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**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Citizens Telecommunications, Petitioner, v. FCC, et al., Respondents.	No. 17-2296
Ad Hoc Telecommunications, et al., Petitioners, v. FCC, et al., Respondents.	No. 17-2342
CenturyLink, Incorporated, Petitioner, v. FCC, et al., Respondents.	No. 17-2344

MOTION FOR STAY PENDING JUDICIAL REVIEW

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July 3, 2017

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INTRODUCTION

The Court should stay, pending judicial review, the effective date of the rules the Federal Communications Commission (“Commission”) adopted in the order on review (the “*Order*”).¹ The petitioners are likely to prevail on the merits and the equities favor a stay of the rules scheduled to take effect on August 1.

In the *Order*, the Commission almost totally deregulated rates for the business data services (“BDS”) used by businesses like the members of petitioner Ad Hoc Telecom Users Committee. These businesses need service at many locations for applications that require lower bandwidth but guaranteed levels of performance and reliability not offered by residential broadband service. The incumbent local exchange carrier (“incumbent” or “ILEC”) is the only provider with a necessary “channel termination” connection into 86% of buildings with low-bandwidth demand, while another 13% are served by a duopoly. Despite this clear evidence of incumbents’ market power, the *Order* removes price regulation in more than 90% of buildings with BDS demand.

The competition problem is obvious. Economic conditions do not support building new connections to every building – a problem that is particularly acute for lower bandwidth services – but business customers demand seamless coverage

¹ *Business Data Services in an Internet Protocol Environment, etc.*, WC Docket Nos. 16-143 et al. (rel. Apr. 28, 2017) (“*Order*”).

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from incumbents or competitive carriers. Competitive carriers therefore must buy BDS from the incumbents in order to compete against them. These incumbent BDS services include both channel-termination connections into a customer building, and dedicated “transport” connections between the incumbent channel termination and competitors’ own networks. Petitioner Windstream derives roughly equal revenue from its incumbent and competitive operations, and both purchases and sells channel terminations and transport.

The *Order* permits the incumbents to raise prices or shut off access to these critical inputs, disabling competitive carriers as they battle the incumbents for retail customers. In turn, business customers face higher prices, lower quality, and less innovation.

Petitioners are likely to prevail on the arguments that the Commission erred (1) by arbitrarily and capriciously abandoning rate regulation for low-bandwidth BDS in more than 90% of buildings; (2) eliminating rate regulation of transport services everywhere; and (3) failing to provide adequate notice before sharply departing from the approach proposed in the notice of proposed rulemaking.

Competitive carriers will suffer massive, imminent, and unrecoverable harm. A stay will benefit business users that would otherwise suffer the absence of competition, especially small businesses and businesses with multiple locations. By contrast, maintaining the status quo will harm no one, including the incumbents

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that are currently charging regulated rates that guarantee more than a reasonable return.

BACKGROUND

The incumbents are the descendants of the monopoly telephone companies that controlled local telecommunications markets before the Telecommunications Act of 1996 welcomed competition.² That is why the incumbents' networks reach almost every building in the areas they serve. Because of their historical monopolies and continuing market power, these incumbents have long been subject to rate regulation and tariffing for BDS supplied over their legacy networks, which are typically offered at capacities below 50 Mbps.

The Commission has struggled to find the right test for determining where competition is sufficient to remove price regulation. In 1999, the Commission established "pricing flexibility" rules, which permitted deregulation of Metropolitan Statistical Areas ("MSAs") containing a predetermined level of non-incumbent investment. The Commission predicted that the presence of non-incumbent investment in part of an MSA would lead to robust competitive entry throughout the MSA.³ But the Commission eventually acknowledged this

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ *Access Charge Reform et al.*, 14 FCC Rcd. 14221, 14261-67 ¶¶77-83 (1999).

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prediction to be incorrect. In 2005, the Commission sought comment on its pricing-flexibility approach,⁴ and in 2012, the Commission suspended those rules.⁵ The Commission found that “competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry.”⁶ The Commission began collecting data to construct a better test.⁷

In the 2016 notice of proposed rulemaking leading to the *Order*, the Commission, using the data it collected, found that low-bandwidth BDS competition remains “stubbornly absent.”⁸ First, the Commission observed that *actual* BDS competition is practically non-existent: 77% of all BDS customer locations are served exclusively by the incumbent,⁹ as are 86% of locations with

⁴ *Special Access Rates for Price Cap Local Exchange Carriers etc.*, 20 FCC Rcd. 1994 (2005).

⁵ *Special Access Rates for Price Cap Local Exchange Carriers etc.*, 27 FCC Rcd. 10557 ¶1 (2012).

⁶ *Id.* at 10574 ¶36.

⁷ *Special Access for Price Cap Local Exchange Carriers etc.*, 27 FCC Rcd. 16318 (2012).

⁸ *Business Data Services in an Internet Protocol Environment etc.*, 31 FCC Rcd. 4723 ¶3 (rel. May 2, 2016) (“FNPRM”).

⁹ *Id.* ¶220.

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BDS demand at or below 50 Mbps (“low-bandwidth”).¹⁰ And 99% of low-bandwidth locations have nothing better than a duopoly.¹¹ Second, the Commission found direct evidence of incumbent market power in low-bandwidth BDS, corroborating substantial record evidence that economic conditions will rarely justify the construction of new facilities to reach the buildings of low-bandwidth customers.¹²

The Commission then proposed to construct a competitive market test (“CMT”) to define geographic and product markets and generate more granular and accurate competition findings.¹³

The new Administration, without issuing a new notice of proposed rulemaking, reversed course and dismantled the BDS regulatory regime almost entirely in the *Order* on review.

On June 23, petitioners sought a stay pending judicial review from the Commission. To ensure sufficient time for this court’s review of this motion, petitioners treat the Commission’s inaction as denial.

¹⁰ Letter from Windstream at 5, WC Docket Nos. 16-143 et al. (filed Oct. 21, 2016).

¹¹ *Id.*

¹² *FNPRM* ¶¶238, 288.

¹³ *Id.* ¶278.

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

Petitioners are likely to succeed on the merits because the Commission violated the Administrative Procedure Act (“APA”) by arbitrarily and capriciously (1) departing, without sufficient justification, from long-standing competition principles;¹⁴ and (2) failing to explain its decisions that run counter to critical evidence in the record.¹⁵ The Commission also failed to comply with the APA’s notice-and-comment requirements.¹⁶

A. The Commission Ignored Competition Principles and Commission Precedent.

The new CMT is the “methodology [used] to determine which local markets are sufficiently competitive to warrant deregulation.”¹⁷ The CMT treats an entire *county* as competitive if either (i) “50 percent of locations with BDS demand in that county are within a half mile of a location served by a competitive provider,” or (ii) “75 percent of the census blocks in that county have a cable provider

¹⁴ See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1209 (2015).

¹⁵ See *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005); see also 5 U.S.C. § 706(2)(A).

¹⁶ See *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1267 (D.C. Cir. 1994); see also 5 U.S.C. §§ 553(b) & 706(2)(D).

¹⁷ Order ¶130.

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present”: a test that would work anti-competitive outcomes if this Court concludes that either prong is likely to be struck down.

The CMT applies to certain low-bandwidth BDS only. Yet even though 86% of low-bandwidth locations have only one provider and another 13%, only two, the CMT declares that 90% of all locations with BDS demand are “competitive.” To do so, the Commission invented a new type of market participant: a so-called “nearby competitor.” This “competitor” does not meet any established meaning of the term, including under Commission precedent. The CMT then ignored precedent that duopolies do not provide effective competition. Thus, the CMT fails to satisfy the Commission’s stated goal of deregulation only where “local markets are sufficiently competitive.”¹⁸ The danger of this new theory is highlighted by the Commission’s boast that it applies to other markets¹⁹; if the Commission is right, the antitrust agencies and the courts have been wrong in steadfastly rejecting 3-2 and 2-1 mergers.²⁰

¹⁸ *Id.* ¶130.

¹⁹ *Id.* ¶120 n.369.

²⁰ *See, e.g.*, Complaint at 7 & 32, *United States v. Halliburton Co.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016) (where “customers would effectively face a duopoly after the transaction”); Plaintiff’s Memorandum of Law at 1 & 4, *FTC v. Ardagh Group, S.A.*, No. 1:13-cv-01021 (D.D.C. Aug. 28, 2013) (“merger to duopoly” was “presumptively unlawful”); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 128 (D.D.C. 2016) (enjoining two-to-one merger where parties “currently operate in the

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i. The CMT Counts Firms That Are Not Within a Properly-Defined Geographic Market.

Under traditional competition principles, the appropriate geographic market for assessing competition is the area within which customers can substitute other providers.²¹ The 2010 Horizontal Merger Guidelines, relied on extensively by the Commission,²² define competitors as firms that (i) currently earn revenues in the relevant market, (ii) have committed to making competitive offerings in the near future, or (iii) can enter rapidly (*i.e.*, “rapid entrants”).²³

The Commission did not seriously contend that either cable companies or competitive carriers like Windstream or BT meet any of these three requirements. First, the Commission admitted that the CMT does not require a currently-active competitor in the relevant market, which is why the term used is “nearby” and cable companies can qualify even if they are not supplying BDS at all right now.²⁴

relevant market as a ‘duopoly with a competitive fringe’); *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 17 (D.D.C. 2015) (enjoining two-to-one merger); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at *2 (N.D. Cal. Jan. 8, 2014) (enjoining two-to-one merger given evidence that parties “viewed themselves as operating in a ‘duopoly’”).

²¹ *Order* ¶39 (citing *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994)).

²² *Id.* ¶¶17, 19, 21, 49, 51, 66, 120, 127, 129.

²³ DOJ and the FTC, *Horizontal Merger Guidelines* § 5.1 (2010) (“2010 Horizontal Merger Guidelines”).

²⁴ *See Order* ¶119.

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Second, the Commission did not limit its test to companies committed to entering the market in the near future.²⁵ Third, the Commission expressly disclaimed any assertion that the challengers qualify as rapid entrants.²⁶

Instead, the Commission asserted that “over a period of several years,” non-incumbents “will in most cases place reasonably effective competitive pressure on the incumbent”²⁷ because “the high sunk cost nature of the BDS market gives providers the incentive to extend their network facilities to new locations with demand . . . over three to five years.”²⁸ But Commission precedent demonstrates that such entry is not sufficiently timely to justify a period of monopoly pricing.²⁹

²⁵ See 2010 Horizontal Merger Guidelines § 5.1.

²⁶ Order ¶120 n. 368.

²⁷ *Id.* The Commission also asserted that this level of competition outweighs the costs of regulation, *id.* ¶117, but, as we demonstrate, there is no basis for the Commission’s conclusion that even this untimely competition will arrive “in most places.”

²⁸ *Id.* ¶13.

²⁹ See e.g., *Application of EchoStar Communications Corp., etc.*, 17 FCC Rcd. 20559, 20616 ¶140 (2002) (requiring entry to be within two years in order to make a significant market impact); *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, 10 FCC Rcd. 7842, 7847 ¶22 (1995) (“potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors”).

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The Commission also completely ignored the facts specific to low-bandwidth BDS even though the CMT applies only to that service. First, the Commission failed to consider the realistic revenue potential of low bandwidth services. The record contains ample evidence, including a CostQuest economic model, documenting that buildout is infeasible for low-bandwidth BDS precisely because of the low anticipated revenues.³⁰ In a footnote,³¹ the Commission dismissed the CostQuest model, arguing that it only considers revenues from a single customer, while combined demand from multiple customers could justify buildout.³² But the study specifically considered the scenario in which “multiple lower capacity circuits are sold at each location”³³ and, nonetheless, found demand to be insufficient. Thus, it is not surprising that the Commission’s own findings

³⁰ *See, e.g.*, Declaration of John Merriman, Level 3 Communications, LLC ¶6, Comments of Birch *et al.*, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (it is “infrequently the case that Level 3 can deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or below ... because the distance between a customer location and a splice point ... usually exceeds the construction feasibility limits”).

³¹ *Order* ¶119 n.363.

³² *Id.*

³³ CostQuest White Paper #1 at 8, Attachment A to Letter from Windstream, WC Docket Nos. 05-25 et al. (filed June 8, 2015).

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show that a non-incumbent is more likely to be present in a building with high-bandwidth demand than in a building with only low-bandwidth demand.³⁴

Second, the Commission failed to consider the magnitude of investment needed to build out, such as the construction of new channel terminations and installation of necessary electronic equipment.³⁵ In light of the limited revenue potential of low-bandwidth BDS, it is especially telling that, as an authority cited by the Commission explained, “linking those last-mile connections through a wired distribution network[] is a costly endeavor.”³⁶ In addition, building owners may refuse to grant building access or it may be difficult or costly for potential competitors to obtain pole access rights or bury lines to a specific building.³⁷ The Commission considered none of this.³⁸

³⁴ *FNPRM* ¶3, 244.

³⁵ *See, e.g.*, Declaration of Dan Deem *et al.* ¶51, Attachment A to Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 21, 2016) (“Windstream June 28, 2016 Comments”).

³⁶ Organization for Economic Co-operation and Development, *The Development of Fixed Broadband Networks* 11 (2015), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP\(2013\)8/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2013)8/FINAL&docLanguage=En); *see Order* ¶120 n.370.

³⁷ Declaration of Jonathan B. Baker ¶¶39-40, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 14, 2016); Declaration of David Schirack and Mike Baer ¶18, Attachment A to Windstream June 28, 2016 Comments.

³⁸ *See Order* ¶¶44, 75, 92, 121, 130. Recently the Commission admitted that it does not know whether providers face a series of such barriers to buildout. *See*

Finally, cable operators themselves admit they will not and cannot commit to providing BDS in *any* significant quantity over their cable networks. They explained that offering BDS over their facilities would absorb vast amounts of limited network capacity needed for their core residential TV, phone, and Internet business.³⁹ This also demonstrates that cable investment in multi-use networks is not “sunk” as that term was used by the Commission: an “investment that has no value in an alternative use.”⁴⁰

ii. The CMT Wrongly Concludes That Duopoly Equals Competition.

Even if the Commission could establish the presence of a single non-incumbent in the relevant geographic market, it would be wrong to conclude that duopoly equals competition.⁴¹ As the D.C. Circuit has explained, “the existence of

Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No. 17-142 (rel. June 23, 2017).

³⁹ *See, e.g.*, Comments of Cox Communications, Inc. at 16-17, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (explaining that “the more ‘dedicated’ bandwidth is sold . . . the less bandwidth ‘headroom’ is available for all of the mass market and small businesses sharing the network and who generate substantially more revenue” than BDS).

⁴⁰ *Order* ¶127 n. 392.

⁴¹ *See, e.g., FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) (“In a duopoly, a market with only two competitors, supra-competitive pricing at monopolistic levels is a danger.”).

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a substitute does not necessarily preclude market power,⁴² and it is, of course, market power that thwarts competitive pricing.⁴³

The Commission’s 2010 *Qwest Phoenix Order* concludes that one competitor is insufficient to constrain incumbent pricing,⁴⁴ a direct contradiction of the *Order*. The Commission attempted to distinguish *Qwest Phoenix*, arguing that high sunk-network costs necessarily incentivize providers to extend their network facilities to new locations with demand,⁴⁵ but the facts discussed above do not support that theory⁴⁶ and, in any event, the *Qwest Phoenix Order* did not recognize any such limit on its conclusion. That a duopoly can produce competition, under hypothetical circumstances of homogeneous products and unlimited capacity,⁴⁷

⁴² *NetCoalition v. SEC*, 615 F.3d 525, 542 (D.C. Cir. 2010), *superseded by statute*, Dodd-Frank Act, 124 Stat. 1376, *as recognized in NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (quoting 2B Phillip E. Areeda *et al.*, *Antitrust Law* § 506(a) (3d ed. 2007)).

⁴³ *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984); *accord Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (“[M]arket power exists whenever prices can be raised above the levels that would be charged in a competitive market.”).

⁴⁴ *Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd. 8622, 8637 ¶30 (2010) (“*Qwest/Phoenix Order*”).

⁴⁵ *Order* ¶121.

⁴⁶ Section I.A.i, *supra*.

⁴⁷ *Qwest Phoenix Order* ¶30 n.88.

does not apply here; the Commission made no necessary factual findings⁴⁸ and, as noted above, capacity is limited.

Finally, the Commission claimed that a single non-incumbent will yield competitive prices. It again failed to cite any record evidence to support its conclusion that two are enough, and the academic sources on which it relies either find significant competitive benefits from additional entrants beyond the second provider or, to the extent they rely on high sunk costs as an incentive for buildout, assume that the incremental cost of providing service to each additional customer is low.⁴⁹ However, as explained above, a non-incumbent must incur substantial incremental costs to build out.

B. The *Order* Fundamentally Misapprehends the Nature of “Transport.”

The Commission eliminated regulation of transport rates nationally on the basis that a significant percentage of *customer locations* are within a half mile of

⁴⁸ Noting that cable companies in some places already are competitors, *Order* ¶121, says nothing about the likelihood that cable companies providing only residential broadband service in other places will offer BDS in a timely manner.

⁴⁹ See *Order* ¶120 n.369 (citing *Timothy F. Bresnahan & Peter C. Reiss, Entry and Competition in Concentrated Markets*, 99 J. of Pol. Reporter 977, 1006-07 at Figure 4 (1991) (showing that most of the increase in competition comes with the entry of the second and *third* firms)); *Id.* ¶120 n.370 (citing Allan Collard-Wexler, *Demand Fluctuations in the Ready-Mix Concrete Industry*, 81 *Econometrica* 1003, 1006 (2013) (“The first *three* competitors have a noticeable effect on prices”) (emphasis added)).

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competitors’ transport facilities.⁵⁰ But unlike channel terminations, which connect a customer location to an aggregation point on a provider’s network (an “end office”), transport services carry customer data traffic between different aggregation points on the ILEC’s network.⁵¹ Thus, for transport, *customer locations* are irrelevant. The correct analysis would consider where a competitive provider connects (or can feasibly connect) with incumbents’ end offices to provide transport services.⁵² The Commission failed to acknowledge this reality, and instead explicitly conflated the market analysis of channel terminations and transport.⁵³ But channel terminations and transport are distinct services, and the assumption that they involve the same facilities and competitive dynamics is wrong.

In addition, the *Order*’s transport conclusion creates an internal inconsistency that renders the Commission’s new framework arbitrary. Even where the CMT deems price regulation necessary, ILECs would be able to avoid that

⁵⁰ *Id.* ¶91.

⁵¹ *Id.* ¶¶77, 79 n.258 (“transport . . . refers to interoffice facilities”).

⁵² *See, e.g.*, Letter from Sprint Corporation to FCC, at 17, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017).

⁵³ *Order* ¶91.

regulation by simply raising rates on unregulated transport bundled with channel termination—a practice the *Order* acknowledges is commonplace.⁵⁴

C. The Commission Failed to Provide the Adequate Notice Required by the APA.

The Commission failed to provide adequate notice. While an agency may adopt final rules that differ “in some particulars” from its proposal, its final rules must be “a logical outgrowth of the one[s] proposed.”⁵⁵ Here, the *Order* fundamentally contradicted the proposal by (1) adopting a CMT that deregulates even more broadly than the flawed pricing-flexibility test that the Commission abandoned; and (2) deregulating transport entirely—all on the basis of assumptions that directly conflict with the findings in the *FNPRM*.

The *FNPRM* found that “competition is lacking in BDS at or below 50 Mbps in many circumstances.”⁵⁶ Against this backdrop, the *FNPRM* “propose[d] a test” designed to ensure that regulatory relief was not granted “too broadly to cover areas where competition is not present or unlikely to occur.”⁵⁷

⁵⁴ *Id.* ¶90 n.289 (ILECS “do not typically . . . charg[e] a customer separately for transport.”).

⁵⁵ *Horsehead.*, 16 F.3d at 1267.

⁵⁶ *FNPRM* ¶271.

⁵⁷ *Id.* ¶¶271, 290.

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The *Order* moved sharply in the opposite direction. With respect to channel terminations, the Commission adopted a test that deems 90% of locations competitive. With respect to transport, the Commission abandoned its proposal to adopt a more granular test by deeming the entire country to be competitive.

The Commission proposed nothing like the CMT. The CMT’s first prong deems an entire county competitive if 50% of buildings with businesses with BDS demand are within a half mile of a building served by a competitive provider. The *FNPRM* did not describe this test, let alone the rationale for it, providing commenters no ability even to determine how broadly such a test would sweep, much less to explain its defects.

The second prong deems a county competitive if 75% of census blocks are served by a cable provider, based on an assumption that the cable operator can build “new fiber connections” anywhere it provides best-efforts service, i.e., with no guarantees for performance or reliability.⁵⁸ But the *FNPRM* stated that this primarily *residential* service is not in the same product market as BDS,⁵⁹ and never explained or sought comment on its theory of wide-scale conversion from best-efforts to BDS, leaving no reason to anticipate that the Commission would then

⁵⁸ *Order* ¶¶31 n.100.

⁵⁹ *FNPRM* ¶¶190-96.

construct a test that deems a market competitive based exclusively on the presence of best-efforts cable facilities.

The Commission’s decision to deregulate transport services nationwide is more deficient. In the *FNPRM*, the Commission did not propose, or even suggest, that transport might be entirely deregulated. To the contrary, it stated that its new competitive market test would apply to transport services.⁶⁰ Commenters had no opportunity to critique an approach that would deem transport services to be competitive without regard to a CMT.

II. THE BALANCE OF THE EQUITIES FAVORS A STAY.

If the *Order* takes effect, petitioners will suffer substantial, imminent, and certain harm, without remedy, even if the Court ultimately vacates the *Order*. By contrast, maintaining the status quo pending review would not harm anyone, and serves the public interest.

A. Petitioners Will Suffer Irreparable Harm if the *Order* Takes Effect.

Higher prices for low-bandwidth BDS input services will drive up petitioners’ costs substantially and for many years, given their continuing reliance

⁶⁰ *Id.* ¶278 (“[W]e propose to abandon the collocation-based competition showings for channel terminations and other dedicated transport services for determining regulatory relief for [incumbents and] propose to apply a new Competitive Market Test.”).

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on low-bandwidth BDS⁶¹ and the incumbents’ use of long-term contracts.⁶²

Moreover, these higher costs usually cannot [REDACTED]

[REDACTED],⁶³ because retail-customer contracts [REDACTED]

[REDACTED].⁶⁴ Thus, petitioners must absorb the full brunt of incumbents’ price

increases for affected customer locations, resulting in millions of dollars of

unrecoverable added costs for services petitioners are contractually required to

provide.⁶⁵

For example, [REDACTED]

[REDACTED]

[REDACTED].⁶⁶ BT, [REDACTED]

[REDACTED]

⁶¹ Declaration of Jennifer Artley, appended as Attachment A (“BT Decl.”); BT Decl. ¶18; Declaration of Joseph Harding ¶8, appended as Attachment B (“WIN Decl.”).

⁶² BT Decl. ¶19; WIN Decl. ¶¶6, 13.

⁶³ Petitioners have designated confidential material as follows. In the body of the Motion, all text contained within red brackets is confidential and should remain under seal. In the body of the exhibits supporting the Motion, all text within the designations “*** **BEGIN HIGHLY CONFIDENTIAL *****” and “*** **END HIGHLY CONFIDENTIAL *****” is confidential and should remain under seal.

⁶⁴ BT Decl. ¶19; WIN Decl. ¶11.

⁶⁵ WIN Decl. ¶27.

⁶⁶ *Id.*

[REDACTED]

[REDACTED].⁶⁷ Petitioners will be [REDACTED]

[REDACTED] even if they ultimately prevail on appeal.⁶⁸

Incumbent “price increases routinely if not always follow[] the FCC’s grant of pricing flexibility in a given” MSA.⁶⁹ ILEC rates are at the maximum permitted by price caps, proving that regulation is constraining rates.⁷⁰ Indeed, an imminent increase is foreshadowed by incumbents’ complaints that regulation is preventing them from raising rates,⁷¹ and by incumbent rate hikes on similar services just days before the Commission adopted the *Order*.⁷² And the broader marketplace has already begun to assume that rates will increase as a result of the *Order*.⁷³ Moreover, Windstream already observes more extensive price squeezes

⁶⁷ BT Decl. ¶¶18-20.

⁶⁸ WIN Decl. ¶27.

⁶⁹ *Id.* ¶¶17-18.

⁷⁰ *FNPRM* ¶¶240-41.

⁷¹ *See* Letter from CenturyLink at 1, WC Docket Nos. 16-143 et al. (filed Oct. 28, 2016).

⁷² WIN Decl. ¶19; *see also Price Change Notification*, AT&T US Domestic Access Channels, AT&T, http://serviceguidenew.att.com/sg_landingpage?tgtPg=sg_nonArchivedFilePreviewer&testid=0681A0000030EbnQAE.

⁷³ BT Decl. ¶15; *see* WIN Decl. ¶¶16, 26.

on unregulated BDS than regulated, low-bandwidth BDS.⁷⁴

Given the *Order*'s removal of pricing regulation for more than 90% of U.S. buildings with DS demand, incumbents will tighten their price squeeze on petitioners [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁵ Because ILECs own the sole channel termination to the vast majority of buildings, they do not face the same cost increases as petitioners, and can set their own retail rates to drive competitors out of the market. These are precisely the kind of circumstances in which the Commission has recognized that “a price squeeze is evident, such as when a *monopolist’s wholesale rates exceed retail rates.*”⁷⁶

⁷⁴ WIN Decl. ¶17. Incumbents charge as much as 109% more for low-bandwidth BDS in unregulated than in regulated areas. *See* Letter from Sprint Corporation, at 17, WC Docket Nos. 16-143 et al. (filed Nov. 9, 2016).

⁷⁵ BT Decl. ¶¶16, 18; WIN Decl. ¶25.

⁷⁶ *INFONXX, Inc. v. New York Telephone Co.*, 13 FCC Rcd. 3589, 3598 ¶18 (1997) (emphasis added) (citing *City of Mishawaka, Ind. v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980)); *see also Verizon Tel. Co. Tariff* FCC Nos. 1 & 11, Transmittal No. 232, 17 FCC Rcd. 23598, 23599 ¶3 (2002); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, 12 FCC Rcd. 15756, 15849 ¶161 (1997).

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Competition would be driven from the market. For example, over the next 12 months alone, “Windstream expects to [REDACTED] [REDACTED] [REDACTED].”⁷⁷ Because these lost customers will enter into multiyear contracts with another provider—most likely the incumbent—this loss will also long outlive this appeal.⁷⁸

Under the *Order*, incumbents may choose not to sell low-bandwidth BDS to competitors at all. Faced with that risk, BT will [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]⁷⁹ [REDACTED] [REDACTED]⁸⁰ and could force BT to use more-expensive, lower-quality substitutes, which [REDACTED] [REDACTED] [REDACTED].⁸¹

⁷⁷ WIN Decl. ¶27.

⁷⁸ *Id.*

⁷⁹ BT Decl. ¶¶22-24.

⁸⁰ *Id.* ¶23.

⁸¹ *Id.* ¶¶24-26.

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Additionally, the *Order* permits incumbents to detariff on August 1, raising the specter of hundreds of industry-wide negotiations over previously-tariffed services.⁸² In addition to cementing higher rates, this will produce enormous, unrecoverable, transaction costs.

Petitioners will be forced to [REDACTED]⁸³ Indeed, BT must commence taking steps to [REDACTED] [REDACTED] that, absent the *Order*, BT [REDACTED] [REDACTED].⁸⁴

Stays are appropriate in cases, like this one, involving rules that fundamentally alter the telecommunications regulatory landscape, with immense and long-lasting pricing impacts. In *Iowa Utilities Board v. FCC*, this Court stayed Commission rules seeking to move telecommunications carriers from one form of rate regulation (based on historical costs) to another (based on long run incremental cost), because rates based on the new rules would “derail current efforts to negotiate and arbitrate agreements.”⁸⁵ This Court observed that “[i]f the

⁸² Letter from AT&T, at 1, WC Docket Nos. 16-143 et al. (filed June 15, 2017) (confirming that price cap ILECs may begin detariffing on August 1, 2017).

⁸³ BT Decl. ¶27.

⁸⁴ *Id.* ¶28.

⁸⁵ *Iowa Utilities Board v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996).

FCC’s rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based” on the disputed rules.⁸⁶ As explained above, higher rates charged in the wake of this *Order* will inflict immediate and grievous injury on petitioners and will also infect long-term agreements and business opportunities, even if the Commission’s rules are later struck down. Moreover, the rates will derail negotiations over contracts with prospective or renewing customers—customers that will be lost for [REDACTED] [REDACTED] at a minimum, if not much longer—making it impossible to restore the status quo.

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

A stay would inflict no harm on the incumbents. Given their near-monopoly control of low-bandwidth channel terminations, the status quo allows the incumbents to exercise extensive market power over low-bandwidth BDS. In addition, the incumbents may increase low-bandwidth prices in the many MSAs that were deregulated under the flawed pricing flexibility rules and may also raise

⁸⁶ *Id.*

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prices for unregulated high-bandwidth services. There also is no evidence that existing regulations result in rates that are too low.⁸⁷

By contrast, the public interest would benefit from a stay. Business data services are necessary for the day-to-day operation of both private and public institutions.⁸⁸ Less competition in the BDS markets inflicts competitive harm on commercial subscribers.⁸⁹ Multi-location customers⁹⁰ may not have a single competitive alternative to the incumbent.⁹¹ And as the Small Business Administration told the Commission, small and emerging businesses will also be harmed.⁹²

Conclusion

Petitioners respectfully request that the Court stay the *Order* pending judicial review.

⁸⁷ See *Order* ¶¶76.

⁸⁸ See Letter from Consumer Federation of America, WC Docket Nos. 16-143 et al. (filed Mar. 30, 2017).

⁸⁹ Declaration of David J. Malfara Sr. ¶5, appended as Attachment C (“INCOMPAS Decl.”); Declaration of Susan M. Gately ¶¶7, 10-11, appended as Attachment D (explaining that businesses continue to rely on lower bandwidth DS1 and DS3 services, and that BDS customers’ experience shows that prices will increase absent a stay).

⁹⁰ INCOMPAS Decl. ¶13.

⁹¹ *Id.* ¶¶14, 16.

⁹² See Letter from Office of Advocacy, U.S. Small Business Administration, to FCC, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017); INCOMPAS Decl. ¶18.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit requirements of Fed. R. App. P. 27(d)(2)(a) because the document contains 5197 words, as determined by the word-count function of Microsoft Word, excluding the parts of the motion exempted by Fed. R. App. P. 32(f); and

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32 (a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Christopher J. Wright
Christopher J. Wright

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2017, an unredacted version of the foregoing Motion for Stay Pending Judicial Review was served by hand delivery upon the following parties:

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I further certify that I will cause a redacted copy of the Motion for Stay Pending Judicial Review to be served via first class mail, postage prepaid, upon the following parties:

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Dated: July 3, 2017

ATTACHMENT A

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
)	
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
)	

DECLARATION OF JENNIFER ARTLEY


I, Jennifer Artley, hereby declare:

1. My name is Jennifer Artley. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the motion of BT Americas, Inc. for stay pending judicial review of the Federal Communications Commission’s Business Data Services Report and Order (“*BDS R&O*”). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I am currently the President of BT Global Services’ business across the Americas region. BT Global Services is the international business division of British Telecommunications plc (“BT”), which generates about *****BEGIN HIGHLY CONFIDENTIAL***** of global revenue by providing information, communications and technology services to 5,500 multinational

companies in 180 countries. I assumed my current position in June 2017. Prior to this, I was the Chief Operating Officer for BT Global Services' operations the Americas region. I have been with BT Global Services since 2014, and I have over 15 years of experience in providing information, communications and technology services to multinational companies and government entities. BT Americas, Inc. is the lead operating entity of BT Global Services in the United States.

3. I am not a lawyer, but I understand that, among other things, the *BDS R&O* concerns the regulatory treatment of business data services ("BDS"), which provide dedicated point-to-point connectivity at certain guaranteed speeds and service levels to businesses, non-profits, schools, universities, hospitals, federal, state and local governments, and cell towers, allowing entities to securely and reliably connect their offices, factories, and other facilities to private data networks, cloud-based applications and services, the Internet, and the public switched telephone network. The difference between best efforts broadband Internet access and BDS is that BDS is highly reliable, always available, and secure, and it is sold with service level commitments.

4. The *BDS R&O* broadly deregulates the marketplace for BDS, and determines that certain business data services are not subject to common carrier regulation under the Communications Act of 1934, as amended. Specifically, I understand the *BDS R&O* removes price-cap regulation for so-called low bandwidth, time-division multiplexing ("TDM") inputs (or circuits), which represent roughly *****BEGIN HIGHLY CONFIDENTIAL*****  *****END HIGHLY CONFIDENTIAL***** of our access inputs purchased in the United States. In addition, I understand the *BDS R&O* eliminates the previous requirement that incumbent

telecommunications companies provide reasonably comparable telecommunications inputs when they retire or eliminate the existing TDM access circuits on which BT relies.

5. The *BDS R&O* irreparably harms BT. As discussed in greater detail below, it has introduced a ticking time-bomb in BT's operations in the United States with respect to the *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL***** of these low bandwidth TDM access circuits BT uses to connect many of its customers' facilities in the United States to their voice and data networks. After the *BDS R&O* becomes effective, AT&T and Verizon, BT's main suppliers of these low bandwidth TDM access circuits—who also are BT's main competitors in the downstream global enterprise services market—will no longer be constrained to offer BT a TDM alternative that is comparable in price and bandwidth offerings, or has comparable service delivery times, service quality and operational support systems, or to set the wholesale rates for the alternative at less than or equal to retail rates. BT cannot *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****

6. BT will be placed in a position of having to respond by, among other things, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** It will have to *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****

causing *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** for customers that have voice and other equipment or applications that are *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

*****END HIGHLY CONFIDENTIAL***** The *BDS R&O* also *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

*****END HIGHLY CONFIDENTIAL***** Finally, BT*****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

*****END HIGHLY CONFIDENTIAL***** These harms are great, and they already have begun to occur.

7. BT is one of the top four global providers of communications services to multi-location, global corporations. The other three providers are AT&T, Verizon, and Orange Business Services, which is a business unit of France Telecom.

8. The United States is a critical market for BT. The United States accounts for over one-third of the global enterprise managed services market. It is the largest market for BDS in the world. The United States is one of BT's largest markets outside the United Kingdom. Approximately *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** [REDACTED] in 2016-2017 was generated in the United States.

9. BT has provided services in the United States for over 30 years, serving customers in industries in nearly every sector of the economy, including financial services, energy, automotive, healthcare, manufacturing, media, government, consumer goods, technology, travel, and transportation. BT's customers include such household names as US- and EU-headquartered companies Bristol-Myers Squibb, Proctor & Gamble, Unilever, Credit Suisse, Schlumberger, and the New York Stock Exchange.

10. These multi-location global entities choose BT because it offers seamless, reliable, always on, made-to-order communication services that have the same look, feel, functionality, and interoperability no matter where in the world an employee of the entity resides—from Baltimore, to Bristol, to Bangalore, to Beijing. They look to BT to provide an efficient one-stop shop for all of their global communications needs.

11. In today's global economy, corporations extensively rely on BT and other providers of global BDS. For example, we recently offered:

- (i) A healthcare provider the ability to provide long-distance telemedicine, collaboration, and mobility for employees and patients;
- (ii) An automotive manufacturer the ability to connect its global design team, engineers, and global supply chain, resulting in more efficient manufacturing and releases of new products such as Internet-connected cars;
- (iii) A pharmaceutical manufacturer the ability to connect its global community of scientists and healthcare practitioners to improve their research and development of new products and facilitate compliance relating to the development of such products with safety regulators; and

- (iv) A leading bank the ability to extend its global reach for its customers to their accounts through mobile platforms.

12. BT's customers demand service level commitments because, among other things, many of the applications that rely on BT's services are critical to our customers' businesses. Financial service companies can lose millions of dollars due to nanosecond delays in trading. Healthcare providers need access to medical records in real-time, and all the time, to serve their patients. Oil companies need real-time data from sensors monitoring critical infrastructure such as pipelines to provide alerts to spills and other safety hazards. Such companies may have a small percentage of communications functions (e.g., browsing the World Wide Web, email, search) for which they would be willing to experiment with a business data service that does not provide such service level commitments, but for the bulk of their needs, they demand that we provide 99.99% or 99.999% service availability.

13. Because global corporations require BT and other providers of BDS to provide communications to dozens, hundreds or even thousands of physical locations where the corporation has a presence, neither BT nor any other provider of global BDS has a physical network that reaches all of the locations of their global corporate customers. This reality is why it is critical that BT be able to purchase on a wholesale basis the access to networks of other telecommunications providers that provide non-substitutable inputs in the form of physical connections to buildings where BT does not itself own such lines, but where BT's global customers have facilities that need to be connected with BT's global communications services.

14. Many global corporations use and require low bandwidth, TDM communications services to meet these needs, making TDM the workhorse in the BDS marketplace and a critical BT offering. This may be because many corporations have legacy

voice TDM-based equipment such as private branch telephone exchange systems, conferencing equipment, and call center equipment, which are interoperable only with TDM access circuits.

Or corporations choose to use low bandwidth DS1 TDM circuits because they are a reliable, secure, symmetric, and less expensive alternative than converting to Ethernet-over-Hybrid Fiber Coax (“EoHFC”) inputs provided by cable companies and Ethernet-over-Fiber. In other words, TDM circuits get the job done, and often at a better price. The fact that *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** provided to customers in the

United States are low bandwidth TDM circuits indicates that there is persistent demand among enterprise customers for this input.

15. In the United States, AT&T and Verizon provide *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL***** of the low bandwidth TDM access circuits on which BT relies. If, as expected, Level 3 and CenturyLink merge later this year, BT will purchase *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** (“Incumbents”), which will represent *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** of our low bandwidth TDM circuits. In addition, and of course, what creates an incentive and ability to price-squeeze or foreclose against BT is the fact that the firms we rely upon for *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** of our low bandwidth TDM circuits are also our largest global competitors. The only thing that has prevented our largest competitors (AT&T and Verizon) from raising their prices *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

CONFIDENTIAL *** [REDACTED] *****END HIGHLY**

CONFIDENTIAL *** has been the FCC access regulations that the *BDS R&O* now eliminates.

16. Before adoption of the *BDS R&O*, while Incumbents charged access prices well above cost to BT and other providers, Incumbents were nevertheless subject to price caps (albeit old, outdated caps) and price controls in many geographic markets, which limited their ability to raise prices for TDM-based access. But after the *BDS R&O* becomes effective, Incumbents can suddenly and permanently increase the prices for BT's *****BEGIN HIGHLY**

CONFIDENTIAL *** [REDACTED] *****END HIGHLY CONFIDENTIAL** *** low

bandwidth TDM circuits in the United States, for which BT already spends *****BEGIN**

HIGHLY CONFIDENTIAL *** [REDACTED] *****END HIGHLY**

CONFIDENTIAL *** even in markets the FCC acknowledges will not be competitive for multiple years. Indeed, the *BDS R&O* permits for the first time Incumbents to wholly eliminate these TDM circuits without providing reasonably comparable alternatives. The *BDS R&O*'s total removal of any price regulation for access to 92% of the buildings in the United States will allow Incumbents to ratchet up already uncompetitive prices for low bandwidth TDM access, which *****BEGIN HIGHLY CONFIDENTIAL** *** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL** *** Indeed, *****BEGIN**

HIGHLY CONFIDENTIAL *** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL** ***

in line with previous Incumbent attempts to move away from BDS.

17. The *BDS R&O* greatly and imminently harms BT because the eliminated price-cap regulations further impede BT's ability to purchase affordable, reliable low bandwidth access inputs in the United States from Incumbents, who effectively are the only suppliers of

such inputs. And, the ability to purchase *****BEGIN HIGHLY CONFIDENTIAL*****

[REDACTED]

*****END HIGHLY CONFIDENTIAL***** seeking secure, reliable, and guaranteed communications services to all global locations where a customer is located.

18. Even prior to adoption of the *BDS R&O*, BT *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** In other words, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

*****END HIGHLY CONFIDENTIAL***** in providing data network services to our customers in the United States. Our contracts with customers *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED]

*****END HIGHLY CONFIDENTIAL***** If Incumbents raise prices on TDM circuits or force BT to switch to higher-priced, higher-bandwidth inputs—as we know will happen based on industry discussions and our experience in this market—BT will *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****

19. This harm to BT is not speculative and is at our doorstep. Typically, BT's contracts with our corporate customers *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** But BT orders *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** Even now, some of BT's *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END

HIGHLY CONFIDENTIAL*** This will ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** would result in ***BEGIN HIGHLY

CONFIDENTIAL*** [REDACTED] ***END HIGHLY

CONFIDENTIAL*** in the first year. ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** BT cannot rely on

BEGIN HIGHLY CONFIDENTIAL [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***

20. Because access costs ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** Providing TDM inputs

BEGIN HIGHLY CONFIDENTIAL [REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****

21. More importantly, the *BDS R&O* threatens *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** As a result of the *BDS R&O*, Incumbents can withdraw these TDM inputs without providing a reasonably comparable alternative. No longer must Incumbents provide a TDM alternative that is comparable in price to a 1.5 Mbps TDM circuit *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** Instead, Incumbents can withdraw TDM and offer an Ethernet-over-Fiber alternative *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** Incumbents will no longer be required to provide an alternative that is comparable in delivery time to the delivery time for a DS1 access circuit, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]. *****END**

HIGHLY CONFIDENTIAL*** Instead, they will be able to offer Ethernet-over-Fiber circuits, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** Incumbents will no longer be required to provide an alternative that is comparable in functionality to a TDM circuit capable of supporting TDM-based voice equipment installed at the customer's premises. They can offer Ethernet-over-Fiber service alternatives that would *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***

22. Consequently, BT is ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** Incumbents will be able to ***BEGIN

HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***Indeed,

where Incumbents eliminate TDM inputs, ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL***assuming such alternative, comparable inputs exist. The greater ability of

Incumbents to now ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL***and that ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

END HIGHLY CONFIDENTIAL Consequently, BT is ***BEGIN HIGHLY

CONFIDENTIAL *** [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***

23. BT will sustain great and irreparable harm ***BEGIN HIGHLY

CONFIDENTIAL *** [REDACTED] ***END HIGHLY CONFIDENTIAL***

The BT customers ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL*** And at an average cost of ***BEGIN HIGHLY CONFIDENTIAL***

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***

This includes ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

END HIGHLY CONFIDENTIAL This protocol minimizes interruptions of services to customers. It also includes a provision for special construction costs that our supplier charges for extending Ethernet-over-Fiber to a customer location if the service is not already available at the site. Given the process can take ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** it is clear that

BEGIN HIGHLY CONFIDENTIAL [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** is a substantial, cumbersome, resource-intensive and lengthy process.

24. I understand that the *BDS R&O* concludes that EoHFC inputs offered by cable companies provide a comparable substitute to Incumbent TDM inputs. But as BT

explained in the underlying docket at the FCC, our experience in the market demonstrates that comparable substitutes to *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL***** circuits largely do not exist. First, EoHFC inputs from cable companies are less reliable than, and therefore not comparable to, TDM. EoHFC, which provides 99.9% availability, does not meet the 99.99% or 99.999% service availability commitments our customers often demand.

25. While it may not sound like much, the differences among 99.9%, 99.99% and 99.999% availability are significant. 99.9% availability amounts to about eight hours and forty-five minutes of unplanned downtime over the course of a year, while 99.99% and 99.999% availability mean less than fifty-two and five minutes, respectively, of downtime over the same time period. 99.9% availability may be good enough for some enterprise applications, but 99.99% and 99.999% availability are the standards in large enterprise contracting. While there are technological advances that may improve service level availability over EoHFC, and a few enterprises are experimenting with EoHFC for a subset of their needs, customers are not migrating en masse from TDM to EoHFC.

26. Second, based on our preliminary due diligence, and assuming alternatives are available, *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****

27. The result of these *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

END HIGHLY CONFIDENTIALBT's past experience with regulation in the United States is that major regulatory changes can have ***BEGIN HIGHLY CONFIDENTIAL***

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** For instance, following the approvals of the mergers and vertical integration of AT&T, SBC and BellSouth, and Verizon and MCI between 2005–2008 without adequate regulatory safeguards to protect against the merged entities' greater ability and incentive to discriminate against BT, BT ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL*** Whereas in the 2000s ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

END HIGHLY CONFIDENTIAL Furthermore, BT ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***

28. Although the United States is the largest and most target-rich market in the global network services marketplace, as a result of the *BDS R&O*'s further tilting of the access playing field in favor of US Incumbents, we ***BEGIN HIGHLY CONFIDENTIAL***

[REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL*** Because the bidding process for ***BEGIN HIGHLY

CONFIDENTIAL*** [REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL***as a result of the *BDS R&O* BT must ***BEGIN HIGHLY

CONFIDENTIAL*** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ***END HIGHLY

CONFIDENTIAL***

I declare under penalty of perjury that the foregoing is true and correct.

Executed the 23rd day of June, 2017.



Jennifer Artley

ATTACHMENT B

**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
)	
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
)	

DECLARATION OF JOSEPH HARDING

WINDSTREAM SERVICES, LLC
1101 17th St., N.W., Suite 802
Washington, D.C. 20036
(202) 223-7664 (phone)
(330) 487-2740 (fax)

June 23, 2017

DECLARATION OF JOSEPH HARDING

I, Joseph Harding, hereby declare as follows:

1. I am the Executive Vice President and Enterprise Chief Marketing Officer at Windstream, a position I have held since February 2015. I have more than 20 years of experience in the telecommunications industry. In my current capacity I am responsible for all aspects of marketing for Windstream’s enterprise business unit. I am over 18 years old and am competent to make this declaration. I submit this declaration in support of Windstream’s motion for stay pending judicial review.

2. Windstream is a communications service provider with interests split relatively evenly between incumbent and competitive carrier operations. It is both the fifth largest incumbent local exchange carrier (“ILEC”) and one of the largest competitive local exchange carriers (“CLECs”) in the nation. Windstream provides advanced communications and technology solutions, including managed services and cloud computing, to hundreds of thousands of business, government, and nonprofit locations throughout the continental United States.

3. Windstream has invested billions of dollars to build and acquire an intra- and inter-city network comprising more than 147,000 miles of fiber across the United States. Like other communications providers, however, to furnish its finished business communications services to its retail customers, Windstream requires the ability to transmit traffic over the “last mile” between a traffic aggregation point and the customer location, known as a channel termination. These last mile connections provide a necessary bridge between Windstream’s extensive fiber network and business consumer locations. Business data services (“BDS”), both

REDACTED – FOR PUBLIC INSPECTION

based on packet-switched Ethernet and on time-division multiplexing DS1 and DS3 special access lines, which offer guaranteed levels of performance and reliability for data transmitted over the last mile, are essential inputs that enable Windstream and other providers to offer communications solutions to retail customers.

4. Outside of its ILEC service areas, Windstream cannot feasibly build its own last-mile facilities to provide communications solutions to the vast majority of business locations, including the vast majority of its customers' business locations. In particular, for customers of services with bandwidth at or below that of a DS3 (i.e., approximately 45 Mbps), Windstream cannot economically construct its own last-mile facilities in virtually all cases.

5. Where it does not have its own last-mile connections for channel terminations and associated local area transport to customer locations, Windstream usually depends on its access to wholesale BDS inputs to provide a competitive option to business services customers. For customer locations that have lower bandwidth demand, Windstream's options for BDS inputs are usually limited to DS1 and DS3 special access service provided over the last-mile facilities of the ILEC. Although other options, such as local loops provided as unbundled network elements, are sometimes available for Windstream to purchase as an alternative, various contractual, regulatory, and technical constraints limit their availability.

6. Windstream purchases BDS inputs on a wholesale basis through typically multiyear agreements. For DS1 and DS3 services in markets subject to price cap regulation, Windstream may purchase inputs through ILECs' term and volume commitment plans that provide credits against the tariffed rates. Windstream also has wholesale agreements in place for Ethernet-based BDS inputs from ILECs and from competitive fiber-based providers, if available.

REDACTED – FOR PUBLIC INSPECTION

7. While Windstream purchases Ethernet-based BDS for some customer locations, those services are not always available or cost-effective, and in many cases customers wish to continue using their existing equipment rather than purchase new equipment that is compatible with Ethernet-based BDS. ILECs' DS1 and DS3 services therefore remain crucial inputs for Windstream to be able to provide lower bandwidth services to business retail customers that want data services at locations where Windstream or other CLECs do not have their own last-mile facilities. DS1 and DS3 services comprise the majority of the wholesale last-mile BDS connections Windstream leases.

8. The cost of DS1 and DS3 BDS inputs needed to reach retail customers, including channel termination and transport, is the largest component of network costs for Windstream's CLEC enterprise and small and medium business ("SMB") segments. As of the end of the first quarter of 2017, this cost accounts for approximately *****BEGIN HIGHLY CONFIDENTIAL***** of the network interconnection costs for Windstream's CLEC enterprise and SMB businesses, and represents *****BEGIN HIGHLY CONFIDENTIAL***** of the total costs of those businesses.

9. Given these high costs, the availability of DS1 and DS3 inputs at reasonable rates for any given customer's location is an essential factor in Windstream's ability to offer a competitive solution to that customer. As of the end of the first quarter of 2017, DS1 and DS3 circuit costs (which includes channel termination and mileage charges) account for approximately *****BEGIN HIGHLY CONFIDENTIAL***** of Windstream's total spend on last-mile access outside of its ILEC territory. Using these wholesale BDS inputs, Windstream provides services to approximately

BEGIN HIGHLY CONFIDENTIAL [REDACTED] ***END HIGHLY

CONFIDENTIAL*** enterprise and SMB customer locations around the country.

10. In most cases, Windstream’s retail enterprise and SMB customers purchase finished communications solutions pursuant to contracts with multiyear terms, typically three or five years. For potential new customers, Windstream usually will negotiate the rates and terms of the agreements. Given the significance of last-mile access and local transport costs, the prices Windstream is able to offer its potential customer depend on the prices of BDS inputs available to Windstream over the entire term of a customer’s service agreement.

11. Many of Windstream’s enterprise customers, including government customers,

BEGIN HIGHLY CONFIDENTIAL [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***. As a result, faced with ILEC price increases on BDS inputs during the term of a contract for services that use those inputs,

BEGIN HIGHLY CONFIDENTIAL [REDACTED]

[REDACTED] ***END HIGHLY CONFIDENTIAL***. Windstream thus must factor in any anticipated DS1 and DS3 input price increases during the term of its contract with an enterprise customer when it initially makes a bid for that contract. In contrast, the ILEC bidding for the same customer contract, as the underlying facilities owner, does not face the risk of increases to its own input costs but can raise the costs for a competitor such as Windstream.

12. Based on the results of the FCC’s competitive market test adopted in the *BDS Report and Order*, Windstream estimates that once they take effect, the FCC’s new rules would result in the elimination of currently effective price cap protections in ***BEGIN HIGHLY CONFIDENTIAL*** [REDACTED] ***END HIGHLY CONFIDENTIAL*** counties in which

Windstream operates a competitive provider. These counties also include approximately

*****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL*****

of Windstream’s total DS1 and DS3 circuit costs as of the end of the first quarter of 2017.

Approximately *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY**

CONFIDENTIAL*** Windstream enterprise and SMB customer locations are either entirely or

partially located in those counties, which collectively represent approximately *****BEGIN**

HIGHLY CONFIDENTIAL*** [REDACTED] *****END HIGHLY CONFIDENTIAL***** in

recurring revenue on an annual basis.

13. The vast majority of Windstream’s DS1 and DS3 purchases in the counties in which price cap regulation will be eliminated are currently made pursuant to term and volume commitment plans. The plans provide discounts, typically as a percentage off of ILECs’ tariffed rates.

14. In addition, even in the counties deemed to be non-competitive under the FCC’s new rules, transport service will also no longer be subject to price cap protections. Although transport, compared to channel termination, is a smaller component of Windstream’s overall costs for BDS interconnection inputs, it still accounted for approximately *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY CONFIDENTIAL***** in spend based on annualizing the first quarter of 2017.

15. The FCC’s broad deregulation of the markets for DS1 and DS3 special access, including for both channel terminations and transport, will impose significant costs on Windstream that cannot be recovered later, and will undermine Windstream’s ability to offer a competitive alternative to customers. The resulting lost revenue cannot be recovered even if the new rules are ultimately invalidated by the court.

REDACTED – FOR PUBLIC INSPECTION

16. Although ILECs, including AT&T and Verizon, have not yet announced price increases following the elimination of price caps, nor committed to maintaining rates at current tariffed levels, Windstream expects that the DS1 and DS3 rates in at least some markets will increase as soon as the ILECs are able to do so after the FCC's new rules go into effect on August 1. ILECs that choose to detariff can raise existing tariffed rates without further delay. ILECs that continue to file tariffs during the 36-month transition period may begin raising DS1 and DS3 channel termination prices after 6 months.

17. This expectation is based on Windstream's past experience as a wholesale customer that also offers competing retail services with these ILECs. With respect to Ethernet-based BDS, which is not currently subject to rate constraints under the FCC's rules, ILECs have engaged in price squeezes against Windstream by pricing their wholesale BDS inputs sold to competitive providers close to or even higher than the ILEC's own rates for finished retail communications solutions that use those inputs. Windstream expects that once ILECs are no longer constrained by price cap regulation, they will engage in the same type of practice for DS1 and DS3 channel terminations in counties that are deemed competitive as well as for transport services nationwide.

18. Also, prior to the FCC's suspension in 2012 of its rules allowing for new grants of pricing flexibility, Windstream experienced ILEC price increases routinely if not always following the FCC's grant of pricing flexibility in a given metropolitan statistical area. Windstream expects a similar result in the counties where prices will be deregulated as a result of the new competitive market test.

19. Most recently, just days before the *BDS Report and Order* was adopted, AT&T announced that 10 and 15 percent price increases for certain intrastate private line DS3 services



would take effect “on or after” the date of the Commission’s scheduled vote. While these intrastate private line services are not subject to the *BDS Report and Order*, this drastic price increase affecting seven states further demonstrates that ILECs, where insufficiently constrained by regulation, can—and will—raise prices on DS1 and DS3 services.



20. Further destabilizing prices is the potential for DS1 and DS3 prices to increase immediately after the new rules go into effect if ILECs detariff, which they are permitted to do at any time under the new rules. ILECs’ term and volume commitment plans provide discounts to the wholesale customer through various mechanisms that most commonly result in a percentage of the tariffed rate that is either reduced or credited to the customer. The plans require a minimum number of purchases at *tariffed* rates to effect these discounts.

21. However, if an ILEC detariffs prior to the end of the term of the volume commitment plan, the continued validity of the agreed-upon prices in the commitment plans would be in doubt. Windstream expects that ILECs will take the position, one with which Windstream disagrees, that immediate detariffing relieves the ILECs’ of their contractual obligation to maintain existing tariffed rates referenced in the term and volume commitment plans for the duration of the terms of those plans. In addition, I understand that although the Order placed a freeze on tariffed channel termination rates for a period of 6 months from the effective date of the new rules, that freeze would not apply if an ILEC were to detariff voluntarily within that 6-month timeframe. To Windstream’s knowledge, none of the large ILECs—AT&T, Verizon, CenturyLink, and Frontier—has committed to maintaining its tariffs for the full term of its respective term and volume commitment plan or otherwise shown any willingness to renegotiate these commitments.

REDACTED – FOR PUBLIC INSPECTION

22. The prospect of rate increases creates uncertainty over the short- or even medium-term for inputs, which will raise the prices of the communications solutions in Windstream's bids for prospective customers and current customers whose contracts are up for renegotiation.

23. Windstream estimates that approximately *****BEGIN HIGHLY CONFIDENTIAL*****  *****END HIGHLY CONFIDENTIAL***** enterprise and SMB customer locations either entirely or partially in a county that will lose rate protections under the FCC's new rules, will need to be renegotiated within the next 12 months. These contracts represent approximately *****BEGIN HIGHLY CONFIDENTIAL*****  *****END HIGHLY CONFIDENTIAL***** in recurring revenue on an annual basis.

24. In the absence of the FCC's new BDS rules, Windstream would have projected, based on past performance, to enter into approximately *****BEGIN HIGHLY CONFIDENTIAL*****  *****END HIGHLY CONFIDENTIAL***** new contracts over the next 12 months in the newly deregulated markets, representing a projected *****BEGIN HIGHLY CONFIDENTIAL*****  *****END HIGHLY CONFIDENTIAL***** in recurring revenue on an annual basis. The specter of significant increases in DS1 and DS3 input prices over the next 12 months will force Windstream either to forgo bidding or to submit higher bids for new or renegotiating customers, and to increase the rates for customers that are on month-to-month arrangements, where the customer contract allows Windstream to do so.

25. Either way, increases in the costs of DS1 and DS3 inputs in the newly deregulated counties put Windstream at a severe competitive disadvantage compared to the large ILECs. These ILECs will not face the same cost pressures because they are the owners of the underlying last-miles facilities, which have been fully or near fully depreciated. Mirroring their current practices with deregulated Ethernet inputs, the large ILECs will use their control of the pricing of

DS1 and DS3 inputs to raise Windstream’s costs of serving retail customers compared to the ILECs’ own costs, squeezing Windstream’s margins and prices and pushing it out of the market.

26. This problem is particularly acute for *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED] *****END HIGHLY**

CONFIDENTIAL*** located either entirely or partially in newly deregulated markets.

*****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY**

CONFIDENTIAL*** The pricing instability caused by the FCC’s new rules, and Windstream’s expectation of higher input costs, mean that Windstream *****BEGIN HIGHLY**

CONFIDENTIAL*** [REDACTED]

[REDACTED] *****END HIGHLY**

CONFIDENTIAL***.

27. As a result, Windstream expects to *****BEGIN HIGHLY CONFIDENTIAL*****

[REDACTED]

[REDACTED] *****END HIGHLY CONFIDENTIAL*****. Because the

lost customers will enter into multiyear contracts with another provider—most likely the ILEC—

Windstream would not be able to recoup revenue lost during the pendency of this appeal or

prevent ongoing lost revenue from those customers. Moreover, for current retail customers that

have contractually locked in rates, Windstream will also fully absorb the loss caused by increases

in DS1 and DS3 input costs for the duration of those contracts, which Windstream estimates to

be *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED] *****END HIGHLY**

CONFIDENTIAL*** over 12 months on a 20% increase in input costs. In both cases,

Windstream would not be able to recover those losses even if the FCC’s rules are invalidated by a court on review.

28. In addition to driving price increases for its retail products, the expectation of higher BDS input costs will also cause Windstream to reevaluate its ability to remain in certain markets. *****BEGIN HIGHLY CONFIDENTIAL***** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *****END HIGHLY**

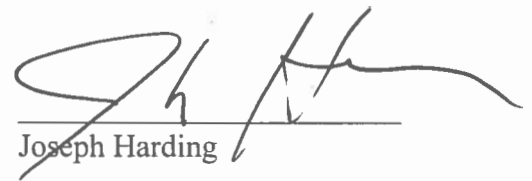
CONFIDENTIAL*** In such markets, customers of lower bandwidth services in particular will be affected because the limited revenue potential of these customers cannot economically support the extension of competitive fiber facilities to their locations.

29. The competitive disadvantage caused by the ILECs’ anticompetitive pricing power, which will be magnified by the FCC’s new rules, harms Windstream’s ability to compete effectively not just in the newly deregulated markets. Lost revenue and lower market share will further force Windstream to reduce staff and other resources, and to forego investments in its network, all of which will injure Windstream’s position in the market and reduce customers’ competitive choice of service provider. These effects of these harms will remain and continue even if the FCC’s new rules are set aside by the court.

REDACTED – FOR PUBLIC INSPECTION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: June 22 2017



Joseph Harding

ATTACHMENT C

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
)	
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
)	

DECLARATION OF DAVID J. MALFARA, SR.

I, David J. Malfara, Sr., hereby declare:

1. My name is David J. Malfara, Sr. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the motion of COMPTEL d/b/a INCOMPAS (“INCOMPAS”) for stay pending judicial review of the Federal Communications Commission’s Business Data Services Report and Order (“*BDS R&O*”). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I have been an active participant in the continuing evolution of the telecommunications industry for more than 30 years. Currently, I am President/CEO of ETC Group, LLC (“ETC Group”), a business management and engineering consulting company founded in 2008. ETC Group specializes in advising communications service providers, among others, on issues related to the management, operation and deployment of emerging strategies

and business models based on the introduction of new technologies. Additionally, I am retained by INCOMPAS as a subject matter expert on matters of emerging technology and service provider business models, and I am a Council Member of Gerson Lehrman Group, Inc. (“GLG”), providing subject matter expertise to GLG’s capital markets clients on telecommunications and broadband industry issues.

3. Previously, I served for over 10 years as a Director, and for 5 years on the Executive Committee, of INCOMPAS, and chaired the association’s Technology Task Force. I also founded and served as the President, Chief Executive Officer, and/or Chief Technology Officer for numerous competitive local exchange carriers, including Remi Communications Holdings, LLC, Z-Tel Network Services, Inc., and Pennsylvania Alternative Communications, Inc. (d/b/a Pace Long Distance and Pace Network Services).

Background

4. Business data services (“BDS”) provided by incumbent local exchange carriers (“ILECs”) have long been used by competitive providers as a mechanism to bring innovative, low-cost communications services to commercial subscribers, where direct subscriber connection to the competitive provider’s network is either not economically or technically feasible. In this capacity, BDS functions as an important “stepping stone” for subscribers and competitive carriers alike in reducing the risk of deployment when the demand for a new service or the viability of a new market cannot be quantified, and so the cost of facilities-based deployment would present an unacceptable risk.

5. ILEC BDS performs this valuable role because in region, ILEC BDS is ubiquitously available and generally the *only* way to reach the subscriber for which it is used. Functioning in this way, ILEC BDS acts not only as a near-term solution for subscriber

connectivity, it provides a means for competitive providers to quickly bring innovative, and often unique and customized, services to subscribers in entirely new markets well ahead of any possible network facilities deployment.

6. The *BDS R&O* puts these strategies at risk by removing price-cap regulation for low bandwidth, time-division multiplexing (“TDM”) inputs (or circuits) and eliminating the previous requirement that incumbent telecommunications companies provide reasonably comparable telecommunications inputs when they retire or eliminate existing TDM access circuits. These effects will cause increases to the costs to competitive carriers in providing their services, and lead to an immediate decrease or, worse, *elimination* of competition for commercial communications services, such as voice, video conferencing, cloud, private virtual networking and Internet access services, in certain markets where the use of ILEC BDS as a wholesale input to a competitor’s retail service is necessary. Less competition in the retail market leads to increased prices, less choice, decreased innovation and customization, and lower quality services for commercial subscribers, harming these customers. This harm to commercial communications subscribers is direct, immediate, and significant.

7. The *BDS R&O* directly and significantly harms commercial subscribers by: (1) reducing competitive carrier expansion into new markets; (2) reducing carrier choice for multi-location commercial subscribers; and (3) preventing smaller commercial subscribers from accessing advanced communications technologies. These harms will occur immediately upon the effective date of the *BDS R&O*.

Reduced Competitive Expansion – Longer Broadband Deployment Timeframes

8. Competitive carriers often use ILEC BDS as a surrogate for their own facilities in order to test their acceptance by potential subscribers in new markets. Using ILEC BDS, they can test-market their product portfolio in the new area without incurring the capital

expense and build-out timeframes necessary to support a facilities-based model. If the market proves successful, the carrier can displace these ILEC BDS facilities with their own network facilities, confident in the knowledge that the market finds their product portfolio attractive enough to hit their market-share goals. Without affordable ILEC BDS, this “stepping-stone” test-marketing strategy would not be possible.

9. Competitive carriers prioritize new markets by the cost of market entry and the time necessary to build a substantial enough subscriber base to support the deployment of its own network facilities. Markets with lower ILEC BDS pricing are more attractive to competitive entrants because these carriers may be able to reach subscribers at a lower cost and, thereby, quickly capture enough market share to support their own network build-out. These early subscribers are able to enjoy the lower price and availability of the entrant’s product portfolio far earlier than would otherwise be possible, solely because ILEC BDS provides an acceptable means of delivery.

10. Markets with somewhat higher ILEC BDS pricing occupy a proportionately lower priority in competitive expansion plans because the retail price of service in those markets may need to be adjusted upward (covering more of the ILEC BDS cost). Higher retail prices, of course, negatively affect subscriber acquisition in both sales cycle time and volume, increasing the carrier’s risk of market entry.

11. The *BDS R&O* will cause the cost of ILEC BDS to go up. If the price of deregulated ILEC BDS services should increase 10% over current rates, I believe the effect will be manifested in a slowdown of competitive new market entry, as the focus shifts to harvesting greater market share in markets where the competitor has already deployed its own network facilities. Should the rates soar by 25%, I would expect the use of ILEC BDS as a competitive

market entry tool to stop and for service providers to immediately adjust retail pricing upward for current subscribers served by ILEC BDS facilities.

12. At rates 50% or higher than current ILEC BDS rates, I believe competitive carriers will begin to exit certain immature markets where facilities-based network deployment is not imminent. The result to commercial subscribers in those markets (and other markets not yet considered for entry) is that the market itself may suffer higher prices because the entry risk is simply too high for competitors to absorb and, therefore, the ILEC's service and pricing remains unchallenged. Competitive expansion will be slowed significantly and may not happen in certain markets at all. Because competitive carriers will need to adjust their business models and expansion plans immediately upon the effective date of the *BDS R&O*, this harm to retail subscribers served with ILEC BDS facilities is also immediate.

Multi-Location Commercial Subscribers May Not Have Competitive Choice

13. Competitive carriers offer multi-location subscribers optimized pricing based on scale economies. Global corporations require communications services to be provided at dozens, hundreds or even thousands of physical locations where the corporation has a presence, however, no provider of global or domestic service has a physical network that reaches all of the locations of their global or national domestic corporate customers. Such providers supplement their own facilities with ILEC BDS services to reach those off-network subscriber locations.

14. Multi-location subscribers often have modest requirements in their satellite locations. A healthcare institution, for example, may comprise 2-3 large hospitals, 30-40 out-patient clinics, and 10 or more testing labs. These facilities are usually dispersed throughout a wide geographic territory to provide uniform health services to patients in urban, suburban, and rural areas of the served community. The hospitals may reside within the urban

area, or on the urban/suburban edge, with the out-patient clinics and testing labs located in the suburban and rural areas of the served community.

15. A competitive service provider network may cover the urban area completely, suburban areas at 80%, and rural areas at 40%. In such cases, ILEC BDS may be used to provide the last-mile reach to the off-network locations. Even under current rules, if affordable ILEC BDS is not available for even a small number of these outlying locations, the cumulative impact may be sufficient to deter the competitor from bidding on the healthcare institution's multi-location contract at all.

16. Post-effective date of the *BDS R&O*, increases in the cost of ILEC BDS resulting from deregulation would certainly foreclose such subscribers from almost all competitive options. The reality is that, even though competitors may exist in any given market, they are not ubiquitous. In such cases, absent affordable ILEC BDS, multi-location subscribers such as the healthcare institution in this example may not have a single competitive alternative to the ILEC because of the need to support satellite offices where only ILEC facilities exist.

Smaller Business Subscribers May Be Shut Out of Advanced Communications Technologies

17. Many ILECs choose to offer services based on advanced technologies only to larger commercial subscribers. A case in point is Ethernet service. Most ILECs choose not to use Ethernet-over-TDM and TDM bonding technologies, which are capable of supporting Ethernet on TDM facilities at speeds up to 100Mb/s. Instead, ILECs choose to offer Ethernet services only over optical fiber facilities at far higher transmission rates, commanding far higher minimum prices. By limiting Ethernet availability in this way, ILECs can ensure that the overhead cost of customer support for advanced services such as Ethernet is justified by the high "average revenue per user" commanded by such service.

18. Conversely, competitive carriers are willing to employ these TDM-based technologies in order to provide a “stepping stone” approach to allow subscribers to grow at their own rate. Affordable ILEC BDS allows competitors to provide these subscribers with what is often their first access to advanced Ethernet services at entry-level prices where, absent the competitive offering, they would have no access to such services at all. Later, as these subscribers grow, fiber deployment to their location may be justified by their increased demand. Rather than being forced to absorb the high entry cost of fiber service capacities they cannot use, these subscribers are afforded the opportunity to “right size” their service, while still taking full advantage of the increased business efficiencies made possible by advanced communication services such as Ethernet.

19. Additionally, ILECs often offer their advanced, unified communication services using a pricing structure that demands a high fixed monthly fee plus an incremental cost per user. In many cases, the high fixed monthly fee places the ILECs’ service out of the reach of smaller businesses. Competitive carriers, on the other hand may offer the equivalent advanced, unified communication service at a somewhat higher monthly cost per user but without the fixed monthly fee.

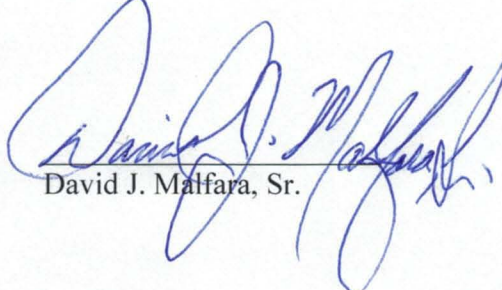
20. Because the *BDS R&O* will result in an immediate increase in the costs of ILEC BDS to competitive carriers, these competitive carriers must begin taking immediate remedial actions, including refraining from targeting smaller commercial subscribers. The resulting harm to these smaller commercial subscribers—the lack of an alternative to the ILECs’ more expensive, less beneficial service offerings and service model—is also immediate.

Conclusion

21. The *BDS R&O* poses immediate and significant financial and operational risk to commercial subscribers. By any measure, the *BDS R&O* results in increased costs to competitive carriers in providing their services to commercial subscribers. These costs are directly and indirectly passed along to such subscribers, preventing them from accessing critical, affordable competitive services. In addition, to the extent that competitive carriers exit the market, commercial subscribers in that market will not be able to purchase and benefit from these unique and valuable service offerings, based on both pricing and non-pricing availability metrics, which these competitive carriers provide.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 23rd day of June, 2017.


David J. Malfara, Sr.

ATTACHMENT D

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
)	
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

DECLARATION OF [DECLARANT]

I, Susan M. Gately, hereby declare:

1. My name is Susan M. Gately. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the Motion for Stay Pending Judicial Review of the Federal Communications Commission’s Business Data Services Report and Order (“*BDS R&O*”) filed by the Ad Hoc Telecom Users Committee (“Ad Hoc”). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I am President of SMGately Consulting, LLC (“SMGC”), 84 Littles Avenue, Pembroke, MA 02359. SMGC is a consulting firm specializing in telecommunications, economics, and public policy. I am an economic and policy expert specializing in the telecom arena with more than thirty years of consulting experience.

My specific experience lies in the areas of telecom industry structure; telecom services and network management practices; regulatory regimes; cost development; pricing and rate structure; and access charges.

3. Prior to founding SMGC, I was a partner in and the Senior Vice President at Economics and Technology, Inc. (“ETI”), providing advice, litigation support, expert testimony, white papers, and in-house training and education to ETI’s myriad carrier, governmental agency, and large business clients. I have provided expert testimony on a variety of telecom policy matters and participated in hundreds of FCC proceedings since 1981 on access charges, universal service, separations and cost accounting, and forms of regulation. I have appeared as an expert witness in state proceedings before state public utility commissions.

4. I have been involved in the analysis of incumbent LEC intrastate and interstate access tariffs since the inception of those tariffs in 1984. I have participated in virtually every major FCC proceeding on access charges and price caps. I am among the nation’s leading experts on access charge rate structure, methodology, and policy. Access issues I have addressed in hundreds of submissions to the FCC include access service pricing and rate structures, price caps implementation, access service costs (including cost allocation of regulated and non-regulated services), and alternative forms of regulation. I undertook a detailed analysis of the data filed in response to the FCC’s first “voluntary data request” in its special access or “BDS” proceeding in Docket 05-25 in 2013 and most recently of the data filed in response to the “mandatory data request” that followed in the above named proceedings.

5. I have served as an economic advisor to and subject matter expert for the Ad Hoc Telecom Users Committee since the early 1980s. In that capacity, I have reviewed and analyzed information regarding pricing, network architecture, contractual terms and conditions, applications, cost allocations, and cost recovery by telecommunications service providers on behalf of hundreds of business customers, including the members of the Ad Hoc Telecom Users Committee. On behalf of those business customers, I have also analyzed their internal network architectures, costs of service, and cost recovery. As a result, I am familiar with the services that business customers purchase and how they are used in furtherance of the customers' business plans.

6. "Business Data Services" ("BDS") is the FCC's latest terminology for a group of telecommunications services that are, and for decades have been, the fundamental building blocks of corporate networks. Formerly known as "special access," BDS services include all of the "private lines" or "point-to-point connections" that business customers use for their internal corporate networks, for their external communications with their customers, and to deliver their products to their customers. Virtually every critical business activity – withdrawals from a bank's ATM, credit card "swipes" at merchants' point-of-sale terminals, toll-free calls to customer service centers, data collected by regional offices, damage assessments recorded by insurance agents, inventory reports by car dealerships or retailers, voice and video conference calls among employees – all of these critical business activities can only be done via BDS facilities. For all types of businesses in all types of industries, BDS facilities are

the long-standing and essential ingredients of the networks used to communicate internally and deliver services to customers.

7. Business rely on a broad range of services. The largest companies in the country still depend upon some of the smallest capacity services offered by the incumbent local exchange carriers (“ILECs”). In particular, business users still rely heavily on DS1 connections for service to low-volume locations. I have, for example, advised an insurance company that uses at its headquarters campus an OC-192, which is a fiber-based facility with enough capacity to handle the equivalent of about 130,000 voice lines. But it also buys about 18,000 DS1 circuits to connect to the offices of its agents around the country. Similarly, credit card issuers purchase very high capacity BDS for their data centers but depend upon the lowest capacity data circuits for the millions of merchant point-of-sale terminals at which their cardholders “swipe” their cards. Thus, the FCC’s decision to eliminate rate protections for customers of DS1/DS3 BDS, in the apparent belief that those services no longer play a critical role for business customers, is simply misguided and misinformed.

8. The Commission has already allowed customers to be exploited for too long by unjust and unreasonable rates while this rulemaking has been pending. In January, 2002, Ad Hoc was the first party to sound the alarm when ILECs began taking advantage of the Commission’s flawed pricing flexibility rules by raising their rates for “special access,” as business data services were then known.¹ Nine months later, AT&T filed its petition “essentially requesting that the Commission revoke the pricing

¹ Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, CC Docket No. 01-321 (filed January 22, 2002) at 3-6.

flexibility rules and revisit the CALLS plan” which had set the rates that price cap ILECs charged for BDS.² Three years and a mandamus petition later,³ the Commission finally opened this rulemaking. Now, after more than a decade – and 15 years after Ad Hoc first flagged the issue – the Commission has finally adopted regulatory reform for BDS. But its latest order does nothing to protect business customers from unjust and unreasonable rates.

9. The Commission’s failure to regulate BDS prices in non-competitive areas has allowed price caps ILECs to exploit customers with rates that have been excessive for years. The magnitude of the resulting overcharges that purchasers of BDS have been paying is quantifiable and patently unreasonable. In an August 2004 analysis filed by Ad Hoc in this docket, I estimated that special access prices were set at levels that were generating about \$15 million per day beyond what would have been expected in a competitive market.⁴ In comments filed by Ad Hoc in July 2016, I pointed out that this amount added up to more than \$64 billion in overcharges imposed on BDS customers.⁵

² *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (“2005 NPRM”) at 2002, para. 19.

³ *AT&T Corp., et al.*, D.C. Circuit Case No. 03-1397, Petition for a Writ of Mandamus (filed Nov. 6, 2003).

⁴ Susan M. Gately, Helen E. Golding and Lee L. Selwyn, *Competition in Access Markets: Reality or Illusion: A Proposal for Regulating Uncertain Markets*, Ex Parte Submission of the Ad Hoc Telecommunications Users Committee in RM-1059 (filed August 26, 2004) at 7-8.

⁵ See Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed July 13, 2016) at 8. This figure is a conservative estimate since it assumed that the level of overcharges had remained constant over time since 2003. In fact, the per day overcharge grew since that time as a result of increased price levels, increased volumes of sales, and efficiency enhancements that were not captured because of the Commission’s failure to reset the price caps X-factor when the CALLS plan expired. In addition, the figure of \$15-million per day was calculated using ILEC year-end 2003 results. Ad Hoc updated the amount to \$17.5-million per day using 2004 year-end data and to \$21-

10. In short, both the direct experience of business customers and the evidentiary record before the FCC in this docket demonstrate that BDS prices will go up absent a stay. As Ad Hoc has repeatedly reported to the FCC and as the evidence in the record confirmed, the ILECs have consistently responded to BDS de-regulation by raising their prices. As the Commission's own tariffs document, ILECs raised prices in "pricing flexibility" areas above the levels the FCC's price caps rules identify as just and reasonable.⁶

11. The FCC's statutory responsibility under the Communications Act is to protect customers from unjust and unreasonable rates. The Commission itself has declared that its job is to preserve "the principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them."⁷ One of these principles, one of the Act's "core statutory values as codified by Congress," which the Commission has declared it must preserve as it facilitates and encourages market-driven technological transitions in network technology, is consumer protection.⁸ In order to vindicate that core statutory value, the Commission must protect customers from the ILECs' market power in the business data services ("BDS") market, pending the emergence of competition in the BDS market.

million per day using 2007 year-end data. (The year 2007 was the last year for which accounting data allowing such calculations was collected). See Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) at 4; Susan Gately, Helen Golding, Lee Selwyn and Colin Weir, *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS*, Attachment B to Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed January 19, 2010), Appendix 1.

⁶ See, e.g., Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) at 18-24.

⁷ See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433 (2014) at 14969, para. 1.

⁸ *Id.* at 1435, para. 1.

Until that occurs, the Commission can and must protect customers from unjust and unreasonable rates, which the BDS order does not do.

12. In light of past experience with BDS pricing by ILECs and the dependence of businesses on those BDS services, either as ILEC customers or customers of competitive carriers that rely on ILEC BDS inputs, the effect of this Order will be to diminish competition to the detriment of business customers by hampering the ability of competitive carriers to compete. Based on my experience, diminished competition, including the withdrawal of competitive carriers from market segments, will lead to business customers paying higher prices and suffering the other harms that come from a lack of robust competitive choices, such as a decrease in the quality of services and less innovation in the creation of new services.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pembroke, Massachusetts on the 23rd day of June, 2017.


Susan M. Gately