



November 4, 2016

The Honorable Thomas Wheeler, Chairman  
The Honorable Mignon Clyburn, Commissioner  
The Honorable Jessica Rosenworcel, Commissioner  
The Honorable Ajit Pai, Commissioner  
The Honorable Michael O’Rielly, Commissioner

Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**RE: Ex Parte:** *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.*

Dear Chairman Wheeler and Commissioners:

As the National Association of State Utility Advocates (“NASUCA”) has stated, “Consumers all across the country depend on reasonable [business data service] 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.”<sup>1</sup> Thus, NASUCA has, on behalf of consumers, consistently participated in the key proceedings identified above.<sup>2</sup>

The Federal Communications Commission (“FCC” or “Commission”) has announced that a Report and Order and Second Notice of Proposed Rulemaking in these proceedings will be

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<sup>1</sup> NASUCA/Maryland OPC Comments (June 28, 2016) at i.

<sup>2</sup> See [https://www.fcc.gov/ecfs/search/filings?q=\(proceedings.name:\(\(05-25\\*\)\)%20OR%20proceedings.description:\(\(05-25\\*\)\)%20AND%20filers.name:\(NASUCA\)&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?q=(proceedings.name:((05-25*))%20OR%20proceedings.description:((05-25*))%20AND%20filers.name:(NASUCA)&sort=date_disseminated,DESC).

considered at the Commission's meeting on November 17, 2016.<sup>3</sup> On October 7, 2016, Chairman Wheeler released a factsheet on his proposal.<sup>4</sup> And numerous industry ex partes have been filed.

NASUCA submits this ex parte to provide its perspective on these recent filings, focusing on Chairman Wheeler's proposal and a representative sample of more than a dozen industry ex parte filings that were posted on two recent days (October 19 and 20, 2016).<sup>5</sup>

To begin, NASUCA supports the concepts that are expressed in the Chairman's proposal: the importance of BDS, as quoted above, and the need for targeted action to encourage competition and fair access in a new framework. NASUCA also strongly supports the proposal to mandate fair BDS terms and conditions based on the findings in the FCC's May 2, 2016 Tariff Investigation Order, including barring new "all-or-nothing" plans and reining in excessive penalties.

NASUCA especially supports the view that reforms are overdue.

The record before the FCC, however, supports BDS reductions more substantial than those contained in the Chairman's proposal.<sup>6</sup> NASUCA agrees with Competition Advocates and Sprint.<sup>7</sup> The Chairman's proposed one-time downward adjustment of 11%, phased in over 3 years, beginning in July 2017 (specifically, 3% in year one, 4% in year two, and 4% in year three) and reducing price caps going forward by an annual X factor reduction of 3%, offset by inflation, beginning in July 2017, in addition to the one-time adjustment, does not adequately update price caps to account for over a decade of efficiency gains. Greater reductions are needed.

CenturyLink states that reductions like those proposed by the Chairman would harm its efforts to improve and expand broadband service to its customers.<sup>8</sup> However, this is merely an argument for maximizing the company's revenues, and overlooks the beneficial effects on BDS customers and consumers from de-inflating BDS rates.<sup>9</sup> Similarly, Comcast argues that regulating its BDS services will harm its expansion of Ethernet services.<sup>10</sup> Again, this ignores the benefits to BDS customers and consumers from rate reductions.

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<sup>3</sup> <https://www.fcc.gov/news-events/events/2016/11/november-2016-open-commission-meeting>.

<sup>4</sup> See <https://www.fcc.gov/document/chmn-wheelers-update-business-data-services-rules>.

<sup>5</sup> See [https://www.fcc.gov/ecfs/search/filings?express\\_comment=0&q=\(proceedings.name:\(\(16-143\\*\)\)%20OR%20proceedings.description:\(\(16-143\\*\)\)\)&sort=date\\_disseminated,DESC&submissiontype\\_description=NOTICE%20OF%20EXPARTE](https://www.fcc.gov/ecfs/search/filings?express_comment=0&q=(proceedings.name:((16-143*))%20OR%20proceedings.description:((16-143*)))&sort=date_disseminated,DESC&submissiontype_description=NOTICE%20OF%20EXPARTE). The posting date is used as a reference here.

<sup>6</sup> See Public Knowledge, et al. ("Competition Advocates") (10/20/16), Sprint (10/20/16).

<sup>7</sup> See NASUCA/Maryland OPC Reply Comments (August 10, 2016) at 2-3.

<sup>8</sup> See CenturyLink (10/19/16).

<sup>9</sup> See SHLB (10/19/16).

<sup>10</sup> Comcast (10/19/16).

The proposed reductions, however, apply only to slower-speed TDM BDS and not at all to packet-switched BDS. This creates a far-from-technologically-neutral divide, and gives pricing freedom to cablecos in non-competitive areas. As Competition Advocates state,

[T]he Commission should also address the high cost of Ethernet services. The Competition Advocates believe the Commission’s Order should address the excessive rates that BDS customers pay for all services over which incumbent providers possess and exercise market power, regardless of the underlying technology.

... [T]he Commission’s reforms must be technology-neutral and future proof, in accordance with the principles underlying the Further Notice of Proposed Rulemaking (“FNPRM”) in this proceeding. Changing technologies – from legacy TDM services to packet-based services – do not magically lower the extremely high financial and operational barriers to competitive deployment of the facilities needed to provide BDS. Likewise, the change from TDM to Ethernet technology does not eliminate incumbent LEC market power at locations in which that provider faces no effective competition. The data collected by the Commission show that that in the vast majority of BDS customer locations, there is little or no competition.<sup>11</sup>

A “technologically-neutral” approach requires rejection of the cable industry position that their BDS services should be free from regulation.<sup>12</sup> These companies do not qualify as new entrants; their BDS services are no longer nascent.<sup>13</sup> The competition shown by the Commission’s data collection overwhelmingly shows duopoly or at best oligopoly.<sup>14</sup> Further, the Commission must reject the cableco arguments that there should be no regulation of BDS service offered on a private-carriage basis.<sup>15</sup> The Commission has found BDS to be a Title II service; a carrier’s definition cannot make Title II go away.<sup>16</sup>

Therefore, NASUCA urges the Commission to create just and reasonable BDS rates, to the benefit of consumers, by adopting rules consistent with NASUCA’s position expressed in comments and ex partes.

Respectfully submitted,

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<sup>11</sup> Competition Advocates (10/20/16); see also Competition Advocates (10/25/16).

<sup>12</sup> See NCTA – The Internet and Television Association (“NCTA”) (10/19/16); Uniti Fiber (10/19/16).

<sup>13</sup> See Comcast (10/20/16); American Cable Association (“ACA”) (10/19/16).

<sup>14</sup> See Consolidated (10/29/16).

<sup>15</sup> See Comcast (10/21/16); ACA (10/19/16).

<sup>16</sup> See Verizon (10/20/16).

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