UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CITIZENS TELECOMMUNICATIONS COMPANY OF MINNESOTA, LLC, et al., *Petitioners*, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*.	)	No. 17-2296 and consolidated cases

OPPOSITION OF RESPONDENT THE FEDERAL COMMUNICATIONS COMMISSION TO MOTION FOR STAY

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This case concerns the Federal Communications Commission's method of regulating rates and terms for business data services (BDS).[1] Petitioners BT Americas, Inc., INCOMPAS, Windstream, and the Ad Hoc Telecom Users Committee—who purchase (or whose members purchase) BDS from "incumbent" telephone companies—disagree with the regulatory approach the Commission chose in the *Order* under review. In seeking a stay, however, petitioners paint a misleading picture of the *Order*.

Petitioners argue the *Order* "removes price regulation," "abandon[s] rate regulation," and "almost totally deregulate[s] rates," leaving them "without remedy" if BDS rates rise. Mot. 1, 2, 18. Those contentions are false.

The *Order* only eliminates one form of regulation—setting prices in advance through price cap tariffs. It leaves in place a robust regulatory regime that protects petitioners from unjust, unreasonable, or unlawfully discriminatory rates and terms.

As explained in the *Order*, regulation by means of prices set (or capped) in advance imposes substantial costs and is no longer generally warranted for the modern, dynamic BDS marketplace. The FCC therefore eliminated that form of price regulation in most markets, recognizing that competition will reliably

[1] *See Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459 (2017) (*Order*), *stay denied*, DA 17-663 (Wireline Comp. Bur. July 10, 2017) (*Stay Denial*, attached as "Exhibit A").

discipline BDS prices.

But the Commission did not rely on competition alone. Nor did it leave petitioners defenseless against incumbents. Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201, 202, expressly prohibit carriers from charging rates that are unjust or unreasonable, and Section 208 permits petitioners to recover any overcharges, *id.* § 208. Thus, even where market forces alone are insufficient to constrain BDS prices, federal law continues to protect petitioners against unjust, unreasonable, or unduly discriminatory rates and terms.

The agency also took additional steps to guard against any immediate or substantial disruption to petitioners' operations. Among other things, incumbent carriers are prohibited from raising tariffed rates for BDS for six months, and must honor the terms of existing contracts with their customers. Given that changing BDS prices would be administratively complex, and that prices must remain just and reasonable, petitioners' claims of injury are wildly overblown.

In sum, the Commission's decision to streamline regulation of BDS prices based on a substantial record and analysis was reasonable, and petitioners remain protected by law against unjust, unreasonable, or discriminatory rates and terms. Petitioners' motion for the extraordinary remedy of a stay pending appeal should therefore be denied.

BACKGROUND

A. *Governing Statutes*

Under the Communications Act of 1934 (Communications Act or Act), all "charges" and "practices" for telecommunications services—including BDS—"shall be just and reasonable," 47 U.S.C. § 201(b), and not unreasonably discriminatory, *id.* § 202(a). Because historically interstate telecommunications were offered by monopoly providers, the Act prescribes that carriers file a "schedule of charges," or tariff, with the Commission, describing the rates and conditions for their services. *See id.* § 203. Parties may challenge a carrier's tariff before it takes effect, and the Commission may suspend the tariff's operation and investigate its lawfulness. *See id.* §§ 204, 205.

In addition, under Section 208 of the Communications Act, 47 U.S.C. § 208, any person may complain to the Commission that a carrier's rates are unjust, unreasonable, or unlawfully discriminatory.[2] The agency must adjudicate such complaints within five months and can award damages for overcharges. *See* 47 U.S.C. §§ 208(b), 209; *Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497, 22511–14 ¶¶32–37 (1997); *see also Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 909 (D.C. Cir. 2009) (calling Section 208 "a formal

[2] Parties may alternatively bring such challenges in federal district court. 47 U.S.C. § 207.

fast-track … to challenge the … rates charged by [incumbents]").

In 1996, after the breakup of the AT&T monopoly, Congress comprehensively amended the Communications Act "to promote competition and reduce regulation" in telecommunications. Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104–104, 110 Stat. 56, 56 (preamble). Among other things, Congress directed the FCC to forbear from the enforcement of any provision of the Communications Act "if the Commission determines that" (1) the law "is not necessary to ensure" rates and practices "are just and reasonable and are not unjustly or unreasonably discriminatory," (2) the law "is not necessary for the protection of consumers," and (3) "forbearance … is consistent with the public interest." 47 U.S.C. § 160. In addition, under Section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by using whatever "regulating methods … remove barriers to infrastructure investment." *Id.* § 1302(a).

B. *BDS Marketplace*

BDS is the "dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections." *Order* ¶6. It differs from home internet service in part because of those guarantees; service to most homes is offered on a "best-efforts" basis. "Businesses, non-profits, and

government institutions" rely on BDS "as a means of connecting to the Internet or the cloud, and to create private or virtual private networks." *Id.*

The market for BDS is complex and "dynamic." *Order* ¶2. Numerous carriers—including not only incumbents (carriers that formerly held regional monopolies) and their "competitive" rivals, but also cable providers—offer BDS using a variety of technologies. *Id.* An older form of BDS uses the same technology developed for the transmission of telephone calls exchanged over the public switched telephone network. *Id.* ¶22. That legacy (or "TDM") form of BDS offers a variety of bandwidths (or "speeds"), including lower bandwidth options known as "DS1" and "DS3." *Id.* A newer form of BDS instead uses "packet-based" technology, usually over fiber facilities and at higher speeds. *Id.*

C. *Evolving Regulatory Treatment of BDS*

The FCC historically subjected incumbent carriers' provision of BDS to tariffing requirements and "price cap" regulation that set a ceiling on rates. *Order* ¶7.

Recognizing that those legacy forms of ex ante regulation might not fit the changing marketplace, in 1999 the Commission began granting significant relief to BDS providers. *See Order* ¶7. For incumbent providers of legacy BDS (formerly called "special access"), the Commission adopted two sets of deregulatory measures in areas where specified levels of competition were demonstrated: The

agency's "Phase I" reforms allowed incumbent carriers to offer individualized and discount agreements based on one set of competitive triggers; "Phase II" reforms, using other triggers, afforded relief from price cap regulation. *See id.* The Commission subsequently granted numerous carriers forbearance from tariffing and price cap regulation for packet-based and higher bandwidth services—forbearance the D.C. Circuit deemed an "appropriate … policy choice[]" reflecting the agency's "technical expertise" and "predictive market judgments." *Ad Hoc*, 572 F.3d at 908.

In August 2012, the FCC suspended further grants of Phase I and II relief because the existing rules were in practice "fail[ing] to accurately reflect competition." *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd 10557, 10558 ¶1 (2012). In December 2012, the agency initiated a data collection to uncover how competition, "whether actual or potential, affects prices," and to identify regulatory and other barriers to investment and competition. *Special Access for Price Cap Local Exchange Carriers*, 27 FCC Rcd 16318, 16346 ¶68 (2012).

With the benefit of the data collected, the FCC in 2016 issued a further notice of proposed rulemaking, declaring it "time for a new start" in BDS regulation. *Business Data Services in an Internet Protocol Environment*, 31 FCC Rcd 4723, 4725 ¶4 (2016) (*Further Notice*). The Commission proposed to

undertake "large scale de-regulation," coupled where necessary—in areas lacking competition—with the use of "tailored rules." *Id*. The Commission also made clear its intention to "remove barriers that may be inhibiting" the transition to newer technologies, *id.* ¶7; *see id.* ¶¶268, 271, and to adopt a regulatory framework suited "not only [for] today's marketplace, but tomorrow's as well," including an "end of tariffing in the BDS marketplace," *id.* ¶8; *see id.* ¶186.

In seeking comment, the Commission noted that "*potential* competition is important," because "nearby suppliers"—in particular, "fiber-based competitive supply within at least half a mile"—"can constrain BDS prices." *Further Notice* ¶161 (emphasis added). Consistent with its practice in other contexts, the Commission also declared that its competition analysis would be "informed by, but not limited to, traditional antitrust principles." *Id.* ¶186 n.478.

D. *Order*

After extensive comment from numerous parties, including petitioners, the FCC issued the *Order* under review, performing a new competitive analysis using the updated record.

1. The Commission concluded that the market for newer, packet-based, BDS–which "represents the future"—is already competitive. *Order* ¶83. It also deemed competitive the market for transport services using legacy technology ("TDM-based transport"). *Id.* ¶85. Based on that analysis, and the availability of

other, less burdensome forms of regulation, the Commission concluded that costly ex ante price regulation is unnecessary to ensure that rates for packet-based and transport services are just and reasonable. *See id.* ¶¶87–93.

2. As for lower bandwidth legacy termination services ("TDM-based DS1 and DS3"), the Commission determined that, "thanks to increased competition," most—but not all—areas are now competitive. *Order* ¶84. The agency implemented a "competitive market test" to identify competitive areas. Under that two-prong test, a county is deemed competitive if (1) 50 percent of the locations with BDS demand in that county are within a half mile of a location served by a competitive provider, or (2) 75 percent of the census blocks in that county have a cable provider offering broadband services. *Id.* ¶86; *see also id.* ¶¶130–144 (selecting those thresholds).

The first prong of the competitive market test was rooted in two findings. First, the record showed that competitive BDS providers "are commonly willing to extend their existing network out approximately a half mile … to meet demand." *Order* ¶119; *see id.* ¶¶43–46. Second, based on the record and economic authorities, the Commission recognized "a substantial competitive effect" when an incumbent carrier has at least one competitor in the relevant market. *Id.* ¶120.

The second prong of the Commission's competitive market test was grounded in evidence that cable providers have invested steadily in their networks

to compete for BDS customers, such that "[t]he entry of cable into [BDS] provisioning has been the most dramatic change in the market over the past decade." *Order* ¶55; *see id.* ¶¶27–29, 119. Cable providers, the Commission found, already exert a competitive effect on prices not only in areas where they provide BDS, *see id.* ¶¶27–29, 119, but "wherever [they are] supplying mass market broadband services over [their] own network[s]," *id.* ¶119, because "the underlying facilities used to provision best-efforts services … can be and are being repurposed to provide [BDS]," *id.* ¶31.

The Commission found that ex ante price regulation is unnecessary for lower bandwidth legacy termination services in areas deemed competitive under the competitive market test (or that were previously subject to Phase II reforms). *E.g.*, *Order* ¶131. Such regulation remains justified, the Commission determined, in other areas. *See id.* ¶¶178–182.

3. The agency crafted this new regulatory framework in part because of the "substantial costs of regulating the supply of BDS" through ex ante price setting and tariffs, including the difficulty of price setting in a dynamic and heterogenous market and the risk of discouraging entry and investment when prices are miscalibrated. *Order* ¶125; *see id.* ¶¶126–127. As the Commission explained, "[t]he question is not whether today nearby competition is everywhere fully effective, or even whether it will become so over the next few years," but

rather "whether the costs of the lack of fully effective competition, even as these decline over time, are likely smaller than the net costs of regulation." *Id.* ¶125.

The FCC made clear, however, that providers of BDS will remain subject to their statutory duties to offer rates and terms that are just, reasonable, and nondiscriminatory. *E.g.*, *Order* ¶¶102 n.308, 124 & n.382. The Commission likewise underscored the availability of Section 208 complaints and the agency's power to award damages to customers who have paid unlawful charges. *Id.* ¶¶93, 96, 102, 134, 162, 175.

ARGUMENT

To obtain a stay pending appeal, petitioners must show that (1) they will likely prevail on the merits, (2) they will suffer irreparable harm unless a stay is granted, (3) other interested parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *E.g.*, *Packard Elevator v. ICC*, 782 F.2d 112, 115 (8th Cir. 1986). A stay is an "intrusion into the ordinary processes of administration and judicial review" and thus "is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotation marks omitted). To merit this "extraordinary remedy," petitioners must make "a clear showing" that they are "entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008). They have not done so here.

I. Petitioners Have Not Shown They Are Likely to Succeed on the Merits.

Based on comprehensive analysis of an extensive record, the Commission reasonably exercised its discretion to provide relief from costly ex ante price regulation in most BDS markets, while leaving in place statutory safeguards that will continue to ensure just, reasonable, and nondiscriminatory rates and terms. This Court should uphold the agency's reasonable, reasonably explained choice of how best to further the "pro-competitive, deregulatory national policy framework" of the 1996 Act. *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 547 (8th Cir. 1998); *see also Ad Hoc*, 572 F.3d at 908 (according "particularly deferential" review when the FCC eliminated ex ante price regulation in favor of ordinary common carrier safeguards, a decision "implicat[ing] competing policy choices, technical expertise, and predictive market judgments").

A. *The Commission reasonably constructed the competitive market test.*

In constructing its competitive market test for lower bandwidth legacy termination services, the FCC determined the prices for such services are disciplined by carriers with nearby competitive facilities. As explained in the *Order*, the "presence of nearby competitive facilities tempers pricing as competitors are generally aware of competitive facilities that can be expanded to reach an additional customer with reasonable costs should the incumbent's pricing

exceed competitive levels." *Order* ¶14. In this regard, the Commission found, "[t]he record demonstrates that most [BDS] providers are willing and able to profitably invest and deploy facilities within a half mile of existing competitive facilities, and often have the ability to build out after winning a customer's bid for business, depending upon the scale of investment required." *Id*. ¶45.

The FCC also recognized the increasing competitive significance of cable companies. The record showed that incumbents are "losing small- and medium-sized customers," as well as larger ones, to cable providers. *Order* ¶31; *see id.* ¶55. Not only do "[c]able providers routinely pitch their best-efforts business broadband … as substitutable for legacy [termination] services," but "the underlying facilities used to provision best-efforts services … can and are being repurposed to provide business data services." *Id.* ¶31. The Commission thus reasonably concluded that "incumbent[s] … increasingly find themselves competing with cable for [BDS] customers." *Order* ¶55.

In addition, the Commission recognized, ex ante price regulation comes with real costs. *Order* ¶¶125–129; *see Nat'l Ass'n of Telecomms. Officers and Advisors v. FCC*, ___ F.3d ___, 2017 WL 2883738, *4 (D.C. Cir. July 7, 2017) ("Rate regulation of a firm in a competitive market harms consumers."). It is difficult for regulators to set efficient, uniform prices in the BDS market because of "large unforeseen changes in both customer demand … and network technologies";

complex products tailored to different customers that vary in cost; and large sunk costs. *Order* ¶127. Unduly high prices bring too many firms into the market, whereas prices set too low discourage market entry and innovation, *id*., counter to the agency's obligation to promote the deployment of advanced telecommunications, *id*. ¶11. The Commission's ability to accurately regulate the BDS market is further constrained because the market is "dynamic, evolving rapidly, and becoming increasingly competitive across all service offerings." *Id.* ¶129. A rapidly changing market "increases the chances that regulatory error will stifle competition and reduce welfare" as regulation quickly becomes outdated. *Id*. ¶129 & n.400 (collecting authorities).

Given those conclusions, the agency reasonably adopted a competitive market test for lower bandwidth legacy termination services that relieves a provider of ex ante price regulation within a county "if 50 percent of the locations with BDS demand in that county are within a half mile of a location served by a competitive provider … or 75 percent of the census blocks in that county have a cable provider present." *Order* ¶86; *see also* ¶¶130–144 (selecting those thresholds). At the same time, the Commission reminded stakeholders that "even in those areas … , the protections of section 208 will continue to apply." *Id*. ¶96. The statutory backstop of Section 208, which protects petitioners against unlawful rates and terms, puts the lie to their overheated contention that the BDS market has been

"almost totally deregulated." Mot. 1.

1. *The Commission reasonably considered the presence of nearby competitors.*

Petitioners argue that nearby BDS providers should not qualify as competitors when they are not currently serving a given location. Mot. 8. But BDS "providers commonly sell their service in bidding markets," and competitors can and do bid for service to buildings to which they must extend their networks. *Order* ¶46. Bidding markets thus allow competitors to exert a competitive effect even when their existing facilities do not reach a specific building. *Id.* ¶118. This is especially so because incumbents "have no way of knowing" precisely where their competitors have facilities, and so must "make much rougher assessments of the possibility of facing competitive bids." *Id.*

Petitioners (Mot. 9) criticize the agency's prediction that, in the market for lower bandwidth legacy termination services, nearby competitors will lead to "reasonably competitive outcomes over three to five years." *Order* ¶13. But the Commission reasonably found that cable companies and other nearby competitors are *already* taking significant and increasing business from incumbent BDS providers, *see id.* ¶¶27–29, and thus "generally" are already "temper[ing] prices in the short term," *id.* ¶13—*i.e.*, providing a competitive effect.

Contrary to petitioners' assertions (Mot. 10–11), the FCC also took into consideration the buildout costs nearby competitors face and the comparatively

low revenue from lower bandwidth services. *See Order* ¶¶49–54 ("Barriers to Entry"); *see also id.* ¶¶42–43, 82, 121, 132 & n.402 (discussing demand and expected revenue). The agency noted, for example, that "even when demand is too low to justify the buildout, competitive providers often consider whether there are any potential customers nearby and may even take a more circuitous route in anticipation of additional demand from businesses along the route." *Id.* ¶42; *see id.* ¶54 (providers may seek longer contract terms to recover the cost of buildout). And although petitioners disagree with the agency's interpretation of the "CostQuest" study, Mot. 10, the Commission articulated a reasonable basis for discounting it, *see Order* ¶119 n.363; *see also Stay Denial* ¶17 (noting that because that study is "predicated on the case of building a network ring, not a lateral from an existing network," it "is only marginally relevant, if at all, to the Commission's analysis of buildout costs from an existing network ring").[3]

[3] Petitioners claim that the FCC's analysis unreasonably "[i]gnored" (Mot. 6) the Department of Justice/Federal Trade Commission guidelines for identifying competitors in horizontal mergers (Mot. 8). Not so. First, the Commission's analysis was "informed by, but not limited to, traditional antitrust principles." *Order* ¶12; *see also id.* ¶12 n.41 (collecting authorities supporting a broader approach); *Further Notice* ¶186 n.478 (same). Second, this is not a merger. When DOJ and the FTC consider mergers, they must decide if prices afterward will be competitive in a free market, without further oversight. The FCC, by contrast, exercises continuing oversight and thus reasonably can consider a longer time frame, as well as other factors such as promoting investment and advanced technologies. Indeed, the guidelines expressly state that "[t]hey are not intended to describe how the Agencies analyze cases other than horizontal mergers." 2010 Horizontal Merger Guidelines § 1. And even within that context, the guidelines

2. *The Commission reasonably concluded that the presence of two providers imposes competitive discipline.*

The FCC also reasonably concluded that sufficient discipline on prices can be provided in the BDS marketplace by a single competitor. As the Commission explained—consistent with numerous economic sources—"the largest benefits from competition come from the presence of a second provider, with added benefits of additional providers falling thereafter." *Order* ¶120. Indeed, the Commission observed, "the impact of a second provider is likely to be particularly profound in the case of wireline network providers" since they have "large sunk costs" in their networks and thus are willing to cut prices to as low as the incremental cost of supplying a new customer. *Id.*

The agency's decision in *Petition of Qwest Corp. for Forbearance*, 25 FCC Rcd 8622 (2010) (*Qwest/Phoenix*), is not to the contrary. *Qwest/Phoenix* makes clear that a second competitor cannot *always* discipline prices. *Order* ¶121. But the decision acknowledges that in some circumstances a competitor may do so, and indeed the decision itself distinguished a prior order that found a duopoly competitive. *Qwest/Phoenix* ¶29. In addition, the record here showed that BDS incumbents had recently sustained "substantial losses," "primarily to new entrant

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make clear they need not always apply uniformly. *See id.* ("These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology."); *see also Stay Denial* ¶7 (recognizing the nonbinding nature of the guidelines).

cable operators." *Order* ¶121; *accord Stay Denial* ¶21; *Order* ¶¶31, 69. In *Qwest/Phoenix*, by contrast, the Commission found no "direct evidence that the markets at issue [were] behaving in a competitive manner." *Qwest/Phoenix* ¶86.[4]

B. *The Commission reasonably found the transport market competitive.*

In the *Order*, the Commission also reasonably found "strong evidence of substantial competition, as well as market conditions that suggest" ex ante price regulation of "transport and other non-end user channel termination services is not justified." *Order* ¶79. As the agency explained, "[t]ransport services are typically higher volume services between points of traffic aggregation," as opposed to termination services that transmit data to or from an end user's location, and thus providers "can more easily justify competitive investment and deployment" in transport. *Id.* ¶77.

Petitioners argue that the agency reached its conclusion based on a single statistic (Mot. 14–15), namely that 92 percent of customer locations are within a half mile of competitive fiber transport facilities. *Order* ¶91. That is wrong; the Commission relied on a host of factors. *Id.* ¶79. The Commission noted, for example, that "as of 2013, competitive providers have deployed competing transport networks in more than 95% of census blocks with special access demand

[4] The Commission's interpretation of its own precedent merits deference. *See Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998).

(and about 99% of business establishments are in these [areas]).” *Id.* Many major markets, the record showed, have as many as 28 competitive transport providers, and several second-tier markets have over a dozen. *Id.* Finally, the Commission predicted that “the relatively high demand … makes it likely that a competitor could justify investing in competitive transport facilities to serve” demand where competition still lagged. *Id.* ¶92; *see id.* ¶81.

The Commission thus reasonably concluded that “[w]hile competition may not be universal,” it is “sufficiently widespread” to “protect against the risk of supracompetitive rates” “over the short- to medium-term,” and that eliminating ex ante price regulation would avoid the “greater harm” of discouraging competitive entry through overregulation. *Order* ¶92. Far from “fundamentally misapprehend[ing] the nature of ‘transport’” (Mot. 14), the agency reached a reasonable decision, well grounded in the record, based on its expert predictive judgment.

C. *The Commission gave ample notice.*

The Administrative Procedure Act requires an agency to provide “a description of the subjects and issues involved” in a rulemaking proceeding. 5 U.S.C. § 553(b)(3). “The Courts of Appeals have generally interpreted this to mean that the final rule [an] agency adopts must be a ‘logical outgrowth’ of the rule proposed.” *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)

(quotation marks omitted). That will be the case so long as the variation is not "so major that the original notice did not adequately frame the subjects for discussion." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).

Petitioners assert inadequate notice because, they contend, the *Further Notice* committed the FCC to adopting more intrusive ex ante price regulations than existed previously. *See* Mot. 16–18. But the Commission repeatedly indicated it would seek whenever possible "to rely upon market forces" to ensure just and reasonable rates and terms. *Further Notice* ¶270; *see id.* ¶¶5, 209. Repeated statements that the existing regulatory regime sometimes underestimated competition, *e.g.*, *id.* ¶¶28, 276, that the Commission sought to reduce regulatory barriers to BDS investment and newer technologies, *see id.* ¶¶7, 268, 271, and that administrative feasibility would be an important consideration, *e.g.*, *id.* ¶¶209, 271, 280, all belie petitioners' contention that they had inadequate notice the Commission might lift ex ante regulation in many markets.

Petitioners' specific notice challenges (Mot. 17–18) fare no better. The Commission was obligated to identify the issues in the rulemaking. It did so. The agency informed participants, for example, that it was contemplating a competitive market test for BDS. *Further Notice* ¶¶270–271. It was not required to set forth the precise details of that test. *See Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1319 (8th Cir. 1981) (explaining that an agency's "notice need not contain every

precise proposal which [the agency] may ultimately adopt" (quotation marks omitted)). The Commission also asked how to "weight competition from a cable company," *Further Notice* ¶294, giving notice that cable might be included in the market analysis. Finally, proposals in the *Further Notice* to undertake "large scale de-regulation," *id.* ¶4, and "abandon collocation-based competition showings for … dedicated transport services," *id.* ¶278, presaged the Commission's decision to lift ex ante regulation for transport.[5]

II. The Balance of Equities Disfavors a Stay

A. *Petitioners have not shown irreparable injury.*

Petitioners also fail to show they will suffer irreparable injury absent a stay. They must show they will suffer harm that is "both certain and great," "actual and not theoretical." *Packard Elevator*, 782 F.2d at 115. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id*.

At the outset, petitioners remain protected against unjust and unreasonable BDS rates by Sections 201 and 202 of the Communications Act, 47 U.S.C. §§ 201,

[5] Petitioners' notice claims are also fatally flawed because the agency, in a pilot project to promote transparency, released a version of the *Order* fully three weeks prior to voting that foretold the final *Order* in all relevant respects. *Stay Denial* ¶35. The Commission received numerous comments in response (including from petitioner-movants Windstream, INCOMPAS, and BT), *see, e.g.*, *id.* ¶35 n.115 (citing a Windstream letter); *Order* ¶102 n.307 (citing an INCOMPAS letter), thus showing petitioners had actual notice and an opportunity to comment, *see Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 176 (D.C. Cir. 2015).

202, which the *Order* leaves in place. Pursuant to Section 208 of the Act, *id.* § 208, petitioners can seek damages if excessive rates are charged. And petitioners cannot reasonably claim entitlement to a stay to block lawful rate increases.

In any event, petitioners' premise that incumbent carriers will immediately raise prices once the *Order* takes effect is unfounded. *See* Mot. 18–24. For termination services in counties newly deemed competitive, the *Order* expressly prevents incumbents from raising tariffed rates until February 2018. *See Order* ¶167. And as to both termination and transport services, the *Order* requires incumbents to honor the terms of their existing agreements with petitioners. *Id.* ¶170.

There is thus no force to the claim that wholesale price increases will cause petitioners to lose "millions of dollars of unrecoverable added costs." Mot. 19. Indeed, Windstream notably concedes that "[t]he vast majority of [its] DS1 and DS3 purchases in counties in which price cap regulation will be eliminated are currently made pursuant to term and volume commitment plans" of the kind the Commission has required to remain in place. Mot.-Attach. B ¶13; *see Order* ¶170. And to whatever extent wholesale prices may ultimately shift under the *Order*, the specific increase that petitioners posit (Mot. 19) is entirely speculative—as are all loss calculations based on that projection.

Insofar as petitioners claim (Mot. 22) they will suffer irreparable harm

because "incumbents may choose not to sell low-bandwidth BDS to competitors at all," or will detariff at once on August 1 (Mot. 23), those fears are likewise speculative. Because the termination and transport services that petitioners require remain subject to Title II of the Communications Act, incumbents offering those services as part of their own retail offerings must offer them to petitioners and may not discontinue them without the Commission's prior approval. *See* 47 U.S.C §§ 202, 214. And because detariffing is an administratively complex undertaking, there is reason to doubt the likelihood of widespread detariffing the moment the *Order* takes effect. *See Stay Denial* ¶43. Finally, because BDS agreements are already routinely negotiated, *see, e.g.*, Mot.-Attach. B ¶ 6 (describing Windstream's agreements), any additional transaction costs resulting from detariffing under the *Order* would not likely rise to irreparable harm. *Contra* Mot. 23.

B. *A stay would harm third parties and disserve the public interest.*

Finally, petitioners ignore that "parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders." *Nken*, 556 U.S. at 427. "After more than ten years of studying the [BDS] … market, numerous requests for comment, and a massive data collection," the FCC "create[d] a regulatory environment that promotes long-term innovation and investment," which will benefit BDS customers. *Order* ¶1. The

Order reflects the expert agency's predictive judgment—based on an exacting analysis of the record and "a careful balancing of the costs and benefits of ex ante pricing regulation," *id.* ¶4—that "minimiz[ing] unnecessary government intervention" in the dynamic BDS market will "spur entry, innovation, and competition," *id.* ¶5. By promoting "network innovation" and the "deployment of competitive services," the Commission's new rules will benefit "American businesses and consumers," including those that, "for whatever reasons" elect to "maintain [legacy] services" as the market completes its technology transition. *Id.* ¶25.

Petitioners argue a stay would "maintain[] the status quo," Mot. 18, without harm to anyone, *see id.* at 24–25. But there is broad consensus that the FCC's existing framework for regulating BDS is flawed. Notwithstanding petitioners' disagreement with the Commission's predictive judgments and policy choices, the public interest is best served by allowing the *Order*'s long-awaited reforms to take effect without delay.

CONCLUSION

The Court should deny the motion for stay pending judicial review.

Respectfully submitted,

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Sarah E. Citrin
Counsel for Respondents

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/s/ Sarah E. Citrin
Sarah E. Citrin
Counsel for Respondents

EXHIBIT 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
	)	
	)	

ORDER DENYING STAY MOTION

Adopted: July 10, 2017 **Released: July 10, 2017**

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) denies the Motion for Stay of the Federal Communications Commission's Report and Order in the Business Data Services Proceeding (the *BDS Order*) filed by Ad Hoc Telecom Users Committee, BT Americas, Inc., INCOMPAS and Windstream Services, LLC (Petitioners).[1] The Commission's adoption of the *BDS Order* on April 20, 2017, was the culmination of more than ten years of analysis of the business data services (BDS) market, numerous requests for comment, and a massive data collection. Based on a careful review of that record, including consideration of substantial numbers of comments and *ex parte* presentations filed by Petitioners, the Commission established a regulatory framework that accounts for the dynamic competitive realities of the BDS marketplace, provides ample regulatory protections for all stakeholders in that marketplace, and creates a regulatory environment that will promote investment, innovation, and buildout. Among other things, the Commission determined the appropriate level of regulation for packet-based and time division multiplexing (TDM) BDS. The Commission relieved packet-based services and transport services from ex ante pricing regulation. It also established a competitive market test (CMT) to determine where ex ante pricing regulation of TDM end user channel terminations could be relieved in favor of competition. At the same time, the Commission reaffirmed the applicability of the provisions of the Communications Act aimed at ensuring just and reasonable rates, terms, and conditions to all such services. The Commission also provided for a lengthy transition period, further showing that there will

[1] Motion for Stay Pending Judicial Review, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25 (filed June 23, 2017), https://ecfsapi.fcc.gov/file/106230709109889/2017-06-23%20Motion%20for%20Stay%20(REDACTED).pdf (Motion for Stay); *see also Business Data Services in an Internet Protocol Environment; Technology Transitions; 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. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, Report and Order, 32 FCC Rcd 3459 (2017) (*BDS Order*).

no irreparable harm either on August 1, 2017, the effective date of the *BDS Order*, or any time after that. Upon consideration of Petitioners' arguments for a stay of the *BDS Order*, we find they fail to demonstrate that they are likely to succeed on the merits, that they will suffer irreparable injury, or that the balance of the equities favors granting a stay. Accordingly, we deny the motion for the reasons set forth more fully below.

II. DISCUSSION

2. To qualify for the extraordinary remedy of a stay, Petitioners must show that: (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent the grant of preliminary relief; (3) other parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.[2] Petitioners generally challenge the CMT and the rationale underlying its development and application, whether the action taken in the *BDS Order* complies with the Administrative Procedure Act (APA), and the effect of the reforms adopted in the *BDS Order* in alleging that they will suffer irreparable harm absent a stay.

3. We turn first to the Petitioners' arguments regarding their likelihood of success on the merits—challenges to the Commission's competitive findings, adoption of the CMT, and arguments regarding notice—and find that they are without merit. We next find that Petitioners have wholly failed to demonstrate that they will suffer irreparable injury should their stay request be denied. Finally, we find that a balance of the equities does not support a stay but would rather harm the public by continuing over-regulation of the BDS market should we grant their motion and delay the implementation of the *BDS Order*.

A. Petitioners are Unlikely to Prevail on the Merits

4. We find that Petitioners have failed to demonstrate that they are likely to succeed on the merits. The heart of their substantive argument is that the Commission's CMT, by taking account of the effect of a nearby facilities-based competitor and finding that the existence of at least one such competitor warrants the removal of one particular form of regulation (price cap regulation), violates antitrust principles. Their arguments are misplaced in this rulemaking proceeding and fail to account for significant record evidence supporting the Commission's market analysis and adoption of a CMT. The Petitioners also argue that the Commission's light touch approach to the transport market was flawed, that the Commission should have applied the CMT to already deregulated packet-based services as well as TDM services, and that the Commission did not provide adequate notice and opportunity for comment before adoption of the CMT and rules governing transport services. However, the Commission provided more than adequate notice for all its actions in the *BDS Order* and those actions are well supported by the record received in response to the Commission's *Further Notice* and by Commission and other relevant precedent.

1. Competitive Market Test

5. Petitioners are unlikely to prevail in their challenge to the Commission's CMT because in the *BDS Order* the Commission analyzed the market relying on more than ten years of record evidence, based its analysis on sound legal ground, and adequately explained its conclusions. Moreover, Petitioners' arguments regarding the CMT suffer from two major flaws. First, Petitioners argue that the Commission was required to conduct a very particular form of antitrust analysis used in merger analysis, which Petitioners believe would favor their preferred regulatory outcome.[3] As the Commission explains

[2] *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[3] *See* Motion for Stay at 12, 16, 23. Petitioners rely on the Horizontal Merger Guidelines to support many of their contentions and seem to believe that the Commission must follow the Horizontal Merger Guidelines in analyzing or devising the appropriate regulatory structure for the market. However, the Guidelines are just that, i.e., guidelines, even for the antitrust agencies, and they possess only persuasive authority in the enforcement of the antitrust laws. (continued….)

in the *BDS Order*, particularly in this rulemaking context, the "competition analysis . . . is informed by, but not limited to, traditional antitrust principles designed to protect competition."[4] The central question before the Commission was whether, in the absence of one particular form of ex ante, price cap regulation, other regulatory methods and competition would be sufficient to constrain rates to just and reasonable levels.[5] Petitioners fail to acknowledge that rulemakings raise different considerations than merger review, such as costs associated with traditional, ex ante price regulation.[6] Second, Petitioners generally appear to conflate the market analysis in the *BDS Order* with the CMT. Although the market analysis plays an important role in the Commission's decision making, it is not, as the *BDS Order* makes clear, the sole factor; the Commission determined that it must take into account other policy objectives, such as promoting technology transitions and considering the administrative burden regulations may impose. Accordingly, in the *BDS Order* the Commission reasonably took account of the effect on BDS prices of nearby facilities-based competitors in a manner consistent with the law, record, and compelling policy objectives. Similarly, the *BDS Order* makes clear that the Commission reasonably determined that a single competitor would be sufficient to discipline BDS rates such that continued ex ante price cap regulation was no longer necessary.

a. The Nearby Competitor Standard

6. Petitioners' challenge to the nearby competitor standard adopted by the Commission for use in the CMT is unsupported by the record and is therefore unlikely to prevail. Petitioners argue that the Commission was wrong to find that sufficient competition exists where there is a nearby competitor, which it defines as one competitive provider with a network within a half mile (800 meters) of a location with BDS demand.[7] As the Commission made clear in the *BDS Order*, customers routinely consider nearby providers as realistic alternatives to incumbent LEC facilities.[8] We conclude that the Commission's nearby competitor standard is well documented and supported in the *BDS Order* and in the record and therefore find the Petitioners' arguments lack merit.[9] We nevertheless address several of Petitioners' specific allegations regarding the Commission's nearby competitor standard.

7. *Market Participants*. Petitioners assert that neither of the types of nearby competitors that the Commission relied on in its two-prong CMT qualify as market participants under the 2010 Horizontal Merger Guidelines.[10] Petitioners' reliance on the analysis suggested by the Horizontal Merger

(Continued from previous page)
See Horizontal Merger Guidelines, U.S. Dept. of Justice & Fed. Trade Comm'n, § 1 (Aug. 19, 2010) (2010 Horizontal Merger Guidelines) (noting the Guidelines "are not intended to describe how the Agencies analyze cases other than horizontal mergers" and emphasizing that even "merger analysis does not consist of uniform application of a single methodology" but rather "it is a fact-specific process"); *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 52 n.10 (D.D.C. 2011) (observing in a merger case that the Horizontal Merger Guidelines "are not binding upon this Court, but courts in antitrust cases often look to them as persuasive authority").

[4] *BDS Order*, 32 FCC Rcd at 3467, para. 12.

[5] *See* 47 U.S.C. §§ 201(b), 202(a). In conducting this analysis, the Commission may "consider technological and market changes as well as trends within the communications industry, including the nature and rate of change." *SeeApplications of Comcast Corp., General Electric Comp. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4248, para. 23 (2011).

[6] *See BDS Order*, 32 FCC Rcd at 3517, para. 126 ("Even well-crafted regulations have unintended consequences, inhibiting competition, reducing investment, and end user benefits.").

[7] *See* Motion for Stay at 10-22; *BDS Order*, 32 FCC Rcd at 3482, 3520-21, paras. 45, 132-33.

[8] *See BDS Order*, 32 FCC Rcd at 3512-3513, para. 118 n.360 (demonstrating that competitive providers employ extensive "proactive" sales force to win new customers from incumbent LECs and wholesalers obtain not only "on net" but also "near net" building lists).

[9] *See id.* Parts III.C. and IV.C.3.a.

[10] Motion for Stay at 12.

Guidelines is misplaced—the Guidelines are not binding in the merger context and certainly are not binding on the Commission in its exercise of rulemaking authority under the Communications Act of 1934, as amended (the Act). More fundamentally, Petitioners' conclusion that competitive LECs (CLECs) and cable operators are not viable market participants is clearly erroneous.

8. The Commission's analysis of competitive conditions in the BDS industry led it to define the relevant market as the area within a half mile of a customer location.[11] Companies with facilities within a half mile are already market participants. Petitioners nonetheless appear to find it dispositive that the Commission "*expressly disclaims* that a second wireline provider … is a rapid entrant."[12] But Petitioners misunderstand the concept of entrants in competitive analysis. An entrant is a firm that may, at some future point in time, compete for customers within the market. In this proceeding, the Commission determined that firms that have facilities within a half mile of a service location are already market participants because they are likely to respond to RFPs and similar requests for service and therefore are currently competing for customers within the market.[13] The Commission's finding was based on significant record evidence of the buildout strategies of various BDS competitors, including those of competitive LECs and cable providers.[14] Moreover, the *BDS Order* makes it clear that the Commission did consider the costs and ability of providers to deploy facilities.[15] Indeed, the Commission recognized that many competitive providers have facilities significantly less than a half mile from buildings with demand for BDS, with half of such buildings located within 88 feet of competitive fiber,[16] and that competitors into account the current demand at any location, the likely growth in future demand, and the opportunity to incrementally extend their network to other nearby locations.[17]

9. Petitioners' reliance on a particular view of antitrust authority as binding authority on the Commission, and their suggestion that the Commission's previous treatment of certain proposed mergers should be controlling, is misplaced in this rulemaking context.[18] The analysis that led the Commission to adopt the CMT as part of the BDS rulemaking is very different from the analysis it employs when conducting a merger review. In the BDS proceeding, the Commission was not considering a transfer of an FCC license within the limited context of transaction-specific facts. Instead, it reasonably considered the long-term costs and benefits of tariffing and other ex ante pricing regulation in an increasingly dynamic market that remains subject to continuing Commission jurisdiction under Title II of the Act.

[11] *BDS Order*, 32 FCC Rcd at 3482, para. 45.

[12] Motion for Stay at 12-13 (emphasis in original).

[13] *BDS Order*, 32 FCC Rcd at 3479-83, paras. 39-47.

[14] *See id.*

[15] As both the *BDS Order* and the *Further Notice* make clear, the Commission's choice of a half mile distance is supported by considerable record evidence from a range of market participants, including competitive LECs and incumbent LECs, as well as the Rysman Paper. *See BDS Order*, 32 FCC Rcd 3479-81, paras. 40-41; *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4822-36, 4814-15, para. 211 (2016) (*Further Notice*). Competitive LECs that provided support for the Commission's half mile distance included Windstream. *See BDS Order*, 32 FCC Rcd at 3482, para. 45 n.146.

[16] *BDS Order*, 32 FCC Rcd at 3481, para. 42.

[17] *Id.* at 3482, para. 44.

[18] *See* Motion for Stay at 22-23.

10. In the *BDS Order*, the Commission relied on its "conclusion that a 'nearby BDS competitor' provides sufficient competition to forgo" federal tariffing requirements under the CMT.[19] The Commission recognized that "competitors outside of the customer's location can affect pricing because the winning bid represents the competitive offer that others must beat, even if that competitor does not already have facilities in the customer's building."[20] The Commission also found that competitive pressure often exists outside of the geographic ranges specified by the CMT.[21] Moreover, the Commission purposefully understated the competitive pressure present in the BDS market by excluding from the CMT competition from other types of service providers, finding that "[a]lthough our competitive market test takes into account competition only from providers of copper, fiber, and coax last-mile facilities, in many locations there are likely more competitors present than the two captured by the test, such as providers of fixed wireless last-mile services, including providers of emerging 5G last-mile transmission technology, which promises to be widespread."[22] As such, the Commission deliberately chose a conservative and administrable approach to formulating a regulatory framework based on a nearby competitor standard, which is appropriate in a rulemaking, as opposed to a merger review, context.

11. Petitioners specifically challenge the basis for the second prong of the CMT and question whether cable operators can be effective market participants in the business data services market. We do not find merit to Petitioners' suggestion that the Commission should have ignored or severely discounted the impact of competition provided by cable operators in BDS markets. Petitioners initially assert that "the Commission never contends that cable 'competitors' under the CMT's second prong are actually in the market."[23] This is a plain misreading of the *BDS Order*. In it, the Commission reviewed the record evidence of cable providers' fiber and hybrid fiber coaxial (HFC) services and found that while HFC-based, best-efforts service is distinguishable from traditional BDS in some senses, substitution nonetheless occurs.[24] More importantly, the Commission found that the underlying facilities used to provision such best-efforts services "are being repurposed to provide business data services."[25] Indeed, there is ample record evidence that the presence of HFC facilities makes it easier for cable providers to build laterals to customer locations.[26]

12. In fact, in the *BDS Order*, the Commission summarized the substantial record evidence of cable operators' investments in networks that can and are being repurposed to provide business data services and the revenues cable derives from those investments.[27] The Commission found that cable providers are rapidly expanding their market share in the business data services market and the record shows many customers, including wholesale customers, are willing to use cable last mile facilities,

[19] *BDS Order*, 32 FCC Rcd at 3512, para. 117.

[20] *Id.* at 3482-83, para. 46.

[21] *Id.* at 3480-81, para. 41.

[22] *Id.* at 3515, para. 122.

[23] *See* Motion for Stay at 13.

[24] *See BDS Order*, 32 FCC Rcd at 3473-75, paras. 27-31.

[25] *Id.* at 3474-75, para. 31.

[26] *See BDS Order*, 32 FCC Rcd at 3513-14, para. 119; Letter from Matthew A. Brill, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al., at 2 (filed Mar. 13, 2017) (Comcast Mar. 13, 2017 Letter) (explaining that "the existence of HFC facilities can facilitate Comcast's ability to construct new fiber connections to customer locations more rapidly and at lower cost than if Comcast lacked nearby HFC facilities. That is because Comcast's HFC network consists of extensive fiber connectivity between the network core and local nodes, which then are connected to customer locations by coaxial cable.").

[27] *See BDS Order*, 32 FCC Rcd at 3485-88, paras. 55-62.

including their HFC facilities, to meet their business data service needs.[28] Importantly, recent trends in the market confirm the Commission's judgment that cable is an active participant in the market and that its presence is serving to intensify price competition in the BDS market.[29]

13. Petitioners' assertion that cable operators "will not and cannot commit to using their cable networks to provide BDS in any significant quantity" and "cable cannot sell EoHFC [Ethernet over Hybrid-Fiber Coaxial] in any significant quantity"[30] misreads and contradicts the basic trends in the business data services market, assuming, contrary to record evidence, that cable providers cannot, and will not, further utilize EoHFC networks to provide BDS in increasingly significant quantity.[31] Further, EoHFC networks represent opportunities for lower cost expansion in, and nearby, geographies, as opposed to greenfield entry and expansion.[32] The fact that cable companies' BDS revenues for their HFC-based service have grown at double-digit rates demonstrates that cable companies do not risk overwhelming their HFC networks' capacity by expanding their business data services customer base.[33]

14. As the Commission noted in the *BDS Order*, in recent years, cable operators have invested billions of dollars in their networks to provide business data services and have experienced substantial BDS revenue growth as a result.[34] Other public analysis of the industry over the same timeframe arrives at a similar conclusion.[35] It was reasonable for the Commission, based upon the record, to treat nearby cable networks as competitively relevant, and its use of nearby cable providers for purposes of the second prong of the CMT is well grounded in a substantial body of record evidence. Finally, application of the cable prong of the CMT accounts for less than a single percent of the locations

[28] *See id.* at 3485-88, paras. 55-62 (detailing evidence of cable's aggressive expansion in the BDS market); Letter from Curtis Groves, Counsel for Verizon Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25 et al., at 5 (filed Mar. 1, 2016) (detailing Verizon's competitive response to cable industry's capture of Verizon's retail and wholesale wireline business customers); Sean Buckley, *Sprint Ropes in Ethernet over Copper, Ethernet over DOCSIS into Ethernet strategy*, FierceTelecom (May 15, 2016), http://www.fiercetelecom.com/story/sprint-ropes-ethernet-over-copper-ethernet-over-docsis-ethernet-strategy/2016-05-15 (reporting Sprint announced launching "Ethernet over DOCSIS options … It is the same Ethernet access, but just instead of using fiber we'll use existing copper in the ground or the cable plant that Comcast, Cox, and others offer services on . . . .").

[29] *See, e.g.*, Moffett/Nathanson, U.S. Communications Infrastructure, U.S. Telecommunications, U.S. Cable & Satellite, U.S. Communications Infrastructure, Telecom, & Cable: Commercial Wireline… The Case of the Missing Revenue, at 1, 15-16 (June 16, 2017) (Moffet/Nathanson June 2017 Report) (pointing out that "cable operators have been incrementally more aggressive in pursuing new business" and noting the revenues flatlined likely because of cable's aggressive pricing and customers "transition[ing] away from legacy services toward next generation services").

[30] Motion for Stay at 13, 18.

[31] *See BDS Order*, 32 FCC Rcd at 3474-75, paras. 30-31.

[32] *See id.* at 3467-73, 3785, 3798, paras. 13, 28 n.81, 28-29, 55-56, 83; Comcast Mar. 13, 2017 Letter at 2; Sean Buckley, *Comcast, Charter Lead Cables Challenges to Telcos in the Business Services Sector*, FierceTelecom (Dec. 15, 2016), http://www.fiercetelecom.com/telecom/comcast-charter-lead-cable-s-challenge-to-telcos-business-services-sector ("[C]able operators enjoy a largely local presence with an embedded base of traditional hybrid fiber coax (HFC) cable that they can rapidly use to scale higher speed services and voice to local business customers").

[33] *See, e.g.*, Letter from Matthew A. Brill, Counsel to Time Warner Cable Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (filed on Mar. 3, 2016).

[34] *See BDS Order*, 32 FCC Rcd at 3485-88, paras. 55-62.

[35] Moffett/Nathanson June 2017 Report at Exh. 2 (showing cable BDS market share growing from 2 percent in 2007 to 14% in 2016) and at 5 ("Cable has posted blistering growth rates, which remain in the mid-teens [percentages] even after tapering off in recent years as the base of business has grown.").

that the Commission determined to be in counties deemed competitive, so its practical effect on an independent basis is very slight.[36] We therefore find Petitioners are unlikely to prevail on this issue.

15. *Barriers to Entry*. Petitioners allege the Commission failed to analyze all barriers to entry and consider all record evidence on that point.[37] Some of Petitioners' arguments stem from their confusing the *BDS Order*'s market analysis and its competitive market test. The Commission found that providers with network facilities within a half mile of a location generally incur lower barriers to facilities-based entry, in part, due to being in close proximity to the customer's location already.[38] Similarly, cable provider facilities that are in the same census block as a location with BDS demand also are considered by the Commission as being competitively relevant.[39] The Commission, in the *BDS Order*, as well as in the earlier *Further Notice*, therefore, addressed the issue of barriers to facilities-based entry extensively, including discussing the applicable timeframe, likelihood, and sufficiency of entrants, as well as the evidence of actual entry that has been taking place and predicted to continue.[40]

16. As to timeframe or timeliness of entry, Petitioners assert that the Commission's estimation that a facilities-based entry of a nearby competitor is likely to occur in the near to medium term – i.e., within three to five years – makes the competitor "not a timely entrant."[41] In the *BDS Order* the Commission made it clear that although facilities-based entry may take a year or two in some circumstances, the existence of the nearby competitor "generally tempers prices in the short term."[42] The *BDS Order* further states:

> [A] business data services competitor does not need to be already offering service in a given building to constrain a supplier at that location. A nearby business data services competitor constrains pricing by responding to RFPs and participating in similar customer service bidding requests, which creates a pricing floor without any physical presence of the potential competitor in the nearby geography.[43]

Moreover, the 2010 Horizontal Merger Guidelines focus on the combined factors of whether entry would be timely, likely, and sufficient, as the Commission did as part of its analysis.[44] There is no explicit

[36] *See BDS Order*, 32 FCC Rcd at 3526, para. 142.

[37] *See* Motion for Stay at 14-22.

[38] *See BDS Order*, 32 FCC Rcd at 3482, 3512-13, paras. 45, 118.

[39] *Id.* at 3520-21, para. 133 ("Given the high sunk cost nature of cable broadband networks, we find when a cable provider is capable of providing Internet broadband service within any census block, then generally they have the incentive to make the incremental investment necessary to serve locations with BDS demand in that census block, especially over the medium term.").

[40] *See id.* at 3483-90, paras. 49-67; *see also Further Notice*, 31 FCC Rcd at 4822-36, paras. 224-30 (2016).

[41] Motion for Stay at 14-15 & n.43 (citing cases on timeliness of entry in other industries but failing to show how conditions in those industries are like those in the business data services).

[42] *BDS Order* 32 FCC Rcd at 3467, para. 13.

[43] *Id.* at 3490, para. 67.

[44] We also note that the 2010 Horizontal Merger Guidelines abandoned an explicit two-year timing requirement for entry as part of the revision of the 1997 Horizontal Merger Guidelines. *Compare* 2010 Horizontal Merger Guidelines § 9 (silent on specific timing requirement) *with* 1997 Horizontal Merger Guidelines § 3.2 ("The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.").

regulatory or legal shot-clock for entry under the Communications Act or otherwise, as Petitioners suggest, particularly in a non-merger context.[45]

17. Regarding the likelihood of entry, Petitioners fault the Commission for not considering the "economic value of demand" for low bandwidth DS1s and DS3s and failing to accord more weight to a CostQuest study.[46] Petitioners' argument ignores the substantial discussion in the *BDS Order* on various strategies providers employ to justify extending laterals to less profitable locations, including such factors as marketing to additional nearby customers and requiring longer contract terms to recoup investment.[47] There is ample record evidence that competitive providers routinely build for demand as low as 10 Mbps and, in fact, some cable providers undertake "proactive fiber buildouts" even before securing the first paying customer in the market.[48] Regarding the CostQuest study, the study's conclusion—that "an economically rational CLEC will not self-deploy to serve a single customer with less than 1 Gbps of capacity per building" —is predicated on the case of building a network ring, not a lateral from an existing network.[49] Accordingly, the CostQuest study is only marginally relevant, if at all, to the Commission's analysis of buildout costs from an existing network ring. Petitioners also argue that in addition to buildout costs, providers also encounter other challenges, such as gaining access to buildings and rights of way.[50] Although some commenters mentioned these potential obstacles to buildout, they neither documented nor quantified them in the record. Imposing widespread regulations based on such residual buildout costs would greatly increase the social cost of regulation.[51]

18. *Business Density*. Petitioners also fault the Commission for "failing to take any steps to approximate demand" or to incorporate "an approximation of demand into its test" by using business density or some other proxy for demand to determine whether it would be profitable to extend a lateral to a particular location.[52] Petitioners also note that the Commission used business density analysis in its *2012 Suspension Order*.[53] Petitioners, however, advocate inconsistently on this point. For example, some competitive LECs—including one of the Petitioners—opposed using business density in their comments submitted in this proceeding.[54]

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[45] Petitioners cite Commission precedent specifying or suggesting timeframes shorter than three to five years. *See* Motion for Stay at 15 n.44. While such timeframes may provide guidance, they are not binding in nature as Petitioners suggest. The Commission has not restricted its own discretion to consider longer timeframes, particularly in rulemakings such as this one.

[46] Motion for Stay at 19-20.

[47] *BDS Order*, 32 FCC Rcd at 3481-82, 3520, paras. 42-43, 132. The Commission also recognized that "rapidly increasing bandwidth demands will place an ever increasing demand for [BDS] services." *Id.* at 3461, para. 3.

[48] *See* XO Jan. 27, 2016 Comments, Decl. of George Kuzmanovski at para. 18; Comcast June 28, 2016 Comments at 9.

[49] Letter from Jennie B. Chandra, Vice President of Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al., Attach. A at 2 (filed June 8, 2015) (CostQuest White Paper). The other filings that Petitioners cite state that only a fraction of the CostQuest White Paper's claimed requirement of 1 Gbps capacity is necessary for build-out. *See* Motion for Stay at 19 n.60.

[50] *See* Motion for Stay at 17-18.

[51] *See BDS Order*, 32 FCC Rcd at 3517-19, paras. 125-29.

[52] Motion for Stay at 21, n.66.

[53] *Id.* (referring to *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. 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, 27 FCC Rcd 10557 (2012) (*2012 Suspension Order*)).

[54] *See* Birch et al. June 28, 2016 Comments at 51 (stating "there is no guarantee that the businesses in denser areas will be of the type or size that require Business Data Services" and therefore "business density is not even an effective *indirect* proxy for the presence of competitors") (emphasis in original); *see also* Comcast June 28, 2016 (continued….)

19. While the Commission found business density metrics to be useful as a diagnostic tool in analyzing the discrete markets it examined in the *2012 Suspension Order*,[55] and while it sought comment in the *Further Notice* on including a similar metric in its CMT,[56] it ultimately declined to incorporate business density metrics into the CMT. Density alone cannot predict competitive deployment. For example, a cell tower located along a rural highway may be an attractive investment option for providers despite being in a low-business density area. Moreover, business density is not a fixed variable and would require reevaluation on an ongoing basis, raising administrability concerns, which were an important concern in the *Further Notice* and comments filed in response.[57]

b. Effect of a Single BDS Competitor

20. Petitioners challenge the Commission's determination that a single BDS competitor will discipline incumbent LEC rates.[58] We find that the Commission's adoption of a single competitor standard is a reasonable response to the record collected in this proceeding and well within its discretion and therefore find Petitioners are unlikely to prevail on the merits of this issue.

21. Petitioners cite precedent acknowledging potential competitive harms that can arise from a market with two participants, particularly the Commission's *Qwest Phoenix* decision.[59] The *Qwest Phoenix* decision, however, dealt with a two-competitor market as of 2010. Since then, that market has seen dramatic changes with the large-scale entry of cable in the business data services market. Moreover, *Qwest Phoenix* was principally concerned with the level of competition in mass market telecommunications services, not business data services. To the extent that the *Qwest Phoenix* decision addressed business data services, its characterization of the 2010 market is fundamentally different than the Commission's characterization of the current BDS market in the *BDS Order*, reflecting the changed circumstances in the market with cable entry. The Commission based its decision in *Qwest Phoenix* on specific factual findings that the local cable provider was connected to "relatively few enterprise customers" and that "other competitors likewise have few lit buildings."[60] The Commission further concluded that "Cox's last-mile network . . . could not readily serve most . . . enterprise businesses"[61] and that therefore "Qwest has not demonstrated that there exists significant actual or potential competition for enterprise services."[62] By contrast, in the *BDS Order*, the Commission found a dynamically evolving

(Continued from previous page)
Comments at 53 (asserting that "looking only at demand in a market" by using a business density metric "would entirely ignore the level of competitiveness on the *supply* side") (emphasis in original).

[55] *2012 Suspension Order*, 27 FCC Rcd at 10585-86, para. 51.

[56] *Further Notice*, 31 FCC Rcd at 4846, para. 293.

[57] *See BDS Order*, 32 FCC Rcd at 3504-05, para. 99 n.305. Administrability is an important factor the Commission considers when choosing among regulatory options.

[58] Motion for Stay at 22-29.

[59] Motion for Stay at 24-26; *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(C) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8637, para. 30 n.91 (2010) (*Qwest Phoenix Order*). The *Qwest Phoenix* decision identifies the Bertrand Model as a type of duopoly that "can yield a competitive outcome assuming homogeneous products and no capacity constraints." *Qwest Phoenix Order*, 25 FCC Rcd at 8637, para. 30 n.88. Petitioners assert that the BDS market is not an example of Bertrand competition since "cable faces real capacity constraints." Motion for Stay at 25 n.79. That assertion, however, is not reconcilable with cable's steady, double-digit BDS revenue increases in recent years that are well documented in the *BDS Order*. *See, e.g.*, *BDS Order*, 32 FCC Rcd at 3488, para. 62.

[60] *Qwest Phoenix Order*, 25 FCC Rcd at 8661, para. 73.

[61] *Id.* at 8662, para. 74.

[62] *Id*. at 8668, para. 87.

market with extensive and growing competition from various competitive providers and cable companies and based its CMT on the actual, not predicted, presence of competitors nearby.[63]

22. Petitioners contend that even in industries with high sunk costs, duopolies do not lead to competitive prices.[64] The Commission, however, found in the *BDS Order* "that the high sunk cost nature of the BDS market gives providers the incentive to extend their network facilities to new locations with demand even when those locations contribute revenue only marginally above the incremental cost of the network extension."[65] It further stated, "consistent with other industries with large sunk costs, the impact of a second provider is likely to be particularly profound in the case of wireline network providers."[66] To the extent Petitioners argue that the business data services market is not a high sunk cost industry but is rather characterized by high marginal costs, their argument is flawed.[67] While incremental costs to serve an additional location may not be negligible, they are low relative to the considerably higher sunk costs of deploying communications networks generally. Petitioners in fact underscore this point by citing several sources that support the relatively low nature of incremental build out costs.[68]

23. Additionally, in the *BDS Order* the Commission found that the disproportionate impact of a single competitor was another reason for basing the CMT, which determines when the Commission should exit ex ante price regulation, on a single competitor standard. The Commission explained that "the largest benefits from competition come from the presence of a second provider, with added benefits of additional providers falling thereafter."[69] Petitioners incorrectly claim that the Commission did not "rely on any empirical data in support of its conclusion that a single BDS competitor has a substantial competitive effect on prices."[70] Data in the record quantify the disproportionate impact of a single competitor—data supplied by a leading competitive LEC.[71] These data further show the relatively minor impact that second, third, and additional competitors have on pricing.[72] Petitioners fail to acknowledge this finding or respond to the data that support it.[73] Ultimately, we find that Petitioners fail to rebut the Commission's finding that the high sunk cost nature of BDS networks provides strong incentive for competitive deployment, even when a single competitor is present.

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[63] *See BDS Order*, 32 FCC Rcd at 3485-89, 3506, 3507 paras. 55-65, 103, 106. *See also* Sean Buckley, *Comcast, Charter Lead Cables Challenges to Telcos in the Business Services Sector*, FierceTelecom (Dec. 15, 2016), http://www.fiercetelecom.com/telecom/comcast-charter-lead-cable-s-challenge-to-telcos-business-services-sector ("'Customers are getting more capacity, prices are coming down even though it's just us as the new competitor and the incumbent,' [SVP of Mediacom Business, Dan] Templin said.").

[64] Motion for Stay at 23.

[65] *BDS Order*, 32 FCC Rcd at 3515, para. 121.

[66] *Id.* at 3514, para. 120.

[67] Motion for Stay at 25, n. 80. In support of this argument Petitioners cite declarations of economists who filed on behalf of various competitive LECs. None of the cited economists, however, compared the magnitude of marginal costs of extending a lateral to the overall sunk network costs.

[68] *Id.* at 28 n.89.

[69] *BDS Order*, 32 FCC Rcd at 3514-15, para. 120.

[70] Motion for Stay at 29.

[71] *BDS Order*, 32 FCC Rcd at 3514-15, para. 120 & n.369 (providing information demonstrating that in one of Sprint's request for bids, the first additional bidder produced a much greater reduction in prices than subsequent bidders); Sprint June 28, 2016 Comments, Exh. B, Decl. of Chris Frentrup at paras. 4, 10.

[72] *BDS Order*, 32 FCC Rcd at 3514, para. 120 n.369.

[73] Motion for Stay at 29 ("Nor does the Commission rely on any empirical data in support of its conclusion that a single BDS competitor has a substantial competitive effect on prices.").

24. Moreover, as the Commission emphasized in the *BDS Order*, even in areas subject to the 36 month detariffing transition, BDS rates remain subject to sections 201, 202, and 208 of the Communications Act.[74] As a result, in the event that competition fails to discipline rates, customers have the protections of sections 201 and 202 prohibitions against unjust, unreasonable, and unreasonably discriminatory rates.

2. Treatment of Transport, Packet-Based and Grandfathered Services

25. *The Transport Market Was Appropriately Deregulated*. The Commission's finding that the transport market is sufficiently competitive was based on record evidence of substantial competition and conditions that support the deployment of competitive facilities.[75] Specific evidence supported the Commission's conclusion that there are structural reasons that make both entry into the transport market attractive and burdensome regulation unnecessary.[76] The Commission also observed that the costs of overregulation were too high to justify a less administratively feasible approach.[77] To the extent the Commission noted the proximity of competitors' facilities to a customer's location in the channel termination context, it did so as a way to confirm its conclusion that this portion of the market has been and will continue to be competitive.[78] Contrary to Petitioner's argument, the Commission did not *rely* on this finding to reach its conclusion regarding the underlying competitiveness of the transport market.[79]

26. Petitioners argue that the Commission's approach to the transport market was flawed because it considered the distance between a customer's location and the competitive transport facility when evaluating competition.[80] Petitioners contend that because transport services carry traffic to and from an end office, the Commission should have but failed to consider this distance.[81] However, the

[74] *BDS Order*, 32 FCC Rcd at 3500, para. 89.

[75] *Id.* at 3496-98, paras. 79-82.

[76] *See e.g.*, *Access Charge Reform*, CC Docket No. 96-262; *Price Cap Performance for Local Exchange Carriers*, CC Docket No. 94-1; *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63; *Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14289, para. 102 (1999) (*Pricing Flexibility Order*), *aff'd*, *WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("[C]ompetitors are likely to enter the market for entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport before they enter the market for channel terminations between a LEC end office and a customer premises."); Letter from James P. Young, Counsel to AT&T Inc., to Marlene H. Dortch, Secretary FCC, WC Docket Nos. 05-25 et al., at 5 (filed on Oct. 25, 2016) (listing urban areas with numerous competitive transport providers); Letter from Russell P. Hanser & Brian W. Murray, Counsel to CenturyLink, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 05-25 et al., at 2 (filed on Nov. 4, 2016) (noting that it uses incumbent LEC transport facilities for a minority of the end user channel terminations it purchases as a competitive provider outside of its incumbent footprint).

[77] *BDS Order*, 32 FCC Rcd at 3501, paras. 92-93. In any event, much of the transport market has enjoyed pricing flexibility for years. *Id.* at 3469-97, para. 79 ("Indeed competition for such services has been robust since a large proportion of TDM transport services were deregulated. As Frontier explains, a substantial majority of transport revenue has been covered by Phase II pricing flexibility since the early 2000s." (internal quotation marks omitted)). To the extent that any party believes that the Commission's finding regarding the competitiveness of the transport market results in unjust and unreasonable rates, it continues to have recourse to the Commission's section 208 complaint process.

[78] *BDS Order*, 32 FCC Rcd at 3501, para. 91 (noting that "92.1 percent of buildings served were within a half mile of competitive fiber transport facilities").

[79] *Cf. id.* at 3495-98, paras. 77-82 (finding widespread competition in the market without reference to the percentage of customers served being within a half mile of competitive fiber transport facilities).

[80] Motion for Stay at 29-30.

[81] *Id.* at 29-30.

Commission rejected this narrow definition of the transport market in the *BDS Order*, finding that the relevant transport market is not exclusively relegated to the carriage of traffic between end offices. The Commission explained that competitive transport providers now commonly take the opportunity to bypass incumbent LEC facilities for network interconnection.[82]

27. Petitioners also argue that in the *BDS Order* the Commission conflated the relevant distance metrics used when analyzing competition in the channel termination and transport markets and neglected the differing functions of these services.[83] But the Commission did not conflate the two in order to reach its conclusion. The Commission recognized that channel termination and transport are different, acknowledged that it has traditionally treated channel termination and other special access services differently,[84] and affirmatively chose to continue to distinguish the two.[85] It simply acknowledged that competitors often provide transport without incurring the additional cost of connecting with an incumbent LEC end office.

28. *Application of the Competitive Market Test Only to TDM Services Was Appropriate*. Petitioners argue that the Commission's decision to not apply its competitive market test to packet-based services of the same or higher bandwidths in the same relevant product market is flawed.[86] But the Commission explained that, on balance, competitive forces in the market for packet-based services counseled against regulation, even when application of the test would indicate a lack of competition.[87] Moreover, because most incumbent LECs had already received forbearance relief from ex ante pricing regulation for packet-based services, this decision merely preserved the status quo and confirmed previous findings that, injecting heightened regulation into the developing packet-based market, even in areas currently deemed non-competitive, would impose an unnecessarily burdensome regulatory framework in this rapidly evolving market, and could have negative consequences such as chilling investment, inhibiting innovation, and distorting competition.[88] The Commission reasonably chose not to employ prescriptive measures because it found that imposing regulations would be likely to impose long term costs.[89] Finally, for those markets in which Petitioners believe the Commission's decision not to apply the CMT to higher bandwidth services produces unjust and unreasonable rates, we note the availability of relief through section 208.[90]

29. *The Commission Appropriately Allowed Grandfathering for Some Services*. Petitioners argue that the Commission's decision not to reintroduce price cap regulation in non-competitive counties previously granted Phase II pricing flexibility is irrational.[91] We disagree. The Commission's choice to maintain the status quo, minimize regulatory disruption, and exempt those few counties that do not meet

[82] *See BDS Order*, 32 FCC Rcd at 3497, para. 81 n.273.

[83] Motion for Stay at 30.

[84] *BDS Order*, 32 FCC Rcd at 3495, para. 77.

[85] *Id.* at 3496-97, para. 78. Moreover, the Commission's rules treat them separately. *Compare* 47 CFR § 69.709, *with* 47 CFR § 69.711.

[86] Motion for Stay at 31.

[87] *BDS Order*, 32 FCC Rcd at 3499-3500, paras. 87-88.

[88] *BDS Order*, 32 FCC Rcd at 3519, para. 129; *see also Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corp. for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-215, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18725-26, paras. 33-35 (2007).

[89] *BDS Order*, 32 FCC Rcd at 3500, para. 88.

[90] *See* 47 U.S.C. § 208; *BDS Order*, 32 FCC Rcd at 3503, para. 96.

[91] Motion for Stay at 31.

the competitive market test, but had been granted regulatory relief many years earlier, is consistent with the Commission's policy goals, properly weighs the relevant costs and benefits, and constitutes reasoned decision-making.[92] We again note that section 208 provides for a remedy in those grandfathered markets where unjust and unreasonable rates may develop.[93]

3. The *BDS Order* Satisfies APA Notice and Comment Rulemaking Requirements

30. Petitioners incorrectly allege that the Commission provided insufficient notice for the competitive market test adopted in the *BDS Order* and for the rules regarding transport thereby affecting Petitioners' ability to effectively comment.[94]

a. Adequate Notice was Provided for the Adoption of the Competitive Market Test

31. Contrary to Petitioners' assertions, the *Further Notice* provided abundant notice that the Commission was considering adopting a market test that focused on BDS where competition is lacking, namely for TDM DS1 and DS3 services, which operate at or below 50 Mbps.[95] As the Commission made clear in the *BDS Order*, the competitive market test utilizes "core attributes of a test on which there was consensus in the record."[96] That consensus was the result of both pointed and broad questions in the *Further Notice* seeking comment on "different tiers of products . . . based on differences in speed,"[97] and "whether the type of competitor in the market makes a difference" or whether to "weight competition from a cable company differently than a non-cable competitive LEC or vice versa,"[98] among other things.[99] Petitioners' assertion that the Commission's final choice of a geographic market for the CMT violates the APA is also not true.[100] Consistent with the *Further Notice*[101] and the record compiled in this proceeding, the Commission adopted the county as the geographic unit for the CMT which takes individual buildings and census blocks into account—enabling an administratively feasible test that, in

[92] *See BDS Order*, 32 FCC Rcd at 3538-39, para. 181.

[93] *See* 47 U.S.C. § 208.

[94] *See* Motion for Stay at 32-40.

[95] *Id.* at 34; *Further Notice*, 31 FCC Rcd at 4840, para. 271 ("As described above, the data and our analysis suggests that competition is lacking in BDS at or below 50 Mbps in many circumstances, and that competition is present in BDS above 50 Mbps in many circumstances. Such evidence will guide how the Commission uses product market characteristics in applying the Competitive Market Test to a relevant market.") (internal citations omitted); *BDS Order*, 32 FCC Rcd at 3503, para. 97.

[96] *BDS Order*, 32 FCC Rcd at 3504-05, para. 99.

[97] *Further Notice*, 31 FCC Rcd at 4844, para. 285.

[98] *Id.*, 31 FCC Rcd at 4846, para. 294.

[99] *Id.*, 31 FCC Rcd at 4840-49, paras. 270-311 (Sec. V.D. Competitive Market Test).

[100] *See* Motion for Stay at 34; *see Further Notice*, 31 FCC Rcd at 4814, para. 209 (The *Further Notice* "suggest[ed] a geographic market definition for lower bandwidth BDS lies somewhere above the average area of the Census Block with BDS demand and below the MSA" and sought comment "for the purpose of developing an administratively feasible test.").

[101] *Further Notice*, 31 FCC Rcd at 4845, para. 289 ("Given our analysis, we seek comment on using census blocks as the geographic area for applying the Competitive Market Test. We also ask whether using a more granular area, e.g., the building or cell site location as the relevant geographic market, or whether a larger geographic area is appropriate"). In the *BDS Order* the Commission explained its reason for using counties as the appropriate geographic measure for the Competitive Market Test. *BDS Order*, 32 FCC Rcd at 3508-12, paras. 108-16.

fact, implements the very kind of more-localized competitive analysis that the Commission proposed, and that Petitioners incorrectly assert is lacking.[102]

32. In addition, Petitioners mistakenly claim the *Further Notice* failed to provide sufficient notice of the competitive analysis undertaken in the *BDS Order* because the second prong of the adopted competitive market test takes into account competitive pressures posed by cable providers.[103] The *Further Notice* contained a substantial discussion of cable entry in the BDS marketplace.[104] Moreover, it specifically sought comment on the idea that the Commission should be looking at cable operators' whole HFC network footprint, stating: "Looking forward, it may already be or soon will be the case that cable companies are able to supply BDS everywhere they have deployed DOCSIS 3.0. We seek comment on this. Counting cable supply as being capable of reaching every unique location with BDS demand in every Census block that cable reports as being able to serve greatly increases the extent of competition at the level of unique location."[105] Additionally, as the *Further Notice* sought comment on competitive market test criteria, it specifically sought comment on whether the Commission should "weight competition from a cable company differently than a non-cable competitive LEC" and on whether it was "enough for a cable company to just have DOCSIS 3.0 coverage over their HFC network in the area or should we weight an HFC network differently based on the presence of Metro-E capable nodes in the area?"[106] Finally, Petitioners' hypothetical claims that the *Further Notice* "might have developed" some sort of economic "model" for the competitive test that was adopted so parties could offer a detailed rebuttal is simply a smokescreen to obscure the fact that the Commission's competitive market test was developed based on reasoned decision-making from comments in the record in response to the *Further Notice.*[107]

33. Petitioners' arguments, rather than stating an actual problem with the *Further Notice*, simply reflect their underlying disagreement with the substance of the Commission's decision. Despite Petitioners' claims that the *Further Notice* did not enable them to "challenge" the methodology employed in the final rule, an agency is not restricted to adopting the position it proposed when seeking comment.[108]

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[102] Motion for Stay at 33; *BDS Order*, 32 FCC Rcd at 3508, para. 109 ("As suggested by various commenters in the record, we agree that the geographic area we use for the competitive market test should be larger than census blocks or census tracks, but smaller than MSAs. We find that counties are granular enough to capture reasonably similar competitive conditions yet large enough to be administratively feasible and are supported in the record.") (internal citations omitted); *id.* at 3509, para. 110 ("The Commission's *2015 Collection* shows an average of 376 buildings with last-mile access demand in a county, whereas the average number of buildings with last-mile access demand in an MSA is 2,713. This statistic shows that counties are much more granular geographic units for administering the competitive market test.").

[103] *See* Motion for Stay at 36. Moreover, Petitioners' claim ignores the broad-ranging questions the Commission sought comment on in the *Further Notice* in order to determine the appropriate criteria for the test and the resulting wide body of economic evidence and literature in the record on this issue, including competition by cable providers and other competitive providers' build or buy decisions. *Further Notice*, 31 FCC Rcd at 4842, para. 278.

[104] *See Further Notice*, 31 FCC Rcd at 4749-53, 4821, 4827, paras. 59-66, 221, 231.

[105] *Id.* at 4821, para. 221. The Census block-level reporting of DOCSIS 3.0-enabled broadband service by cable operators that the *Further Notice* references is done through the Commission's Form 477, which data the *BDS Order* used as the basis for the second prong of the competitive market test.

[106] *Id.* at 4846, para. 294.

[107] *See* Motion for Stay at 35. Likewise, Petitioners ignore that the test adopted by the Commission is, in fact, based on the *Further Notice*'s proposal to "use publicly available information, the *2015 [Data] Collection*, and other information in the record to apply the test." *See Further Notice*, 31 FCC Rcd at 4840, para. 272. Petitioners incorrectly allege that, even though Form 477 data used in the test are publicly available, the Commission was obligated to more specifically state that Form 477 data could be used. *See* Motion for Stay at 37.

[108] *See* Motion for Stay at 35; *see*, *e.g.*, *Agape Church, Inc. v. FCC*, 738 F.3d 397, 423 (D.C. Cir. 2013) (even though the "final action taken by the FCC was not something that the agency had expressly proposed in its NPRM" (continued….)

Under the "logical outgrowth" standard, a notice of proposed rulemaking does not violate notice requirements under the Administrative Procedures Act if it "provide[s] the public with adequate notice of the proposed rule followed by an opportunity to comment on the rule's proposed content."[109] As noted above, that is precisely the case here.

34. The *Further Notice* comprehensively framed the subjects for discussion as evidenced by the comprehensive comments in the record.[110] The Commission initially proposed various criteria for a competitive market test, but also retained an open mind by seeking broad comment on possible criteria and relevant issues -- including what "appropriate factors" and "appropriate weight" to apply in such a test.[111] Throughout the *Further Notice* the Commission encouraged commenters to suggest other alternatives for consideration and "comment on how any approach would further our goals of promoting competition and investment" and the "administrative feasibility of any particular approach."[112] Given the comprehensive record in this proceeding, with opposing views on the current and predicted state of competition in the marketplace, and what a competitive test should entail, Petitioners' advocacy for issuing yet another Notice is not only legally unwarranted, but from a practical standpoint, it is unreasonable to believe that any additional analysis offered by any party would have resulted in a different outcome, and it would only serve to further delay the conclusion of a proceeding which was initiated in 2005.

35. In addition, Petitioners' arguments that parties had no meaningful opportunity to comment on the competitive market test adopted by the Commission are further discredited by the additional opportunity to comment provided to parties when the Chairman released a public version of the proposed final *BDS Order* for public review weeks prior to its adoption.[113] Therefore, it is not appropriate to overturn the Commission's decisions adopted in the *BDS Order* under concern that notice was insufficient.[114] Indeed, several parties submitted *ex parte* filings that addressed the competitive market test—which the Commission considered and responded to in the record—before adopting the final rule.[115]

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it was a logical outgrowth of requests for comment that "alert[ed]" the public that the relevant rule "might be in jeopardy"); *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (finding a logical outgrowth even though final rule deviated from proposal developed through negotiated rulemaking). Such a restriction would undermine the "purpose of notice-and-comment—to allow an agency to reconsider and sometimes change, its proposal based on the comments of affected persons." *Ass'n of Battery Recyclers v. EPA*, 208 F.3d 1047, 1058 (D.C. Cir. 2000); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (If the EPA were precluded from changing its position, it "could learn from the comments on its proposals only at the peril of subjecting itself to rulemaking without end." (internal quotation marks omitted)).

[109] *Agape Church*, 738 F.3d at 422; *see generally Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 548-49 (D.C. Cir. 2006).

[110] *See Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982) ("An agency adopting final rules that differ from its proposed rules is required to renotice when the changes are so major that the original notice did not adequately frame the subjects for discussion.").

[111] *Further Notice*, 31 FCC Rcd at 4840, para. 271.

[112] *Id.* at 4840, 4844-45, paras. 271, 286.

[113] *See Wireline Competition Bureau Announces Process to Access Unredacted Version of Proposed Business Data Services Report and Order*, WC Docket Nos. 16-143 et al., Public Notice, 32 FCC Rcd 2116 (WCB Mar. 30, 2017). This additional opportunity for comment was instituted by the current chairman and is a departure from prior Commission practice.

[114] If notice was insufficient, which we do not find in this case, it would be no more than harmless error since the Chairman released the document weeks prior to its adoption allowing for additional, pointed comments on the entire framework, including the CMT.

For the reasons discussed above, we do not find that the Petitioners' arguments provide cause to grant the requested stay.

b. Adequate Notice was Provided for Adopting Rules Governing BDS Transport Services

36. Petitioners' assertions that the Commission provided insufficient notice and opportunity to comment on the rules the Commission adopted for BDS transport services are also baseless. Moreover, the Commission squarely addressed this very question in the *BDS Order*.[116] The Commission consistently included transport services within the ambit of its analysis in this proceeding because transport services are an integral part of the business data services market. For example, in the *Further Notice* the Commission proposed to define business data service as a service that "transports data between two or more designated points,"[117] which naturally includes the transport component of a BDS circuit. In the *Further Notice* the Commission also proposed to "abandon the colocation-based competition showings for channel terminations and *other dedicated transport services* for determining regulatory relief," and asked for comment to create a new regulatory framework.[118] Indeed, in an *ex parte* filing, Sprint expressly opposed any attempt to exclude transport services from the Commission's reform of business data services regulation.[119] All of this discussion invited comment on the appropriate regulatory treatment of TDM transport services.

37. Petitioners further claim that "nationwide deregulation" of transport is not a "logical outgrowth of the [*Further Notice*]."[120] Yet in the *Further Notice* the Commission announced at the outset that it was "proposing to end the traditional use of tariffs for BDS services" and called for "large scale de-regulation."[121] At a minimum, the revised treatment of transport services is a logical outgrowth of the Commission's proposal to "abandon collocation-based competition showings" for dedicated transport services.[122] Furthermore, Petitioners' assertion that the *BDS Order* treats the "entire country" as the relevant market glosses over and mischaracterizes the more granular analysis the Commission used to decide how to reform regulation of TDM transport services.[123] The Commission's conclusion to adopt nationwide deregulation of TDM transport services was a logical outgrowth of its analysis of granular census block data which showed that in 2013 there was at least one competitive fiber provider in "more than 95 percent of census blocks with BDS demand in MSAs, and . . . those census blocks cover about 97

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[115] *See, e.g.*, Letter from John T. Nakahata, Counsel for Windstream, and Christopher J. Wright, Counsel for Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017) (objecting and recommending changes to the Competitive Market Test framework and asserting the draft order does not comply with notice requirements and provides insufficient time to engage their experts to evaluate the framework); *BDS Order*, 32 FCC Rcd at 3485, para. 56 (responding to the framework challenge).

[116] *See BDS Order*, 32, FCC Rcd at 3501, para. 90 n.289.

[117] *Further Notice*, 31 FCC Rcd at 4842, para. 279.

[118] *Id.* at 4842, para. 278 (emphasis added).

[119] *See* Letter from Paul Margie, Counsel to Sprint Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al., at 1-3 (filed Nov. 9, 2016) (citing a "misleading, eleventh-hour demand to carve-out transport circuit elements from the reform framework").

[120] Motion for Stay at 38.

[121] *Further Notice*, 31 FCC Rcd at 4725, para. 4.

[122] *Id.* at 4842, para. 278; *Ne. Md. Waste v. EPA*, 358 F.3d at 952 ("A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.").

[123] Motion for Stay at 39.

percent of the BDS connections and 99 percent of business establishments."[124] The Commission's conclusion that these more-granular data warranted a finding of broader deregulation is not unusual. The Commission has always aggregated relevant markets facing the same competitive circumstances.

38. Petitioners' claim that parties did not "have an opportunity to comment on the competitive analysis and rationale supporting the Commission's" deregulation of transport services is also inaccurate.[125] In the *Further Notice* the Commission specifically sought comment on its proposed competitive analysis and each of the Petitioners commented on the proposal.[126] The Petitioners next claim that the Commission did not propose to analyze transport competition "based primarily on the number of buildings located within a half mile of competitive fiber transport facilities."[127] We know of no requirement for the Commission to identify and seek comment on every possible metric that the Commission might use to analyze data in a Further Notice of Proposed Rulemaking and therefore reject this argument.

B. Petitioners Fail to Demonstrate that they will Suffer Irreparable Injury Absent a Stay

39. In attempting to establish irreparable injury, Petitioners paint a misleading picture of the Commission's *BDS Order*. This is so in at least two critical respects.

40. First, Petitioners mischaracterize the regulatory action taken by the Commission. In their stay request, Petitioners argue that the Commission has imposed "extensive deregulation" that will "replace discontinued BDS with higher-cost alternatives."[128] These are not apt descriptions of the Commission's action, which eliminated "the extra layer dominant-carrier pricing regulation" provided by tariffing and the Commission's ex ante pricing rules, "while leaving in place basic Title II common-carrier regulation" under sections 201, 202, and 208 of the Act.[129]

41. This change in regulatory approach is a far cry from the "seismic change[]" the Petitioners attempt to depict.[130] As Petitioner BT Americas is well aware, price cap regulation "merely reflects the Commission's 'tentative opinion' about the dividing line between reasonable and unreasonable rates for the limited purpose of exercising [its] suspension power" under section 204 of the Act.[131] Petitioners are concerned that, absent a stay, incumbent LECs will increase their business data services rates substantially.[132] But they were free to do that prior to the *BDS Order*, regardless of whether the underlying services were the subject of forbearance relief, Pricing Flexibility II grants, or regulated

[124] AT&T Aug. 9, 2016 Reply at 2.

[125] Motion for Stay at 39.

[126] *See Further Notice*, 31 FCC Rcd at 4840-49, paras. 270-311; *see also* INCOMPAS June 28, 2016 Comments at 5-9; Sprint June 28, 2016 Comments at 5-12; Windstream Aug. 9, 2016 Reply at 15 (criticizing AT&T's assertion that the existence of one competitor within a half-mile of a customer "means that the marketplace for business data services is 'robustly competitive at all levels.'").

[127] Motion for Stay at 39.

[128] *Id.* at 3.

[129] *Ad Hoc v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

[130] Motion for Stay at 3.

[131] Letter from Thomas Jones, Counsel to Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC, WC Docket No. 05-25, at 5 (filed Aug. 28, 2015) (quoting *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3306, para. 895 (1989) (internal quotation marks and citation omitted)); *see BDS Order*, 32 FCC Rcd at 3550-51, para. 216.

[132] Motion for Stay at 40.

under price caps. First, a substantial percentage of the locations at issue were relieved of price cap regulations pursuant to either grants of Phase II pricing flexibility or forbearance relief well before the action taken in the *BDS Order*,[133] making the changes effected by the *BDS Order* and the potential for those changes to disrupt the market less sweeping and more incremental in nature. Moreover, even in instances in which the location is being relieved of price cap regulation, customers remain fully protected against unjust, unreasonable, or discriminatory rates, terms, and conditions by the clear terms of sections 201 and 201 of the Communications Act. Ultimately, under either type of regulation, customers are protected against rates that are just and reasonable.

42. Second, Petitioners overstate how the August 1, 2017, effective date of reforms adopted in the *BDS Order* will affect the industry. In the *BDS Order*, the Commission acted to implement a reasonable shift from the tariffing regime to broader Title II protections in a manner that is fair to those seeking a quicker transition from federal tariffing obligations, and to those opposing a transition from tariffs.[134] Focusing on middle ground, the Commission implemented a 36 month transition period;[135] took interim measures to address issues raised in the record to ensure an evenhanded implementation of its new rules;[136] and emphasized the requirement of just and reasonable rates after the transition period.[137] In counties that were deemed competitive, and relieved of price cap regulation, tariffs may still be used for three years.[138] Any tariff filing made during that permissive period will be subject to challenge, as they are presently, and for a period of six months after the effective date of the *BDS Order*, the Commission required "price cap incumbent LECs to freeze the tariffed rates for end-user channel terminations in newly deregulated counties, as long as those services remain tariffed."[139] The Commission also grandfathered existing BDS "contract tariffs, term and volume discount plans, and individual circuit plans," minimizing disruption during the transition, with a focus on and ensuring that both parties to such agreements realize the benefit of the bargain they struck.[140] In fact, the Commission specifically made clear that it does not intend for its actions in the *BDS Order* "to disturb existing contractual or other long-term arrangements—a contract tariff remains a contract even if it is no longer tariffed [and that] contract tariffs, term and volume discount plans, and individual circuit plans do not become void upon detariffing."[141] Emphasizing its continuing jurisdiction, during and after the transition period, the Commission stated that it "expect[s] all carriers to act in good faith to develop solutions to ensure rates are just and reasonable."[142]

43. As a practical matter, implementing and coordinating changes across multiple tariffs by multiple incumbent LEC operating companies would be administratively burdensome and challenging to accomplish during the pendency of this appeal.[143] Removing only the BDS portions of these tariffs (the

[133] *BDS Order*, 32 FCC Rcd at 3463-64, para. 7 (describing previous grants of pricing flexibility and forbearance from tariffing, price cap, and other dominant carrier regulation for BDS).

[134] *BDS Order*, 32 FCC Rcd at 3533-34, paras. 166-70.

[135] *Id.* at 3533, paras. 167.

[136] *Id.* at 3533-34, paras. 168-70.

[137] *Id.* at 3533-34, para. 170.

[138] *See id.* at 3517, para. 127 n.389 (finding "[i]t is rare for end-user contracts to be much longer than three years . . . ." (citing XO Jan. 27, 2016 Comments, Decl. of James A. Anderson at para. 37)).

[139] *Id.* at 3533, para. 167.

[140] *Id.* at 3533-34, para. 170.

[141] *Id.*

[142] *Id.*

[143] We note that AT&T for example, provides these services through five separate tariffs for its five operating entities: Ameritech, Southwestern Bell, BellSouth, Nevada Bell, and Pacific Bell.

switched access services will remain tariffed) will involve changing hundreds of tariff pages and will have to be done in a deliberate manner to ensure the correct services have been removed. Moreover, once the various services are detariffed, the carriers will lose the deemed lawful protections of section 204(a)(3), providing additional incentives for carriers to ensure they have the proper agreements in place prior to detariffing.[144]

44. Finally, Petitioners do not acknowledge the continuing availability of the section 208 complaint process to protect competitive LECs from unreasonably high business data services rates. The Commission found that "customers are protected in the near term from harm that would result from any rates, terms, or conditions that are unjust and unreasonable or unjust and unreasonably discriminatory because the Commission's section 208 complaint process continues to be available for common carriage services."[145] As the D.C. Circuit has recognized, that process provides "a formal fast-track . . . for business end users and competitive broadband providers to challenge the rates charged by ILECs" and have their challenge investigated and resolved within five months.[146]

C. The Balance of the Equities Does Not Favor a Stay

45. Petitioners argue that the balance of the equities favors maintaining the status quo. First, Petitioners contend third parties will not be harmed if the Commission grants their stay motion.[147] Petitioners, however, fail to recognize and address the negative impact delaying the effectiveness of the *BDS Order* would have on the market generally.[148] In the *BDS Order*, the Commission concluded that "there is a significant likelihood [that maintaining] ex ante pricing regulation will inhibit growth and investment in many cases. In such circumstances, we should not continue unnecessary regulations."[149] The Commission also found that "there are substantial costs of regulating the supply of BDS."[150]

46. Petitioners have also failed to demonstrate that the public interest supports grant of their stay request. As detailed above, Petitioners' claims regarding imminent incumbent LEC BDS price increases and the consequences of decreased competition are wrong. In the *BDS Order*, the Commission adopted a measured change in regulatory approach, subject to a generous transition period, to unleash innovation and increased buildout while maintaining ample regulatory protections for all stakeholders in the BDS marketplace.[151] Unconstrained by ex ante pricing regulation, ILEC BDS providers, like their competitors, can now evaluate how best to operate their businesses while the Commission relies on sections 201, 202, and 208 to ensure that rates for such services remain just and reasonable.

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[144] *See* 47 U.S.C. § 204(a)(3) (new or revised charges, regulations, or classifications that a local exchange carrier files on a streamlined basis, are deemed lawful unless the Commission takes action before those charges, regulations or classifications become effective).

[145] *BDS Order*, 32 FCC Rcd at 3505-06, para. 102.

[146] *Ad Hoc v. FCC*, 572 F.3d at 909.

[147] Motion for Stay at 50.

[148] *NATOA v. FCC*, No. 15-1295 (D.C. Cir. July 7, 2017), slip op. 10 ("Rate regulation of a firm in a competitive market harms consumers: Prices set below the competitive level result in diminished quality, while prices set above the competitive level drive some consumers to a less preferred alternative.") (citing Alfred E. Kahn, The Economics of Regulation: Principles and Institutions, vol. 1, 21, 66-67 (1970)).

[149] *BDS Order*, 32 FCC Rcd at 3462, para. 4. *See also id*. at 3517-19, paras. 125-29.

[150] *Id.* at 3517, paras. 125-26.

[151] Also, a stay would produce no change for areas that currently are not subject to ex ante regulation, the "grandfathered" regions, as there is no change in these areas triggering an imminent or irreversible harm. *See BDS Order*, 32 FCC Rcd at 3538-39, para. 181; *id.* at 3461, para. 2 (finding the "record indicates the market for business data services is dynamic with a large number of firms building fiber and competing for this business").

47. Therefore, we reject Petitioners' claims and find that granting a stay of the *BDS Order* would harm third parties and the public interest by delaying the promised benefits of the *BDS Order* including stimulating critical investment in and deployment of facilities and accelerating the deployment of next generation packet-based services relied upon by businesses and other institutions of all sizes. As the Commission explained, it adopted a regulatory framework "that promotes long-term innovation and investment by incumbent and competitive providers alike which well-serves business data services customers."[152] We find Petitioners' arguments do not support further delaying this outcome.

III. CONCLUSION

48. Petitioners bear the burden of showing they meet each of the elements required of a stay request. We find Petitioners have failed to meet that burden. Therefore, for the reasons detailed above, we deny Petitioners' motion for stay.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, pursuant to the authority contained in sections 1, 2, 4(i), 4(j), 10, 201(b), 202(a), 214, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i)-(j), 160, 201(b), 202(a), 214, 303(r), 403, and the authority delegated pursuant to section 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91 and 0.291, this Order Denying Stay Motion in WC Docket No. 16-143 et al. IS ADOPTED and SHALL BE EFFECTIVE IMMEDIATELY.

50. IT IS FURTHER ORDERED, that the Motion for Stay Pending Judicial Review of Ad Hoc Telecom Users Committee, BT Americas, Inc., INCOMPAS, and Windstream Services, LLC IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

[152] *Id.*