EMBARGOED UNTIL DELIVERY

DISSENTING STATEMENT OF COMMISSIONER MIGNON L. CLYBURN

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Technology Transitions*, GN Docket No. 13-5; *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

We have heard a lot of talk in recent months about protecting our nation's small businesses —the backbone of the American economy. Yet it is these very businesses — the mom & pop hardware store, the family-owned wireless provider and the small rural hospital, that just drew the short straw. Instead of looking out for millions of "little guys," the majority has again chosen to side with the interests of multi-billion dollar providers.

Call it whatever you want — business data services (BDS) or "special access"— what this Order does is open the door to immediate price hikes for small business broadband service in rural areas and hundreds of communities across the country. Cash strapped hospitals, schools, libraries, and police departments will pay even more for vital connectivity, and soon we will see pressure on our Rural Healthcare and E-Rate fund budgets, resulting in less bandwidth for our schools, libraries, and rural healthcare institutions. The promise of realizing more bang for our Universal Service buck in the Connect America Fund II and the Mobility Fund II reverse auctions, will not be realized, which will mean less broadband to consumers, for a higher price tag. This order puts a hefty nail in the coffin of wireline competition, undermining the market-opening goals of the 1996 Telecommunications Act, and paving the way for less competition and more industry consolidation. I should not be surprised by any of this. After all, this is Industry Consolidation Month at the FCC.

I am not the only one expressing concern about this Order. Members of Congress, industry, the Small Business Administration Office of Advocacy, and even the European Union have substantial concerns about the direction and impact of this item. But, when the goal is deregulation at all costs, I am not surprised that those calls fall upon deaf ears.

Most heartbreaking, is that today's action ruthlessly targets areas that most desperately need help. The last time we deregulated this broadly, there were price hikes as high as 67%. Markets in distressed rural communities that have been federally designated as economic empowerment zones are expected to bear the brunt of this Order. Low-income, rural counties in the Mississippi Delta, Kentucky, and Texas are deemed "competitive" for every piece of business connectivity in the county. The American economy has already lost $150 billion over the past 10 years as a result of improperly calibrated business broadband regulation and this Order sets us on a path to lose even more. And just where does the buck stop? At the wallets of every American consumer.

This is a 186 page all-out assault on America's small business, schools and local economies that at a minimum, deserved the benefit of better data collection, and a more thoughtful approach. But in the rush to deregulate, the leadership, providing as much notice as a run-away train, opts to adopt a framework that relies on faulty data and lackadaisical market

analysis to come up with an ineffectual competitive market test, calibrated to deregulate as broadly as possible. The order upends decades of competition analysis, by defining a particular market as competitive when there is only one provider in a market and the mere possibility of a second entrant. Unfortunately, this is not a "typo." The mere presence of a second nearby potential business data service provider that is located a half a mile away is deemed a competitor whether they plan to serve an area or not.

Almost every aspect of this Order fails basic Administrative Procedure Act (APA) requirements much less remedial economic theory. Therefore I must vociferously dissent.

Data

To begin with, the Order uses bad data to arrive at a number of unfounded conclusions. About six months ago, several stakeholders argued that the four year-old snapshot data the Commission used to underpin its market analysis was stale. Multiple members of Congress also expressed concern about rushing forward using existing data.

And while it is true that we have seen the cable industry enter into the BDS market, what we have also seen, is significant consolidation including: Altice-Cablevision, Charter-Time Warner Cable-Bright House, Verizon-XO, Windstream-EarthLink, CenturyLink-Level 3. Yet, *the Order uses as its justification to deregulate the existence of competitors that no longer compete in the market, and the fact those former competitors have been purchased by the very incumbents they are supposedly competing against, magically gets lost in the analysis.* Mark my words, we will see more, not less, consolidation as a result of this Order.

The Order compounds its illogic, by using new data wholly inadequate for the market analysis it purports to undertake. Parties in the proceeding argue that modifying our Form 477 data collection would solve the insufficiencies with our 2013 data collection. Rather than make this change, the majority uses the existing residential cable data as a proxy for entry in the business data services market. One 200 kbps best-efforts residential cable connection in a census block is sufficient for the Commission to say that the entire census block is served with business-grade cable broadband. This is like saying because one house in a census block has a dirt road, we assume the whole census block has an interstate highway running through it, and copious well-paved roads to access that highway.

This approach not only goes against common sense, but runs counter to the way the Commission has conducted overlap analyses and challenge processes in the high-cost universal service context. Indeed, just last month, the Commission underscored the need for further proceedings due to the ineffectiveness of the Form 477 data in accurately portraying competition.

Market Analysis

The Order styles its market analysis according to antitrust principles, but fails to follow some of the most basic principles underlying market analysis. As to the product market, there is no analysis of cross-elasticity of demand, and no analysis as to whether a dominant firm can

impose a small but significant non-transitory increase in price (SSNIP). These errors carry over into the geographic market definition as it relates to new entrants.

The Commission treats all BDS offerings as a uniform product market rather than as distinct sub-markets. This undermines one of the fundamental principles of market analysis: that the relevant product market include all firms selling reasonably interchangeable products from the perspective of consumers. According to the majority, everything from a multi-location 100 Gigabit connection for a giant multinational corporation, to the facilities associated with a single 1 Megabit best-efforts internet connection to a home business is in the same product market. Common sense would suggest that this is not so, and that a SSNIP for a 100 Gigabit connection would not result in a customer switching to a 200 kilobit best-efforts connection. It would be like saying a 400-seat commercial passenger jet is in the same product market as a single-seat propeller plane.

The services the majority includes as potential substitutes are also overly broad. For example, retail services sold using the incumbent's infrastructure are deemed substitutes for the incumbent's services. Legacy low-bandwidth services are also considered substitutes for high-bandwidth IP services, when it is clear that the substitution points only one direction. Services that are incapable of providing the high quality of service demanded by many customers, including Ethernet-over-HFC, and best-efforts Internet infrastructure are also deemed substitutes. The evening before the meeting, even satellite broadband was added to the analysis of the product market, despite no party explicitly raising it as a potential substitute in the record. To be clear, some businesses do buy these products, but casually asserting that these all may be substitutes for the others fails the reasoned decision-making requirements of the APA.

Finally, the geographic market is overly broad. It is a hallmark of antitrust analysis to consider "the commercial realities" of the industry when determining the geographic market. The majority completely ignores the demand-side view of the market, which clearly suggests that the size of the geographic market is the customer's building because such customers are unlikely to move their office in response to a SSNIP. From the supply side perspective, competition indeed has material effects within some relatively narrow distance from the building. But the incumbents' use of building-by-building price lists, belies the notion that the market is much broader than that, much less that competition has material effects within the range of half a mile.

The majority simply ignores market realities for low-bandwidth services in analyzing the geographic market. When you are talking about single-location low-bandwidth services, it is almost impossible to get competition to enter the market. The evidence in the residential market backs this up.

We hear stories of companies refusing to extend their network half a mile, unless the consumer pays $60,000 in construction costs up front. And that is on top of the monthly service charge. Then, there are the aggressive network upgrades and marketing tactics employed by incumbents to retain customers. One only has to look at the case study of Google Fiber to see how difficult it is to make significant entry into this market.

If the majority just looked at actual data, they would see a highly-concentrated market. An independent analysis of the market pegs the Herfindahl-Hirschman Index score for the BDS market at around 5000 in 99% of census blocks, far above the 2500 threshold for a market to be considered highly concentrated. Even relying on our own 2013 data collection, and under relatively broad market analysis, we see that 77% of buildings have no facilities-based competition. And, even if we took the seriously flawed market definition in the Order at face value, 69% of buildings have at most two providers. And this analysis includes as "competition" when there is only one line into the building, but that line is leased to a competitive provider. Prior staff regressions show market power in the supply of DS1s and DS3s even when competitors were relatively close by, and that competitive effects were generally not felt beyond a quarter of a mile. Yet those regressions merit no mention in this Order. And what percentage of buildings with BDS demand does this Order retain price controls for? Less than 10%.

But, perhaps the simplest and broadest example that there is significant market power in this market, is that incumbents have operated at their price caps for BDS for the past five years. This means that for several years, where an incumbent lowers prices in one place, it raises them in another in order to maximize overall revenue. If they faced the vigorous nationwide competition they asserted, they would be unable to raise prices to bump up against the cap. Yet, the majority says it disagrees with these facts. It uses voodoo economics to suggest that the price caps may be set too low. But these assertions are belied by carriers' suggestions in their SEC filings that these legacy special access services are high margin services.

And this is all completely separate from the assertions that all transport and all packet-based BDS is competitive. While it is clear that some transport is competitive, like transport in New York City, merely asserting that it is competitive nationwide does not make it so. And asserting that all packet-based services are competitive feeds into the fallacy that somehow changing the electronics on either end of a piece of fiber magically makes that fiber strand subject to competition.

Practically, finding the transport market competitive provides a safety valve for incumbents looking to raise prices even in areas that are deemed noncompetitive. If the incumbent is the only game in town for a DS1, and the Commission's market test agrees, the incumbent can still charge supra-competitive prices for a finished connection, since unsophisticated entities likely will not contract separately for the channel termination and transport. This is exacerbated by the quick transition to a detarriffed world, since it is entirely possible that an incumbent will no longer choose to offer a channel termination separate from transport. Will a small Tribal library be assuaged that their channel termination is available at regulated rates, if the transport to the nearest urban center is a monopoly facility, and accordingly priced? I do not think so.

And practically, finding the packet-based BDS market competitive means that buildings without facilities-based competition will continue to face supra-competitive rates until another packet-based competitor comes along. For those outside urban centers, that may be a long time coming.

Competitive Market Test

Given all of these egregious errors in market definition and analysis, it comes as no surprise that the competitive market test is over-broad. Those 77% of buildings without facilities-based competition? Most will be deregulated. Recall that we are only talking about channel terminations here, all packet-based services, higher-bandwidth services, and transport services are deregulated without even the pretense of determining whether there is actual competition.

Even when it does go through the motions of a competitive analysis, the Commission for the first time says that a single market participant is adequate competition, as long as there is the possibility of another provider entering the market. This overturns decades of precedent, without a whisper of recognition that it is doing so. It is like saying that there is competition in the grocery market where there is a single supermarket serving an area, and sufficient commercial real estate for another supermarket to enter if it so chose.

Even if we accept this flawed market analysis, both prongs of the competitive market test have serious flaws.

Channel terminations are deregulated if 50% of the locations with demand in that county are within a half-mile of a location served by a competitive provider. Recall that since unbundled network elements are included as substitutes in the market analysis, it is possible for a county to be found competitive even if a competitor has absolutely no facilities in that county. Even if it does, this analysis also completely ignores whether the competitive provider can actually serve any of the locations in a county because of the lack of a suitably placed fiber splice point.

Channel terminations are also deregulated if 75% of census blocks in a county are "served" by a cable provider per our From 477 data. This means that a handful of low-speed consumer-grade cable connections in a county are sufficient to deregulate every business-grade connection in the county. No effort is even made to determine whether the cable company even offers or can offer business solutions in the county. Again, a single dirt road is treated as a comprehensive transportation system for the purposes of analyzing competition.

Further Actions to Consolidate Market Power

Tellingly, the Order states that where the Commission mistakenly granted incumbents the ability to raise prices, this Order will not require them to lower them even if the competitive market test finds the market non-competitive. Legacy pricing flexibility triggers were found seven years ago to be both over- and under-inclusive. Now, even in areas where we acknowledge to be uncompetitive, we still allow incumbents to utilize monopoly pricing. This simply makes no sense.

It comes as no surprise, then, because the majority makes clear that it does not want to hear about anti-competitive practices in the BDS market. The Order limits transparency by permitting non-disclosure agreements in contracts that would prohibit wronged entities from coming to the Commission with evidence of wrongdoing. To be sure, it bans them in the small number of areas the competitive market test finds noncompetitive. But, an admittedly minimalist market test is likely to understate competition, and result in areas where competition can be

effectively blunted via anticompetitive terms and conditions. And because of the majority's actions today, there will be no recourse to complain to the Commission.

Even in non-competitive areas, the majority declines to take action against anticompetitive conditions in contracts and tariffs. These include all-or-nothing requirements, which preclude purchasers from selecting purchase options generally available in tariffs to all customers. Or, punitive shortfall and early termination penalties that exceed expectation damages which will lock up the market and force purchasers to stay in contracts. And finally, there are tying arrangements that require a purchaser to buy competitive services in conjunction with noncompetitive services. Particularly in an effectively deregulated nationwide market, these provisions could essentially be wielded to undermine nascent competition and to consolidate market power.

The Order also twists precedent to find that certain common carrier services are indeed private carriage services. The majority largely ignores the most recent court-upheld analysis of what constitutes common carriage articulated in the Commissions *2015 Open Internet Order*. Instead, it strikes its own way forward, relying heavily on the individualized negotiation prong of *NARUC I*, glossing over that individualized dealings are expressly permitted under a common carrier framework. Indeed, the fact that rates and contracts are individualized do not automatically result in the carrier being classified as a private carrier. Carriers that are offering the exact same type of service, using the exact same technology, are deemed by this Order to be common carrier services, while certain cable services are deemed private carriage. Competitive parity and technological neutrality apparently have no place here. There is lip-service mention that the same analysis would apply to other offerings that look like private-carriage, but no mention of what would happen to offerings that look like common carriage.

Regarding wholesale price protections, this Order also fails. It is clear from every shopper who goes to a wholesale store that when you buy wholesale, the price is better. It is a symptom of an ill-functioning market when that is not the case. But providers have clearly made the case in the record that they are being charged as much or more for a wholesale connection as a retail customer would pay for the same connection. If this is not symptomatic of the exercise of market power, I do not know what is.

Practically speaking, the lax interpretation of what constitutes private carriage and the lack of wholesale price protections will have impacts in the marketplace that will raise the costs of service for residential users. Last-mile providers that rely on BDS for backhaul are likely to face price squeezes, refusals to deal, and ultimately, higher costs. These costs will be either passed along to consumers or the universal service fund, or in extreme the last-mile provider will close up shop.

There is also no more than a six month glide path for BDS customers who will experience rate shock as a result of this Order. Historically, for both economic regulation and deregulation, changes have been phased in to protect consumers and rational business planning. And where prices may rise by up to 67%, like they did when the Commission permitting upward pricing flexibility, this Order hardly does anything.

Indeed, one carrier has *already* noticed its intent to raise prices its DS3 private line prices by 15% in several states. This is evidence that now-tariffed services can be changed on a dime and deemed lawful, with no protection for customers or competitors. Even in contract tariffs, change of law provisions would open them up to change relatively quickly, and some do not even contemplate the possibility of a tariff ceasing to exist. In the same vein, this Order also does not extend the wholesale platform protections that would have eased the transition to new market realities.

Finally, I am unsure whether this Order comports with our nation's treaty obligations. Under the WTO GATS commitments, we must ensure price and service information transparency regardless of competition, that rates are cost-oriented, and that appropriate protections are in place to prevent anti-competitive practices. For the reasons I have outlined above, I have serious doubts that we are living up to our obligations, particularly as it relates to low-bandwidth services in areas where there is little to no competition.

Conclusion

Make no mistake, these are highly complex issues and yet the conclusion I am forced to reach, is that this Order is one of the worst I have seen in my years at the Commission. It is abhorrent that the policy goal is deregulation at all costs, and the entire Order—facts, policy, and law—are all calibrated to achieve that goal. The Order as a whole is a dizzying departure from the underlying Further Notice that purports to provide the APA basis for this policy direction, and the majority's failure to grapple with contrary facts renders this Order arbitrary and capricious. Given the substantial likelihood of harm, I believe that the Order is at a substantial risk of judicial stay.

As I see it, this Order deepens the digital divide. Communities where competition is unlikely to ever develop will see substantial deregulation, so rural and poor areas will see prices go up without the hope of any relief. Today is a sad day for the proud small business owners across this great nation, for rural hospitals, schools, libraries, and police departments, indeed, for all consumers.

And while I disagree with the policy decisions made in this item, I nonetheless appreciate the staff of the Wireline Competition Bureau for your responsiveness to my office's many requests. These are very difficult issues, and your work ethic is commendable.