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

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

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EXECUTIVE SUMMARY

The initial comments in this proceeding present two diametrically opposed positions and interpretations of data. The comments of AT&T and USTelecom – ILEC providers of business data services ("BDS") – and Comcast, also a BDS provider, present a world where there is rampant competition for BDS, where rates for BDS services are decreasing, where BDS terms and conditions are set through open negotiations between parties of equal bargaining power, and where the future requires further deregulation of BDS.

These providers were and are wrong. The comments of NASUCA and the Maryland People's Counsel ("Consumer Advocates"); Public Knowledge, et al.; Ad Hoc; Sprint; and others – are from customers and consumers who depend on BDS. Based on a more careful and more accurate description of the data, these comments show that BDS rates are excessive, competition is limited, many terms and conditions are the result of the exercise of market power, and that re-imposition of price regulation on BDS rates is best for the future.

Consumer Advocates' comments proposed an immediate re-initialization of BDS rates for services at 50 Mbps and below. Consumer Advocates proposed that after this, a careful reformulation of a price cap regime could be undertaken. Consumer Advocates agree with many of the consumer, competitor and public interest commenters on the details of that reformulation. Consumer Advocates proposed a truly technologically-neutral regulatory framework, which would not distinguish between traditional time-division multiplexing ("TDM") BDS, and the newer packet-switched version of these Title II services. Consumer Advocates stressed the importance of public disclosure of BDS rates, terms and conditions – regardless of platform and speed – as a further means of ensuring that BDS customers receive the benefits of competition.

Verizon and INCOMPAS have presented what claims to be a compromise between the interest of ILECs and of competitors. (Indeed, Verizon presents itself as a competitor.) This agreement between two parts of the industry does not, however, adequately express **consumers'** interests, and should not be adopted as submitted.

Consumer Advocates applauded the FCC for finally addressing rates and rate structure for BDS, formerly referred to as "special access" services. As INCOMPAS noted,

> While most consumers are not familiar with these services, they use them when they make a voice call or send a text on a mobile device, withdraw cash from an ATM, or search online reference materials on a computer at their public library. The rates, terms, and conditions on which these services are offered have a significant effect on consumer welfare.[1]

None of the commenters seriously disputed the value and importance of BDS.[2] It is crucial for the Commission to act now.

[1] INCOMPAS at 2.

[2] See CFA/NNI at 7.

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I. THE COMMISSION SHOULD ADOPT CONSUMER ADVOCATES' PROPOSED PROCESS TO REDUCE BUSINESS DATA SERVICES ("BDS") RATES.

Consumer Advocates proposed an immediate re-initialization of business data services ("BDS") rates for services at 50 Mbps and below.[3] Ad Hoc – consumers of BDS – also stress the need for immediate action.[4] Like Consumer Advocates, Ad Hoc recommends that the Commission take the first steps toward reversing years of ILEC BDS overcharges by immediately rolling back rates, pending further refinement of price cap specifics.[5] Public

[3] Consumer Advocates Comments at i. Sprint agrees with this differentiation. Sprint at iii-iv.

[4] Ad Hoc at ii. Ad Hoc's recommendation for interim rate adjustments would extend to some BDS above the 50 Mbps level.

[5] Id. at 4-9.

Knowledge argues that there should be no delay in such action.[6] The reforms proposed by the Commission are long overdue.

Consumer Advocates proposed that after this re-initialization of BDS rates, a careful reformulation of a price cap regime could be undertaken.[7] Consumer Advocates concur with Ad Hoc's recommendations that the Commission: 1) adopt technology-neutral interim measures to reduce prices for both TDM and packet services; 2) move TDM services back under price caps rules, adjusting rates accordingly; 3) reverse the forbearance for packet services at speeds of 50 Mbps or less; and 4) make a "catch-up" adjustment to the price cap rules to capture economic changes since 2005.[8]

Consumer Advocates agree with Sprint, which cites the Commission's findings in the FNPRM:

> Given the dearth of competition, these carriers "have charged the highest rates permitted under their price cap indices" since the expiration of the CALLS plan, rather than "pass[ing] these productivity cost savings to customers in the form of lower prices." The appropriate first step of overhauling the price cap regime is to correct this past failing and make the necessary "adjustments to current price caps to reflect . . . past productivity gains that were not reflected in [the FCC's] past regulatory regimes," thereby "captur[ing] those gains for ratepayers."[9]

Sprint calculates that a reduction of between 25.2 and 44.7 percent in the current price cap indices of price cap ILECs is required to account for these past productivity gains.[10] Obviously, the difference between the price adjustment necessary to implement the top of this range and the bottom is substantial. Even if the Commission opted for immediate implementation based on the low end of this range, which reflects an annual reduction of 2.6%

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[6] Public Knowledge, et al. at 4.

[7] See Section 0, below.

[8] Ad Hoc at ii.

[9] Sprint at 46-47, citing FNPRM at ¶¶ 401, 364-5, 403; see also Joint CLEC Comments at 66.

[10] Sprint at 50-53; see also, Windstream at 61.

for each of the eleven years between 2006 and 2016,[11] this would be preferable to another prolonged period of inaction.

AT&T argues that such a BDS rate reduction would be unlawful.[12] But AT&T relies on its other arguments – that no reduction is necessary and a reduction would be arbitrary – for this proposition. A reduction would be within the Commission's authority to draw lines, and the record here demonstrates the market abuse under the current rates.

To avoid near-term change, Verizon argues that current contracts should be continued, so that those contracting will receive the "benefit of their bargain."[13] To the contrary, such contracts must be revised,[14] because the "bargains" were struck under a regulatory structure that the Commission now finds to be flawed. The contracts must be reformed – as the Commission has the power to do[15] – to include the newly-derived prices, and to exclude the terms and conditions that the Commission has found to be unjust and unreasonable.

At the end of the day, the benefit of the Commission's obligations to ensure just and reasonable rates for BDS services runs to consumers. Large, medium, and small consumers have suffered too long from excessive prices for BDS. Every consumer representative that commented in response to the FNPRM advocates for measures to counteract the abuse of market power by dominant BDS providers (i.e., ILECs) and restore prices for BDS to just and reasonable levels.[16]

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[11] Sprint at 51.

[12] AT&T at 62-

[13] Verizon at 5.

[14] Public Knowledge at 6.

[15] See FNPRM, ¶¶ 61-65.

[16] See, e.g., Public Knowledge at 5; Ad Hoc at i-ii, 2, 23; see also, Sprint at i-ii.

II. THE COMMISSION SHOULD ADOPT A REGIME BASED ON TECHNOLOGICAL NEUTRALITY.

There is broad consumer support for adopting a technology-neutral regulatory framework for BDS. As Public Knowledge aptly observes: "The industry's transition from TDM to packet-based technology does not change the fundamental economics of deploying the network facilities necessary to provide BDS, including the extremely high financial and operational barriers to such deployment."[17] Moreover, contrary to what AT&T suggests,[18] investment in IP networks is not – or at least should not be – affected by actions to limit ILECs from earning supracompetitive profits for services offered in the (still very substantial) TDM-based BDS market.

Some commenters misapply the principle of technological neutrality. For example, Comcast argues that its BDS services need not be regulated because it does not exercise "monopoly" power.[19] But the exercise of **market power** does not require a monopolist: Duopolists have market power. Here, the most common criterion in comments regarding effective competition is the presence in a geographic market of **four** competitors.[20] Comcast also argues against regulation of "new" entrants.[21] Comcast's provision of BDS services is not "new" by this point. Again, market power is the key aspect prompting regulation for these Title II services.[22] Consumer Advocates disagree strongly with the suggestion by cable companies that

[17] Public Knowledge at 5.

[18] See AT&T at 1.

[19] E.g., Comcast at 26.

[20] E.g., Verizon at 3; Sprint at iii. CenturyLink and AT&T incorrectly argue that a duopoly is competitive. CenturyLink at vi; AT&T at 51-52. The correct scope for geographic markets is discussed in Section 0.

[21] E.g., Comcast at 2. See also NCTA at ii-iii.

[22] NTCA variously argues that cableco BDS services cannot be regulated. NTCA at iv-vi. BDS services are Title II, and can be regulated. The fact that a cableco is offering the Title II services does not defeat regulation. See also generally, Charter comments.

they can unilaterally define various BDS offerings a "private carriage" in order to exempt them from Commission oversight.[23]

AT&T argues against regulation of Ethernet services. AT&T asserts that Ethernet providers' share of ports is so small that none have market power.[24] But the analysis on which AT&T relies looks at the entire U.S. market share,[25] rather than on any geographically relevant market. It also fails to account for the ubiquitous infrastructure (poles, conduit, rights-of-way) that the ILEC has in place and can access more easily than many other potential competitors to expand the reach of its Ethernet BDS.

Verizon proposes automatic different treatment for packet-based BDS.[26] Sprint does as well.[27] As discussed in Consumer Advocates' comments, the **functional** speed of 50 Mbps – rather than a TDM/packet switched distinction – is a more accurate measurement of whether there is competition.[28]

III. THE DATA CONFIRM CONSUMER ADVOCATES' VIEW THAT THERE IS LIMITED COMPTITION FOR BDS.

As Ad Hoc states, "[T]he ILECs continue to dominate the market for special access or 'BDS' services, be they TDM or packet, and they have used their market power to raise prices above the levels that a competitive market would produce."[29] These conclusions support Consumer Advocates' position.[30] Windstream – "the nation's fifth largest ILEC, and with

[23] Comcast at 15-16.

[24] AT&T at 31.

[25] See http://www.verticalsystems.com/leaderboards.

[26] Verizon at 4.

[27] Sprint at v.

[28] Consumer Advocates at 18-19.

[29] Ad Hoc at 1.

[30] E.g., Public Knowledge t 6-7; Consumer Advocates at 19-21.

substantial CLEC operations making it the nation's fifth largest provider of business data services and managed services…"[31] – also cites the "lack of actual, vigorous competition to the large ILECs…."[32]

While AT&T and some of the other ILECs once again try to steer the Commission toward reliance on "potential" competition based on proximity of competitor facilities, the Commission should be extremely cautious about predicting competitive entry based on the location of competitor fiber. Consumer Advocates strongly agree with Public Knowledge that "the Commission's regulatory framework for BDS should be based on actual competition, not the specter of potential competition."[33] Public Knowledge also aptly reminds the Commission that reliance on mis-specified indicators of potential competition formed the foundation of the now-discredited pricing flexibility rules for BDS.[34] Sprint, Windstream, and INCOMPAS all give convincing explanations of why the nearby location of competitor fiber may not equate with a legitimate opportunity to extend service.[35]

Consumer Advocates further agree that, in applying the competition test, the actual presence of only two providers should not be presumed to demonstrate the existence of effective competition, as proposed by CenturyLink et al.[36] The Commission has previously found that duopoly does not reliably serve to discipline prices.[37] According to the FNPRM, 99% of commercial buildings were served by one or two facilities-based competitors as of 2013.[38]

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[31] Windstream at 1.

[32] Id.; see id. at 5-7.

[33] Public Knowledge at 5.

[34] Id. at 5, 10.

[35] Sprint at 10-12; Windstream at 30-31; INCOMPAS at 8.

[36] CenturyLink, et al. ("Mid-sized ILECS") at v, 35.

[37] See Public Knowledge at 11, citing *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25

IV. THE ILEC REPRESENTATIONS ON COMPETITION ARE NOT BASED ON REASONABLE INTERPRETATIONS OF THE DATA.

Although AT&T and the "Mid-Sized" ILECs argue at length against the conclusion that they possess market power over BDS, their arguments cannot overcome the evidence regarding ILEC market power: Whether or not a 3.2% price effect on DS1s,[39] where there is a competitor serving a building in the census block. is "significant" is not essential to the Commission's findings. By a wide variety of other indicators, the ILECs have been shown to possess market power in the supply of BDS, particularly at speeds of 50 Mbps and below.[40]

Regardless, AT&T's conclusion – that a small differential in ILEC prices between allegedly competitive and non-competitive locations shows a lack of market power – is, in fact, implausible. A far more plausible conclusion is that ILEC market power is so strong and ubiquitous that ILECs do not need to reduce prices even in the face of competition. The public sales data summarized in the FCC's order show that ILECs dominate the market for DS1s and DS3s (especially DS1s).[41]

There is no evidence in this record or in the ILECs' tariffs for BDS to suggest that the ILECs price these services on anything but a uniform basis throughout a service area (state service territory or MSA). AT&T admits that it bills at the MSA level and complains that billing based on a pricing structure tied to a smaller geographic unit would be difficult to implement.[42] Thus, the conclusion to be drawn from the pricing difference between DS1s, both those that

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FCC Rcd 8622 (2010) (Qwest Phoenix Forbearance Order), ¶¶ 30-31, aff'd *Qwest v. FCC*, 689 F.3d 1214 (10th Cir., 2012).

[38] INCOMPAS at 3, citing FNPRM at ¶ 220.

[39] Notably AT&T does not address Dr. Rysman's findings for DS3s – which indicate a more robust 10.9% price effect.

[40] Sprint at 18-21.

[41] FNPRM at ¶¶ 216-218.

[42] AT&T at 23.

AT&T has associated with competitor presence and those without, is that AT&T and other ILECs are so dominant that they have been willing to sacrifice a minimal number of locations (and the associated revenues) to competitors, in exchange for maintaining supracompetitive prices in the vast majority of locations.

Other arguments by AT&T regarding the allegedly minimal price effects of competitor presence are also misplaced. For example, AT&T complains that the 3.2% price differential "would not even be considered evidence of market power under the Justice Department's well-established 'SSNIP' test."[43] But the SSNIP test compares prices under existing competitive conditions to potential changes when some amount of competition is eliminated. Here, ILECs have never faced effective competition, and none of their prices for DS1 and DS3 services reflect a competitive benchmark.

Consumer Advocates also disagree strongly with AT&T's suggestion that bringing down the prices for TDM-based BDS is wasted effort and that the costs to implement a price reduction tied to "such small competitive effects" outweigh the benefits.[44] TDM-based BDS continue to account for a substantial portion of the BDS market. The value to consumers of adjusting prices to just and reasonable levels, multiplied over several years, will far outweigh the public and private costs associated with implementing the Commission's market-sensitive proposal.

Just as with AT&T's claim of Ethernet coverage discussed above, which was based on national numbers, and not on a realistic view of how BDS competition works, the ILECs' other assessments of competition presume unrealistic geographic markets. For example, AT&T stresses how many competitors are within one-half mile of AT&T's facilities.[45] This ignores the

[43] Id. at 22.

[44] Id. at 23.

[45] See, e.g., AT&T at 2, 11-13.

cost of deploying up to a half-mile (2,640 feet) of connecting facilities. As discussed in Consumer Advocates' initial comments, these costs are significant enough to deter competition, particularly for lower-bandwidth BDS services.[46] The Commission should give little weight to the ILEC view, which – as exemplified in USTelecom's comments – seems to stress competitors' facilities deployment as the only true and lawful means to competition.[47] Meanwhile, customers and consumers suffer from the effects of the ILECs' market power.

V. THE LIMITATIONS OF THE VERIZON/INCOMPAS PROPOSAL PREVENT ITS ADOPTION.

Consumer Advocates are encouraged by the consensus principles summarized in a letter submitted just prior to the comment due date by Verizon and the CLEC organization INCOMPAS.[48] Consumer Advocates agree generally with many elements of the Verizon-INCOMPAS proposal, including:

- The use of capacity-based product markets and a census block geographic market for purposes of analyzing competition;
- The ubiquitous classification of BDS at 50 Mbps and lower[49] as non-competitive in all census blocks;
- Business Data Service between the thresholds specified above should be subject to a competition test.[50]
- Ex ante price regulation for non-competitive BDS;
- Periodic review of the classification framework;

[46] Consumer Advocates at 17-18. A June 30, 2016 ex parte from Windstream confirms that there are "few wholesale alternatives" for last-mile access. https://ecfsapi.fcc.gov/file/107050545200966/2016-07-05%20Ex%20Parte%206-30-16%20Meeting%20[Redacted].pdf.

[47] USTelecom at iii.

[48] Letter from INCOMPAS and Verizon, filed as ex parte submission in WC Docket Nos. 16-143 and 05-25, June 27, 2016. ("I-V Joint Framework")

[49] The I-V Joint Framework actually indicates agreement only "that the specific threshold should be no lower than 50 Mbps…." Id. at 2.

[50] INCOMPAS at 6.

- A one-time adjustment to account for the freeze under the CALLS settlement, with subsequent annual adjustments (including an X-factor adjustment); and
- Price reductions for packet-based BDS that are deemed non-competitive.

Consumer Advocates also support the view expressed by INCOMPAS in its comments with respect to measuring competition based on the presence of alternative providers in the census block, rather than the "consensus" position from the I-V Joint Framework. As INCOMPAS notes, "mere fiber presence is a poor proxy for competition in the provision of Business Data Services."[51]

Despite these benefits, the "broad framework"[52] nevertheless suffers from fatal flaws:

- It is not adequately supported;
- It is not adequately detailed; and
- Despite claiming to benefit consumers,[53] it does not adequately address the needs of consumers. The Consumer Advocates comments, Public Knowledge comments and, indeed, Ad Hoc comments show the extent of consumers' concerns.[54]

As noted above, given its late entry in the record, at this point the I-V Joint Framework lacks wide support, even among their respective segments of the industry.[55] The proposal is very briefly described in an ex parte letter and is not fully explained. It is presented as a "broad

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[51] INCOMPAS at 8. INCOMPAS' comments elaborate by saying:

The fact that a competitor has deployed fiber that runs near a building does not mean that the competitor has a splice point close enough to deploy a connection to a customer. Thus, the presence of fiber in the vicinity of a customer location provides no indication as to whether the carrier has any ability to, or interest in, using the fiber facility to serve the customer. In fact, an analysis of the fiber deployment data provided in response to the mandatory data request shows that there are four or more competitors with fiber in over 540,000 census blocks in which no customer purchased even a single Business Data Service circuit as of 2013.

Id. See also, Sprint at 9-11.

[52] Id. at 1.

[53] Id. at 2-3.

[54] Se ITTA at 2-3 for industry opposition.

[55] In granting a two-week extension of the reply comment date here, the FCC noted, "Petitioners cite a number of factors in support of their request, including the voluminous record and a desire for more time to review and consider the Verizon/INCOMPAS proposed framework." DA 16-830.

framework" and does not include sufficient detail or analysis for the Commission to conclude that it is reasonable.[56]

For example, the framework's adoption of the census block as the default measurement of competition, as discussed in Consumer Advocates' comments,[57] ignores the areas where a building-by-building approach is needed, including areas served by Verizon or by INCOMPAS members.

Finally, the major violation of technological neutrality in the framework – the automatic differing treatment of TDM and packet-switched BDS – cannot be ignored. As Consumer Advocates argued, technological neutrality dictates treating both services the same.[58]

VI. THE COMMISSION SHOULD NOT DISTINGUISH MARKETS BY CUSTOMER TYPE.

Consumer Advocates had stressed that the BDS CMT should not distinguish between customer classes, e.g., wholesale vs. retail.[59] As Ad Hoc states,

> Categorizing services for purposes of regulation according to the nature and characteristics of the customers that purchase them serves no purpose. The identity of the customer does not play a significant role in determining the costs and available revenues for a competitor deciding whether to deploy facilities nor can it change the economic characteristics associated with competitive supply.[60]

None of the comments seriously support using customer-type markets.[61]

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[56] See the three-page I-V Joint Framework.

[57] Consumer Advocates at 17-19.

[58] Id. at 11-12.

[59] Consumer Advocates at 18.

[60] Ad Hoc at i.

[61] See, e.g., AT&T at 47-50.

VII. THE COMMISSION SHOULD USE THE SMALLEST ADMINISTRATIVELY-FEASIBLE GEOGRAPHIC MARKET.

Like Consumer Advocates, parties other than the ILECs generally support most aspects of the Commission's proposed competition test. There is widespread agreement that the geographic market is legitimately defined at the building level, although most parties are willing to accept a slightly larger market definition (i.e., census block) for purposes of administrative efficiency. Public Knowledge supports such an approach.[62] Verizon concedes the use of census blocks is appropriate,[63] but opposes the "administrative headaches and other shortcomings of a building-by-building" approach.[64] Verizon does not, however, address the use of buildings in specific situations.

VIII. THE PRICE CAP SYSTEM SHOULD BE REFORMED.

There are two key steps that Commission should take to restore the prices of non-competitive BDS services to just and reasonable levels under a price cap system. The first is to roll back rates for such services, as discussed above. The second step is to ensure that, going forward, the price cap indices capture productivity gains. The Verizon/INCOMPAS proposal recommends a 4.4 percent productivity factor, a number that several parties endorse as reasonable.[65]

AT&T vigorously opposes both the initial adjustment of rate levels and the development of any BDS-specific X-factor, arguing that the Commission's FNPRM does not provide

[62] Public Knowledge at 8-10.

[63] Verizon at 10-11.

[64] Id. at 3.

[65] Verizon/INCOMPAS Proposal at 2; see Windstream at 62; Sprint at 54. Windstream and Sprint indicate that the productivity offset, going forward, should be "at least" 4.4%.

sufficient justification for either adjustment.[66] As noted earlier, however, Sprint did provide detailed analyses in support of these adjustments (which are significantly higher than the estimates actually put forth by AT&T). Moreover, throughout the extensive course of this proceeding, including when there was better access to ILEC-specific financial data, parties such as Ad Hoc provided evidence of the magnitude of overcharges for BDS subject to pricing flexibility, rather than the price cap rules. Thus, Consumer Advocates urge the Commission to reject AT&T's renewed arguments against a meaningful adjustment in BDS rates and a going-forward resumption of the price cap regime, with an X-factor of at least 4.4 percent.

Even if the Commission were to conclude that the present record does not permit it to determine the prior-period productivity factor adjustment or its going-forward level, this should not prevent the Commission from adopting immediate interim relief. Consumer Advocates agree with Ad Hoc that "[t]o protect ratepayers from the continuing impact of those rules while the process for revamping them continues, FCC must undo the rate increases imposed by the ILECs while the discredited rules were in effect"[67] both for BDS that have remained under price caps[68] and also for BDS that were subject to Phase II Pricing Flexibility.[69] As Ad Hoc explains, for BDS provided pursuant to tariffed rates, this is a fairly straightforward adjustment.[70] Regardless, the adjustment of rates and adoption of a new productivity factor, as described above, should not be delayed by more than a very brief time. ILECs have succeeded in prolonging this proceeding for more than a decade (nearly fifteen years, if one starts from the filing of the AT&T petition

[66] AT&T at 53, 62.
[67] Ad Hoc at 9.
[68] Id. at 15-17.
[69] Id. at 13 ("Mechanically, this change can be made by replacing the prices in the pricing flexibility sections of the ILECs' special access tariffs with the prices for the equivalent price caps regulated service.".).
[70] Id. at 13.

when AT&T was an Interexchange Carrier and a CLEC), by insisting on the existence of competition where there was none, withholding meaningful data, and employing other delaying tactics. Having concluded that the BDS rates under pricing flexibility are not just and reasonable, the Commission must move as quickly as possible to lower these rates for the benefit of consumers.

Consumer Advocates also would call attention to an important point made in passing by Ad Hoc: that, despite a clear record that establishes BDS overpricing over the past decade, the Commission is not proposing to order refunds. Consumers (directly and indirectly) will not recoup the economic harm that has been done to them in the past. With this in mind, it is especially important that the Commission not waste any additional time seeking an elusive precision with respect to the X-factor and adjustment factor. Moreover, if the Commission adopts Ad Hoc's proposal with regard to an immediate, interim adjustment factor, the ILECs are certain to speak up if the adjustment, upon further analysis, is shown to be too large. However, as Ad Hoc points out, [b]ecause no corresponding "sharing" or refund mechanism remains in the price caps plan to protect customers in the event the final PCI adjustment is delayed, the Commission's interim adjustment should err on the side of a larger, rather than smaller, adjustment." [71]

On a related matter, Consumer Advocates agree with Windstream that the Commission needs to take proactive steps to prevent ILECs from adopting anticompetitive approaches to implementing the price cap reductions. Windstream proposes that:

> In addition, to mitigate the potential for anticompetitive behavior and to ensure that price cap reductions flow through to wholesale purchasers, including those purchasing through optional tariffed discount plans, the Commission should also establish a rule that no DS1 or DS3 rates, whether the "rack" rate or a rate under

[71] Id. at 18.

> an optional plan, can increase. This is similar to the safeguards the Commission adopted for intercarrier compensation reform in which it capped price cap carriers' interstate access rate elements and did not permit them to increase. If the Commission does not take this step, it is possible that a price cap carrier could increase some rates—such as eliminating the optional plans used by many wholesale purchasers—while lowering "rack" rates or even rates for services within the special access basket, but outside the DS1 and DS3 service bands."[72]

If ILECs are permitted to offer contract prices that are lower that their tariffed or "rack" rates (as is reasonable under current market conditions), they should not be permitted to exploit the "headroom" thus created to raise other customers' prices. As Ad Hoc explains:

> To prevent anti-competitive cross-subsidization between competitive and non-competitive services in the same price caps basket, the Commission must require that carriers choosing to exercise downward contract pricing authority remove contract revenues from the relevant price caps basket for purposes of determining the actual price index ("API") and price caps index ("PCI") for the affected basket.[73]

The Commission has already started to see protests against ILECs that, in implementing the BDS Tariff Order directives, they have adopted various approaches that harm consumers and competition.[74] The Commission must be diligent in setting rules that discourage further attempts along these lines.

[72] Windstream at 62.

[73] Ad Hoc at 15.

[74] See Petition of Windstream Services, LLC, INCOMPAS, EarthLink, and Sprint Corporation to Reject or Suspend and Investigate Verizon Transmittal No. 1335 (filed July 8, 2016); Petition of Birch Communications, Inc., EarthLink, Inc., INCOMPAS, Level 3 Communications, LLC, Sprint Corporation, and Windstream Services, LLC to Reject or Suspend and Investigate AT&T Transmittal Nos. 539, 1847, and 3428 (filed July 8, 2016); Petition of Windstream Services, LLC to Reject or Suspend and Investigate, and Request for Confidential Treatment Pursuant to 47 C.F.R. §§ 0.457 and 0.459; Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1847; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Transmittal No. 539; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Transmittal No. 3428.

IX. THE COMMISSION SHOULD NOT ADOPT ITS BENCHMARKING PROPOSAL.

Public Knowledge correctly opposes the Commission use of current Ethernet rates as a benchmark.[75] Consumer Advocates objected to the use of benchmarks more generally.[76] Public Knowledge's proposal that "the Commission should make downward adjustments to incumbent LEC TDM rates before using them as the benchmarks for reasonable Ethernet rates"[77] is consistent with Consumer Advocates' argument to re-initialize rates and then work out details for the future.[78]

X. THE COMMISSION SHOULD ADOPT ITS PROPOSED DEFINITION OF BDS.

Consumer Advocates supported the FCC's proposed definition of BDS.[79] AT&T challenges the Commission's exclusion of "best efforts" service from BDS, saying the distinction "ignore[s] the real world fact that customers frequently do choose best efforts services over higher priced services with performance commitments."[80] The real world fact is that the Commission must consider the public interest, not just the interest of those who are able to exercise their market power.

[75] Public Knowledge at 12-13.

[76] Consumer Advocates at 6, 28.

[77] Public Knowledge at 12.13.

[78] Consumer Advocates at 31.

[79] See Id. at 10-11.

[80] AT&T at 47.

XI. THE COMMISSION SHOULD ALSO REFORM TERMS AND CONDITIONS.

Consumer Advocates continue to recommend that restrictions against terms and conditions that have a negative impact on competition should apply to BDS in both competitive and noncompetitive markets. Contracts are likely to combine BDS from both types of markets. These terms and conditions interfere with competitors' ability to vie for customers even at buildings where entry might otherwise be feasible. The Commission understands that the best route, in the long term, to being able to do away with price regulation is to establish conditions under which the BDS market will become competitive.

Other commenters come to the same conclusion. Public Knowledge explains in detail how minimum commitment contracts impede competition and subject customers to higher prices.[81] Windstream discusses how ILECs abuse shortfall penalties and early termination fees to inhibit competition.[82] Consumer Advocates had supported the FCC's decision to extend the findings in the Tariff Review Order – that certain practices are unjust and unreasonable – to the BDS rules.[83] AT&T opposes any such rules.[84] Again, AT&T relies on its unproven claim that the BDS market is robustly competitive, but this argument should be rejected.

XII. PUBLIC DISCLOSURE SHOULD BE MANDATED.

Consumer Advocates had agreed with detariffing if public disclosure were mandated, because public disclosure would enhance competition.[85] Windstream also recommends that non-

[81] Public Knowledge at 13-15 (specifically discussing the anticompetitive effects of ILEC percentage commitment terms).

[82] Windstream at 67.

[83] Consumer Advocates at 6-7.

[84] AT&T at 71-80.

[85] E.g., Consumer Advocates at 14. CenturyLink supports "permissive" detariffing. CenturyLink at vii. Such permissive action ensures that each ILEC will choose the path best suited for its interests, not those of customer.

disclosure requirements in ILEC contracts should be eliminated, particularly insofar as they pertain to disclosure to the Commission.[86]

Ad Hoc raises the point that:

> [T] he FNPRM asks whether the Commission can eliminate tariffs (using its forbearance authority) and still have a price caps system to regulate prices. It cannot. The price caps rules do not dictate what rates the ILECs can charge; they are not a rate prescription. They are merely a tariff review mechanism. They determine when a tariff investigation will be triggered when carriers file rate increases. They do not prohibit increases and they do not set rate levels. Without tariffs, the price caps rules would have no effect on pricing.[87]

AD Hoc's valid point applies, however, to the current price cap rules. It should be possible to substitute "publicly noticed" for "tariffed" in the enforcement mechanism of new BDS price cap rules.

AT&T objects to any requirements for disclosure in "competitive" areas.[88] It states,

> By definition, competition will ensure that the terms and conditions governing the sale of BDS are just and reasonable. Prohibitions on the use of particular terms and conditions could only reduce the tools available to buyers and sellers of BDS in competitive markets that could be used to develop innovative and mutually beneficial arrangements for BDS, and thus by definition could only undermine the implementation of the most customer-friendly arrangements.[89]

Consumer Advocates assert that any loss from the incumbents' tool-chest will be outweighed by the benefits of public disclosure.

XIII. CONCLUSION

The Commission must act now to reform BDS rates, terms and conditions. As Public Knowledge states, "[A] functioning BDS market, with reasonable rates, terms and conditions,

[86] AT&T at 78.

[87] Ad Hoc at ii.

[88] AT&T at 81.

[89] Id.

would spur a virtuous cycle of demand, innovation, and investment."[90] USTelecom, in opposing such reform, states, "[O]ur ability to continue to innovate and lead the world in broadband deployment … hangs in the balance."[91] USTelecom's opposition to reform is wrong, but its assessment of the importance of BDS is correct.

AT&T claims that reforming the price cap structure will give "customers an artificial incentive to remain on … legacy networks."[92] The data shows that the current situation is artificial in that it allows incumbents to overcharge for the use of their networks, resulting in pricing that would not occur in a competitive market.

Consumer Advocates also contest the argument that realigning prices for TDM-based BDS is unnecessary or even counterproductive in light of Commission policies to support an IP Transition.[93] Consumers, not incumbent LECs, should be the ones to determine the pace of migration to packet-based BDS. As the Commission has documented, consumer demand for TDM-based BDS remains strong.[94]

For all these reasons, Consumer Advocates urge the Commission to revise the BDS structure.

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[90] Public Knowledge, at 3.

[91] USTelecom at iii.

[92] AT&T at 7.

[93] See Id. at 1.

[94] FNPRM, ¶ 7.

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