized dedicated circuits.

2. The FCC should not define markets by customer class.

Consumer Advocates do not support defining markets by customer classes corresponding to wholesale, mobile backhaul and retail customers (or by the size of the business being served⁸¹) because these designations do not necessarily correspond with economically-sound product markets. The factors that more critically determine the level of competition in a market are the location of potential customers (e.g., is the area sparsely populated, which could signal limited potential revenue, or urban, which could entail, for example, costly access to rights of way) and the potential revenue stream (e.g., are customers purchasing DS1/DS3 or services operating at more than 50 mbps). The cost of entry into relevant geographic and product markets and the anticipated potential revenue streams affect elasticity of supply. The key question is not whether a BDS customer is a wireless carrier, a bank or a competitive provider but rather whether anticipated revenues and costs warrant entry. Consumer Advocates acknowledge that business size⁸² may signal the attractiveness of entry because it can be an indicator of potential revenue streams, but recommend that the Commission rely instead on the product to define the market (e.g., DS1 versus DS3, channel termination versus transport) rather than the customer class.

⁸⁰ See WC Docket 05-25, NASUCA/MD Reply Comments (February 19, 2016,) at 12-13.

⁸¹ FNPRM, ¶ 284.

⁸² See id., ¶ 284.

3. Relevant geographic area for evaluating competition

Customers are highly unlikely to re-locate in search of alternative BDS suppliers and products,⁸³ and it is therefore particularly important to define the geographic market to correspond with the actual and likely potential supply of relevant BDS products. The FCC has appropriately determined that MSAs encompass too large a geographic area for assessing competition.⁸⁴ Consumer Advocates applaud the FCC’s goal of learning from its past experience and not “granting relief too broadly to cover areas where competition is not present or unlikely to occur...”⁸⁵

The FCC seeks comment on “how close competition must be to place material competitive pressure on supply at a given location, and whether this distance might vary with the nature, most notably the bandwidth, of the BDS in question.”⁸⁶ The relevant geographic area for evaluating competition will indeed vary with the bandwidth of the product. That is, the appropriate size of the geographic market might well differ depending on the consumer demand. In a densely populated urban area, the geographic market for higher bandwidth services might reasonably encompass more than a building-by-building assessment. But where consumer demand is less, whether because of lower density or lower bandwidth, it may become too costly for competitors to justify deploying infrastructure to offer BDS. In those areas, the appropriate

⁸³ As Rysman explains (page 218): “Using locations to measure market structure should be linked to our concept of a relevant market. In theory, the relevant market should be determined in both geographic and product space, both by customer willingness to switch away in both dimensions, and by the willingness of firms to switch towards a customer in both dimensions. In practice, I expect customers are unlikely to switch geographic locations based on the price of business data services. A provider that raises price is unlikely to drive a customer to a new address that is served by a rival provider. Similarly, it would be rare that the expected price of BDS or managed services would significantly influence a customer’s location decisions because such costs are a relatively small part of the purchasing firm’s overall costs, and because in many instances other factors will dominate, such as the need to meet the purchasing firm’s own customers’ desires.”

⁸⁴ FNPRM, ¶ 287, citing *Suspension Order*, and ¶ 288, discussing and citing analysis of the *2015 Collection*: see also *id.*, ¶¶ 209-215.

⁸⁵ *Id.*, ¶ 290.

⁸⁶ *Id.*, ¶215.

geographic market may well be the building.⁸⁷

As with many of the questions posed in the FNPRM, the FCC will confront a trade-off here between administrative efficiency and accommodating the range of market structures that exist. Tailoring the market definition to the specific circumstances of each situation may be theoretically appealing but administratively unwieldy. However, if in doubt, the Commission should err on the side of defining the geographic market narrowly; the extensive data submitted in this proceeding demonstrates that the mere presence of a CLEC within an MSA does not constrain the rates, terms and conditions of an ILEC within the more granular geographic market of a building.⁸⁸

Consumer Advocates recognize that census tracts and census blocks vary in size.⁸⁹ Although Consumer Advocates would prefer a building-by-building analysis (because the cost-to-revenue ratio of entry for low-bandwidth BDS is high), we acknowledge the importance of administrative manageability in defining geographic markets. If the FCC determines that assessing competition on a building-by-building basis is not workable, Consumer Advocates recommend the use of the census block rather than the census tract for lower bandwidth BDS services.

As a “going-in” default assumption, based on the recent extensive data collection, the FCC also should reasonably assume that in the vast majority of instances (if not all), DS1 and

⁸⁷ As aptly stated in the Rysman paper (p. 218): “Building facilities from one location to another can be a costly endeavor, and can include not only the cost of stringing or burying lines, but also the cost of getting approval from the relevant government authorities and from building owners. Whereas some statements from industry sources suggest that a provider can easily reach any location in a census block, or beyond, in which it has presence, other statements suggest that in some cases, even building from one floor of a building to another can be prohibitively costly, especially if permission from the building owner is not forthcoming.”

⁸⁸ See also discussion at FNPRM ¶¶ 211-213 citing to carrier responses filed in the *2015 Data Collection*. See also Table 3 in ¶ 220 showing the lack of competition.

⁸⁹ *Id.*, ¶ 214.

DS3 products and their packet-based equivalents at or below 50 Mbps are not competitive.⁹⁰ A building-by-building re-assessment is not necessary to confirm this market reality.

Consumer Advocates recognize, however, that the FCC needs a “future-looking” test for assessing competition, and that such a test necessarily entails defining relevant geographic markets. As stated above, Consumer Advocates support the use of a building-based geographic market for DS1 and DS3 markets because the potential revenue for these products is limited and the cost of entry is high, yet acknowledge the greater administrative simplicity of using census blocks. In any event, at the outset, the default assumption should be that all DS1 and DS3 markets are non-competitive. If and where ILECs believe that they are confronting competition in the supply of DS1 and DS3 products, they could either (1) petition the FCC on a building-specific (or census block) basis (grouping such petitions in an annual filing in order to minimize administrative burden) for competitive classification or (2) be permitted to lower rates provided that they demonstrate that their retail rates for a given building exceed the wholesale rates that they charge for similar elements and services. In no event should a competitive classification for a geographic market lead to rate increases.

4. Concentration is high

The FCC has gathered ample evidence, and stakeholders have demonstrated unambiguously that ILECs possess market power in their provision of DS1 and DS3 BDS.⁹¹ Consumer Advocates appreciate the fact that “no analysis is ever perfect,”⁹² but the evidence that the FCC has collected thoroughly from industry participants provide solid footing for the FCC to

⁹⁰ See, e.g., *id.*, Table 3 in ¶ 220.

⁹¹ *Id.*, ¶ 237; see generally, Declaration of Susan M. Gately, On Behalf of the Ad Hoc Telecommunications Users Committee (January 27, 2016); Rysman paper at 212, 232; NASUCA/MD Reply Comments, filed February 19, 2016, at 2. See also FNPRM at ¶ 353.

⁹² FNPRM, ¶ 237.

regulate all DS1 and DS3 BDS products as non-competitive. The FCC need not second-guess its conclusions nor open the door to further and unending deliberations in search of “perfect analysis.”

The FCC, referring to the Rysman White Paper, seeks comment on whether the BDS market for bandwidths in excess of approximately 50 Mbps may be considered to be competitive.⁹³ For BDS at high bandwidths, the economics of supply differ significantly from that for DS1 and DS3 and packet-switched services of 50 Mbps, making entry more likely, and the potential for market discipline greater.

But consumer demand also varies among geographic locations. As such, the level of competition for BDS in a rural area, even at a higher bandwidth threshold, may not necessarily be sufficient to justify relaxing regulatory oversight of the ILECs’ rates. Any assessment of the competitiveness of high-bandwidth BDS products should be grounded in the actual structure of the relevant geographic market so that if, for example, there are no CLECs in (or near) the relevant geographic market, the market cannot be deemed competitive, even for BDS above the 50 Mbps level. Alternatively, if the FCC determines that ILECs may price high-bandwidth BDS flexibly, ILECs should be required to set the same rates throughout their footprint so that they do not undercut CLECs in urban areas, for example, while over-pricing in areas where the ILEC faces less (or no) competition. Otherwise, the combination of pricing flexibility and geographic de-averaging could harm competition (by providing a mechanism for ILECs to undercut CLECs’ prices in some markets) and rural communities (by allowing ILECs to over-price in areas with few or no alternative suppliers). As discussed above, rates should be public so that consumers and regulators can detect any anticompetitive pricing patterns.

⁹³ Id.

The FCC raises the possibility that cable companies may at some point be able to supply BDS where they have deployed DOCSIS 3.0.⁹⁴ Consumer Advocates reiterate the view they have stated in various FCC proceedings that the FCC should not rely on *predictive* judgment to make determinations about the level of competition that exists *presently* in relevant markets.⁹⁵ Markets evolve, and if and when ILECs demonstrate compelling evidence that competition is sufficient to discipline the rates, terms and conditions of specific BDS products in relevant geographic markets, the FCC can certainly modify its regulation accordingly. But it would disserve consumers and competitors for the FCC to base its decision today on speculation about tomorrow's developments.

The FCC seeks comment on extending price cap regulation to BDS that are presently subject to Phase II pricing flexibility “to the extent an application of our proposed Competitive Market Test determines such services are non-competitive.”⁹⁶ As stated elsewhere, Consumer Advocates support the extension of price cap regulation to BDS now subject to Phase II pricing flexibility, and moreover, posits that there is no need to apply a Competitive Market Test to DS1 and DS3 services (or any services at 50 Mbps and below). Instead the FCC can, based on the ample record in this proceeding, simply place such services under price cap regulation immediately.

5. Competitive Market Test Criteria and Application

Although a duopoly is preferable to a monopoly, two providers do not make a market competitive – the opportunity for collusion is great and competitive pressures are insufficient to

⁹⁴ Id., ¶ 221.

⁹⁵ See, e.g., WC Docket 05-25. NASUCA/MD Reply Comments (February 19, 2016), at 1, 4, and 6.

⁹⁶ FNPRM, ¶ 355.

yield just and reasonable rates.⁹⁷ Density is an indicator of the potential for competition to develop, but it is not determinative; the weight that density should be afforded in any assessment of an ILEC's market power depends on the product in question.⁹⁸ Even in dense areas, it is rarely financially rational for a CLEC to offer DS1 service over its own facilities, because the associated revenue is limited and the cost of entry is high (e.g., rights of way, access to the building, etc.).

Consumer Advocates welcome a competitive market test (which may be based on a matrix that assesses such factors as density and the presence of suppliers), but urge the Commission not to await its possible implementation before classifying all DS1 and DS3 BDS (and all BDS whether TDM or packet-switched up to and including 50 Mbps) as non-competitive.⁹⁹ Suppliers and large users may offer insights based on their real-life experience, regarding the key elements of such a competitive market test, and Consumer Advocates welcome the opportunity to address the FCC's competitive market test further in reply comments.

In any event, Consumer Advocates fully support the FCC's establishment of a public, easily accessible database and map, that allows all stakeholders to readily identify which product and geographic markets have been or are being considered to be competitive.¹⁰⁰ Consumer Advocates acknowledge that relying on census blocks is more administratively feasible than classifying individual buildings. Consumer Advocates can support this level of geographic disaggregation for assessing market power, provided that the FCC designates all DS1 and DS3 (and indeed all products with bandwidths 50 Mbps and below) as non-competitive, regardless of the geographic market encompassed.

⁹⁷ Id., ¶ 294.

⁹⁸ Id., ¶ 293.

⁹⁹ Id., ¶¶ 296-299.

¹⁰⁰ Id., ¶ 297.

6. The post-determination process

Any process that the Commission establishes to offer providers and purchasers an opportunity to challenge the FCC's determinations¹⁰¹ should minimize administrative burdens on the Commission, while preserving the due process rights of participants. The process to challenge a CMT finding should be available both for providers and for the public. The ability to challenge the finding should not be limited to direct purchasers of BDS. The public, including such as Consumer Advocates, representing those impacted by pricing flexibility, should be able to challenge a competition finding. The challenge may well be overtaken by the periodic data review discussed below.

E. Rules applicable in non-competitive markets

1. Price cap regulation

a. Background

As the FCC explains in Attachment 4 to the FNPRM, it has two forms of rate regulation for BDS – price cap and rate-of-return, but the focus in this proceeding is on price cap ILECs.¹⁰² The FCC established a process in 1999 for granting price cap ILECs additional pricing flexibility based on the satisfaction of certain “regulatory triggers,” which were intended to serve as a proxy for potential competition. As explained by the FCC: “Depending on the level of pricing flexibility, ILECs can ‘offer special access services at unregulated rates through generally available and individually negotiated tariffs.’”¹⁰³ In August 2012, the FCC suspended the rules for granting this additional level of pricing flexibility, finding that there was “significant evidence that these rules . . . are not working as predicted, and widespread agreement cross

¹⁰¹ Id., ¶ 300.

¹⁰² The five largest ILECs – all price cap carriers – are AT&T, Verizon, CenturyLink, Frontier and Windstream

¹⁰³ FNPRM, Attachment 4 – “FCC Background on Business Data Services,” at 251.

industry sectors that these rules fail to accurately reflect competition in today's special access markets.”¹⁰⁴

b. Consumer Advocates urge the FCC to implement long-overdue relief immediately.

The fact that rates in purportedly competitive areas where ILECs have been granted pricing flexibility exceed rates in non-competitive areas¹⁰⁵ not only underscores fundamental problems with the existing regulatory system for critically important BDS, but also the need for the FCC to implement *immediate* relief to discontinue the consumer harm that has persisted for more than a decade.¹⁰⁶

Accordingly, Consumer Advocates urge the FCC first to bring immediately under the existing price cap plan all DS1 and DS3 products (channel terminations and transport), regardless of the platform used and regardless of the geographic market encompassed. That will reverse the Phase II pricing flexibility relief granted previously. The relief was based on competition triggers that the FCC has found to be unreliable.¹⁰⁷ This remedy would provide interim and long-overdue relief pending further FCC deliberations on price cap mechanics and competitive benchmarks.

Then, because rates set under the existing "frozen" price cap plan likely exceed those that would prevail in competitive markets, the FCC should implement a second phase of overdue relief.¹⁰⁸ Consumer Advocates urge the FCC to conclude that the price levels that the existing price cap plan permit are not just and reasonable, and to “re-initialize” them, that is to establish

¹⁰⁴ Id., at 251-252.

¹⁰⁵ FNPRM, ¶ 416. See also ¶ 368.

¹⁰⁶ See id., ¶ 345, acknowledging that Commission action on price caps is over a decade overdue.

¹⁰⁷ See id., ¶ 353, stating: “The record makes clear that the market for lower-bandwidth TDM business data services such as those currently subject to price caps is non-competitive in significant measure.”

¹⁰⁸ Id., ¶ 403.

price levels that would more closely resemble those that would prevail in competitive markets.¹⁰⁹

As the FCC has indicated, carriers have achieved significant productivity gains and cost savings since the expiration of the CALLS plan in June 2005, and indeed these gains likely have outpaced those for the general economy.¹¹⁰ The productivity achieved in the industry relative to the economy during the past decade provides a basis for the FCC to re-initialize BDS rates.¹¹¹ Any price cap ILEC that challenges the result should be required to support its challenge with detailed cost studies.

As the third phase of the process of establishing a well-functioning “going-forward” price cap plan, the FCC should establish economically sound elements such as a productivity factor, consumer dividend, baskets, and pricing bands. Consumer Advocates welcome the opportunity to participate in these important deliberations, but in any event the FCC should not hold the first initial step (immediate relief from supra-competitive prices) hostage to these subsequent, potentially more time-consuming steps.¹¹²

2. Further discussion

Consumer Advocates support the Commission’s proposal to apply price cap regulation to BDS services that are not found to be competitive.¹¹³ It is obviously important that the price cap

¹⁰⁹ See *id.*, ¶ 366, stating (internal citations omitted): “Over the period since the expiration of the CALLS plan, as technology has evolved and for other business reasons, price cap LECs, like other LECs, have been consolidating TDM switches, placing soft-switches, increasing fiber deployments, and decreasing maintenance costs. We believe that, as a consequence, business data services productivity growth has significantly outpaced inflation and therefore that the price cap LECs are likely charging unreasonably high rates. In a regulatory environment where prices fail to reflect productivity gains and, consequently, carriers set prices too high, end users will purchase less of the services produced, and the quantity of output will be lower than if prices were set at a competitive level. The productivity of which the plant is capable will not be realized.”

¹¹⁰ *Id.*, ¶ 401.

¹¹¹ See *id.*, Appendix C Productivity-Based X-Factor and Price Cap Indices Adjustment Calculations.

¹¹² The FCC poses numerous questions regarding various aspects of a price cap plan. Consumer Advocates may address these elements in more detail based on our review of initial comments.

¹¹³ *Id.*, ¶ 354. As stated elsewhere, Consumer Advocates propose that the Commission begin with an assumption that all DS1 and DS3 services are not-competitive, because the Commission’s extensive data collection has

mechanism be accurate and well-tailored to restore and maintain the rates for non-competitive BDS to the cost-based levels that would prevail under competitive market conditions. Consumer Advocates agree that offsets to reflect productivity and growth¹¹⁴ should be included in the price cap, and that different services within the overall BDS category should be segregated into baskets that inhibit ILECs from overpricing those services that confront the lowest levels of competition. Consumer Advocates are concerned that many parties (perhaps with the exception of the large ILECs) lack the resources to provide detailed, fact-based responses with regard to the many very specific questions that the Commission poses regarding the specification of a new price cap mechanism, regarding adjustments, baskets, etc., particularly in the limited time available to respond to the FNPRM.

Indeed, Consumer Advocates consider it highly likely that hammering out the many specific details of the price cap mechanism will involve a process that could extend for many months. While the Commission is engaged in fine-tuning the price cap specifications, it is important to put an immediate end to as much as possible of the long-term harm that BDS customers have suffered as a result of excessive rates and unreasonable terms and conditions. Based on the existing record, the Commission has all the evidence it needs to justify re-imposition of price cap regulation on DS-1 and DS-3-level BDS nationwide and to reinitialize the prices for these services.¹¹⁵ This should occur immediately and not be held hostage until

demonstrated that for the vast majority of buildings, the ILEC is the only supplier and markets with two suppliers also cannot be considered competitive (relatively few markets have more than two suppliers).

¹¹⁴ The Commission also asks whether it should require price cap LECs to share their business data services earnings. ¶ 387. Such a mechanism, had it been in effect, would have provided partial compensation for the many years of supra-competitive rates that ILECs have sustained. By limiting the sharing to a portion, the Commission could retain the economic incentives inherent in a price cap plan while also protecting consumers from rates that are set above those that would prevail in competitive markets.

¹¹⁵ Re-initialization is essential -- Consumer Advocates concur with the Commission that “[g]iven the rapid growth in business data services output, and the ever-increasing economies of scale with respect to providing business data services, per unit costs likely have decreased significantly since that time.” *Id.*, ¶ 365.

every question in the FNPRM is fully addressed. Once reinitialization is done, the Commission should commit to **expeditiously** resolving the disposition of the many specific price cap refinements that the NPRM proposes to consider.

3. Prices for packet-based BDS not previously subject to price caps

At the same time that it proposes a highly nuanced approach to re-establishing a price cap regime to apply to TDM-based BDS, the Commission acknowledges that a significant portion of BDS (and eventually perhaps all) will, in the foreseeable future, be transitioned to packet-based BDS that have not previously been subject to a price cap mechanism.¹¹⁶ Importantly, though, the Commission also recognizes that whether BDS is offered via TDM or packet-based technology does not substantially alter the prevailing market conditions, under which BDS are non-competitive.¹¹⁷ Thus, early in the section of the FNPRM that discusses the reinstatement of price cap regulation for BDS in non-competitive markets, the Commission seeks comment on the important question of whether and how to apply some form of rate regulation for packet-based BDS in those noncompetitive markets:

We also seek comment on the scope of the application of rate regulation in non-competitive markets to packet-based BDS (and, as well, to TDM BDS). At some point in the future, there may be non-competitive BDS markets in which TDM is no longer available. In such a case, how would we regulate the non-competitive business data services? How do we ensure the regulation we adopt here is technology-neutral and sufficient to permit it to be applied to such a non-competitive BDS market?¹¹⁸

¹¹⁶ Id., ¶ 420 (“As discussed above, TDM BDS rates currently are constrained to some extent by price caps. In this section, we propose and seek comment on a methodology to ensure that, *in non-competitive markets*, rates for Ethernet business data services not subject to price cap regulation are just and reasonable.” [Internal footnote omitted.]

¹¹⁷ See id., ¶¶ 226, 429.

¹¹⁸ Id., ¶ 352.

However, having raised this very substantial concern, the Commission is a bit too quick to retreat from the possibility of using a price cap mechanism for rate regulation of packet-based BDS in favor of a rather ill-defined “benchmarking” proposal.

The first challenge with respect to implementing a benchmarking approach is to figure out how to relate the prices of TDM-based BDS to their various packet-based BDS counterparts, which typically do not match up exactly.¹¹⁹ This is made more problematic by the fact that, without a significant re-initialization, even the rates for the TDM-based BDS that have been subject to price caps exceed just and reasonable levels.¹²⁰ Moreover, the migration to packet-based service is driven by more efficient technology. The greater efficiency associated with packet-based BDS should, under competitive conditions, have already driven prices to lower levels than would have prevailed in a TDM-only BDS market.

The second challenge of benchmarking relates to future adjustments in packet-based BDS rates in non-competitive markets. Even if reasonably accurate benchmarks can be set to fix the initial rates for packet-based BDS relative to existing TDM services, there will need to be a mechanism for adjusting the prices of packet-based BDS over time, and that mechanism will need to capture the productivity gains specific to those packet-based services (as opposed to their TDM trackers). Moreover, the price regulation mechanism will have to function independently of TDM-based BDS after those services have been phased out in favor of packet-based BDS.

Although Consumer Advocates agree with the Commission that, over time, the price constraints for packet-based BDS services will need to be de-linked from their TDM counterparts, Consumer Advocates are concerned with the vagueness in the Commission’s

¹¹⁹ See *id.*, ¶ 430.

¹²⁰ See *id.*, ¶¶ 401-402.

proposal about how packet-based BDS will be “benchmarked to itself” going forward.¹²¹ The Commission should commit to applying a well-specified price cap mechanism to any packet-based BDS that are offered alongside or as replacements for TDM-based BDS below the 45 Mbps threshold within any non-competitive market.

In proposing its benchmarking approach, the Commission expresses a reluctance to bring packet-based BDS under price caps, stating:

[B]ringing more services under our price caps would entail reporting and monitoring costs which we can avoid under our proposed anchor or benchmarking approach (since such an approach, in part by its expression, and in part through setting of precedents in adjudications, will encourage parties to negotiate reasonable terms and conditions).¹²²

This brief explanation incorporates several important conclusions, none of which Consumer Advocates find altogether convincing. Earlier in the Order, the Commission went into extensive detail in an attempt to arrive at an accurate approach to applying price cap regulation to TDM-based BDS in noncompetitive markets.¹²³ But in ¶ 425, in half a sentence, the Commission dismisses price cap regulation for packet-based BDS, **in the same markets**, as unduly burdensome.

In light of the enormous cost to consumers of misaligned BDS rates over an extended period of time under the pricing flexibility regime, the Commission should not be so quick to sacrifice accuracy to regulatory expediency. Consumer Advocates are also troubled by the notion that negotiation and the Commission’s complaint process (i.e., “setting of precedents in adjudications”) are a more efficient or reliable way of ensuring that the rates, terms, and

¹²¹ See *id.*, ¶ 427.

¹²² *Id.*, ¶ 425.

¹²³ See generally, *id.*, ¶¶ 356-419.

conditions for packet-based BDS in non-competitive markets are just and reasonable.¹²⁴ These are, after all, services subject to the same non-competitive conditions in which incumbents have been able to “negotiate” their way to the inflated rates and unreasonable terms and conditions that the Commission plan seeks to overturn in connection with TDS-based BDS. Given the acknowledged history of excessive prices for non-competitive service, the Commission should not be anticipating an escape route from applying price caps to the packet-based BDS services of the future.

F. Pricing rules applicable in competitive markets

Essentially by definition, services in competitive markets do not require regulatory control over pricing: The competition itself is assumed to ensure that rates are just and reasonable. As discussed above, however, BDS competition must be facilitated by the public disclosure requirements and the prohibition on NDAs.

G. Collecting data

In order to protect consumers and rates in areas that have been deemed non-competitive, an ongoing collection of data is crucial. This proceeding shows the difficulties inherent in an irregular and inconsistent collection of data.

Consumer Advocates generally support the data points discussed in the FNPRM.¹²⁵ Smaller carriers may be excused from the data collection, however,¹²⁶ but must be responsible for individualized data if they seek to have their services deemed competitive.

¹²⁴ Id., ¶ 425.

¹²⁵ Id., ¶¶ 528-530.

¹²⁶ Id., ¶ 527.

V. CONCLUSION

For the reasons set forth herein, Consumer Advocates urge the Commission to immediately reduce BDS rates and then to put in place a pricing regime for non-competitive areas to ensure that, going forward, BDS rates will be just and reasonable as required by 47 U.S.C. § 201(b).

Respectfully submitted,

David Springe, Executive Director
NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

David C. Bergmann
Counsel
3293 Noreen Drive
Columbus, OH 43221
Phone (614) 771-5979
david.c.bergmann@gmail.com

Paula M. Carmody
Maryland Office of People's Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202
(410) 767-8150

June 28, 2016