Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers	)	WC Docket No. 17-144
	)	

REPLY COMMENTS OF ITTA AND USTELECOM

ITTA-The Voice of America's Broadband Providers ("ITTA") and USTelecom-The Broadband Association ("USTelecom") hereby reply to the comments filed in the above-captioned docket.[1] The comments unanimously support the Commission's proposal to permit model-based rate-of-return carriers[2] to voluntarily elect incentive regulation for business data services ("BDS"). The commenters confirm that the costs of legacy regulations of model-based carrier BDS now far outweigh the benefits.

The record supports applying the existing price cap BDS rules[3] to model-based rate-of-return carriers as proposed in the Petition for Rulemaking ("Petition").[4] The competitive market test for determining the level of regulation appropriate for packet-based services and higher

---

[1] *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers,* Notice of Proposed Rulemaking, WC Docket No. 17-144, FCC 18-46 (rel. Apr. 18, 2018) ("*NPRM*").

[2] The proposal is limited to "model-based rate-of-return carriers," defined as those rate-of-return carriers that either (1) have elected to receive universal service support pursuant to the amounts specified in the A-CAM to support broadband and voice services, (2) are otherwise affiliated with price cap carriers and receive support based on the Connect America Cost Model ("CAM") or reverse auctions, or (3) otherwise receive fixed support, such as carriers subject to the Alaska Plan. Comments of ITTA—The Voice of Broadband Provider's and USTelecom, WC Docket No. 17-144, 3 (filed Jun. 18, 2018) ("ITTA-USTelecom Comments").

[3] *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al.*, Report & Order, FCC 17-43 (rel. Apr. 28, 2017) ("*BDS R&O*"), *pet. for rev*., *Citizens Telecommunications Co. v. FCC*, No. 17-2296 (8th Cir., filed Jun. 12, 2017).

[4] ITTA-The Voice of America's Broadband Providers and USTelecom-the Broadband Association, Petition for Rulemaking, WC Docket No. 17-144 (filed May 25, 2017) ("Petition").

bandwidth time-division multiplex ("TDM") price cap BDS is equally valid for model-based carrier BDS.

Certain of the additional proposals made by AT&T and Sprint should be rejected because the BDS marketplace has changed. Moreover, their proposals would undermine the consumer, competitive and investment incentive benefits of the *NPRM*'s proposals.

I. COMMENTERS SUPPORT THE OPTIONAL TRANSITION TO INCENTIVE-BASED REGULATION.

There is substantial record support for the original Petition's proposal. TDS Telecom states that eliminating unnecessary requirements and allowing an optional move to incentive regulation "will enable these carriers to more quickly upgrade their networks and better respond to customer demand in this competitive marketplace, ultimately benefitting the rural communities they serve."[5] The market has evolved to the point where the "burdens of rate-of-return regulations for BDS offered by model-based carriers often outweighs the benefits."[6] NTCA and WTA likewise support providing both an optional pathway to incentive regulation for BDS and further deregulation of BDS pricing in line with the rules previously adopted for price cap carriers.[7]

Importantly, every commenter agrees with the *NPRM*'s proposal that removal of outdated and burdensome legacy regulations would promote competition and investment in rural networks. In particular, AT&T states that elimination of ex ante pricing regulation of packet-

---

[5] Comments of TDS Telecommunications Corp., WC Docket No. 17-144, 1 (dated Jun. 18, 2018) ("TDS Telecom Comments").

[6] TDS Telecom Comments at 1.

[7] Comments of NTCA-The Rural Broadband Association, WC Docket No. 17-144, 2-3 (dated Jun. 18, 2018) ("NTCA Comments"); Comments of WTA-Advocates for Rural Broadband, WC Docket No. 17-144, 1 (dated Jun. 18, 2018) ("WTA Comments").

based services and TDM BDS of speeds greater than 50 Mbps "will encourage competitive entry and network investment and provide an incentive for the transition to packet-based technologies."[8] Sprint agrees that electing rate-of-return model-based carriers should be granted Phase 1 pricing flexibility in order to allow these carriers to effectively compete and to provide attractive options for customers.[9] Both AT&T and Sprint believe that reduced regulation will promote competition and lower prices for wireless backhaul services.[10]

Legacy rate-of-return regulation imposes lopsided and burdensome costs on model-based rate-of-return carriers.[11] The inflexibility of legacy regulations preclude such carriers from offering beneficial rates, terms, and conditions to their BDS customers, including institutional customers like schools, universities, and hospitals. These undue cost burdens and inflexibility harm customers and deter rate-of-return carriers from making the investment necessary to meet the modern communications needs of American businesses and other enterprises operating in rural America and other rate-of-return territories. The coming 5G wireless revolution will likewise increase demand for competitively priced Ethernet services. The toxic mix of

---

[8] Comments of AT&T, WC Docket No. 17-144, 15 (dated Jun. 18, 2018) ("AT&T Comments").

[9] Comments of Sprint Corp., WC Docket No. 17-144, 5 (dated Jun. 18, 2018) ("Sprint Comments").

[10] AT&T Comments at 15; Sprint Comments at 7. Sprint argues that even if wireless backhaul services are regulated pursuant to ex ante incentive-based pricing regulations, model-based carriers should be allowed to offer location-specific rates that are available to similarly situated customers. *Id*. at 7. Such a proposal is a transparent attempt to gain favorable rates for its own backhaul services, while impeding competition among BDS service providers for other BDS services. That self-serving proposal should be rejected because it is not supported by either competitive analysis or facts.

[11] Typically, model-based rate-of-return carrier costs are approximately $ 30,000 per study area to perform required cost studies, which is extremely burdensome when they are now only relevant to the provision of BDS. *See also* TDS Telecom Comments at 3; NTCA Comments at 2; WTA Comments at 3.

burdensome and unnecessary costs, inflexible rules straightjacketing BDS terms of service, and disincentives to broadband investment, make the costs of traditional rate-of-return regulation exceed the benefits.

II. SECTION 69.803(C)'S COMPETITIVE MARKET TEST APPLICABLE TO LOWER BANDWIDTH TDM BDS IS EQUALLY APPROPRIATE TO MODEL-BASED RATE-OF-RETURN CARRIER LOWER BANDWIDTH BDS.

AT&T argues that Section 69.803(c) should not be used to determine whether model-based carrier lower bandwidth TDM BDS is subject to effective competition. Instead, AT&T argues that the Commission should rely on evidence of competition from either Form 477 census block data in rate-of-return carrier serving areas or from a new data collection from model-based rate-of-return carriers and their competitors, with a preference for the former proposal.[12] Sprint asserts that it is premature to establish any rules for eliminating ex ante incentive-based pricing regulation of any BDS.[13] Sprint bases this conclusion on Sprint's "experience,"[14] but offers no evidence that competition is lacking in rate-of-return service areas.

Such opinions are not supported by the existing record. There is growing competition for BDS in rate-of-return carrier territories.[15] Cable providers' BDS sales have grown by a robust annual rate of twenty percent over the past several years.[16] Furthermore, eliminating ex ante price regulation will spur competition and attract further competitive entry.[17]

---

12 AT&T Comments at 15.

13 Sprint Comments at 5-6.

14 *Id*. at 6.

15 TDS Telecom Comments at 1-2.

16 *BDS R&O*, ¶ 62.

17 TDS Telecom Comments at 6.

The Commission itself conducted a comprehensive product and geographic market analysis that identified the competitive factors necessary to constrain pricing, and terms and conditions, and imposed regulations based on these different product and geographic markets.[18] This analysis was based on one of the most detailed examination of rates, terms, and conditions of ILEC and competitor BDS offerings ever conducted by the Commission. Most importantly, the Commission evaluated the competitive effects of BDS offered by nearby fiber-based and cable broadband providers.[19] From this analysis, the Commission made findings of the type of competitive entry that would constrain ILEC BDS pricing, terms, and conditions based not on the nature of the ILEC's pricing regulation, but rather on the behavior of competitors. ITTA and USTelecom have already demonstrated that rate-of-return geographic territories demographically and competitively resemble those of nearby price cap ILECs.[20]

AT&T claims that the *BDS R&O*'s test "reflects "only competition within the price cap carriers' portion of the county."[21] That statement is inaccurate. The price cap carrier competitive market test rule declares a county "competitive" when cable operators provided broadband in 75 percent of the census blocks in the county, not just in the price cap carrier operating territory.[22]

---

[18] *BDS R&O,* ¶¶ 86-87, 90.

[19] *Id.*, ¶¶ 10-85.

[20] ITTA-USTelecom Comments at 19-21.

[21] AT&T Comments at 14. It is true that the finding that competition is likely where a competitor has facilities within one-half mile of an ILEC customer was only based on ILEC data. However, this is not true of the cable competitor portion of the competitive market test.

[22] 47 C.F.R. § 69.803(b)(1). The rule was developed based on the fact that "widespread" cable penetration in a county was enough of a market factor to effectively constrain prices in the entire county. *BDS R&O*, ¶¶ 86, 101.

> In particular, we do not require a county to be 100 percent competitive to deregulate it. Were we to require this, few counties, if any, would qualify. For similar reasons, we do not require a county to completely lack competition in order to regulate it. We acknowledge that by setting the percentage threshold at something less than 100 percent necessarily leaves a portion of businesses at non-competitive locations within a county deemed competitive without the near-term potential for competition.[23]

Thus, the Commission believed that a substantial presence of cable-broadband in the county where the price cap carrier operated, even when jointly served by a price cap and rate-of-return carrier, was sufficient to constrain pricing of price cap carrier BDS.[24] It is logical to conclude, therefore, that if the same competitive presence exists anywhere in a county at least partially served by model-based rate-of-return carriers, the same competitive impact would be present. The Commission has already found that applying the competitive market test on a county or county-equivalent basis corrects the "over- and under-inclusivity issue posed by MSAs" and is the geographic market which provides the best administrability.[25] Use of counties reflects widespread cable broadband competition, and reflects exiting cable franchises, thereby demonstrating low entry barriers.[26]

Using Form 477 cable broadband data, the existing BDS competitive market test can simply be applied to the facts existing in counties where model-based rate-of-return carriers operate.[27] The Commission has already published a list of counties that meet the BDS

---

[23] *BDS R&O*, ¶ 135.

[24] *See, e.g., id.*, ¶ 133 n.409.

[25] *Id.*, ¶¶ 97, 101, 109-12.

[26] *Id.*, ¶ 112.

[27] TDS Telecom Comments at 4-5. If necessary, the Commission can rerun the Form 477 data county analysis to include both price cap and rate-of-return carrier served census blocks in a county. But it would be inconsistent with the Commission's *BDS R&O* analysis to simply run the competitive market test analysis based on census blocks served only by rate-of-return carriers. The more restrictive analysis would fail to reflect the Commission's conclusion that

competitive market test,[28] and committed to update the list no later than every three years thereafter based solely on the presence of cable broadband connections in 75 percent of the census blocks within a county.[29] The very few remaining counties that have not yet been evaluated can easily be added to the list in accordance with the Commission's competitive market test.

No further granular market investigation need be conducted. That price cap carrier market investigation took years to complete. Such investigation was extremely burdensome and would be even more burdensome on the smaller rate-of-return carriers providing BDS subject to this proceeding.

III. THE COMMISSION SHOULD MODIFY THE ALL-OR-NOTHING RULE TO ALLOW MODEL-BASED CARRIERS TO MOVE ONLY BDS TO INCENTIVE REGULATION.

AT&T argues that 47 C.F.R. § 61.41(e), the price cap all-or-nothing rule, should not be modified. The result of such a proposal would be to require electing model-based rate-of-return carriers to move all interstate rate-of-return services to incentive regulation.[30] AT&T argues that the all-or-nothing rule is necessary because model-based rate-of-return carriers still have the incentive to shift costs in a way that is detrimental to customers. In particular, AT&T seeks to

---

effective competition can be determined by widespread cable competition throughout the county, based on the presence of a nearby cable competitor.

[28] Public Notice, *Wireline Competition Bureau Publicly Releases Lists of Counties Where Lower Speed TDM-Based Business Data Services are Deemed Competitive, Non-competitive, or grandfathered*, WC Docket No. 16-143, *et seq*., DA 17-463 (Wir. Comp. Bur., rel. May 15, 2017), county list published at https://www.fcc.gov/bds-county-lists (last viewed May 16, 2017).

[29] 47 C.F.R. § 69.803(c).

[30] AT&T Comments at 4-11.

require electing model-based carriers to move their terminating switched access termination rates to the shorter price cap carrier transition period.[31]

The *NPRM* correctly rejects AT&T's argument and instead proposes to modify the price cap all-or-nothing rule to apply incentive regulation only to electing carrier BDS.[32] AT&T theorizes, but never explains, how such cost shifting could harm customers given the existing rate-of-return switched access regulations. ITTA and USTelecom already have fully explained that terminating switched access rates are being transitioned to bill-and-keep, while originating switched access rates have been capped.[33] Thus, there is now no link between costs and rates or costs and recovery for switched access, and "cost shifting" would have no impact on either. Model-based carriers' universal service support is now governed by models or other frozen support levels. And BDS would be moved to price cap regulation where rates are no longer tethered to costs. Thus, the "gaming" concern behind the all-or-nothing rule no longer exists for electing model-based rate-of-return carriers.

There is no justification for upsetting settled model-based carriers' business expectations by advancing the rate-of-return terminating rate transition, or eliminating other switched access regulatory mechanisms, all of which have been established over a period of years and through exhaustive proceedings.[34] Abruptly changing transition periods would be a jarring flash cut that

---

[31] *Id*. at 10.

[32] *NPRM*, ¶ 15. ITTA and USTelecom do not object to requiring an electing model-based rate-of-return carrier to make the proposed election at the holding company level applicable to BDS rates in all study areas.

[33] ITTA-USTelecom Comments at 10- 11.

[34] Such relief would include the ability to leave other rate-of return switched access services in the NECA pool. *NPRM*, ¶ 13. Although AT&T claims that continuing to leave some switched access services in the NECA pool would be "complex," AT&T Comments at 11 n.33, it fails to explain how any cost shifting would be useful given the switched access rules described above

the Commission has sought to avoid. Leaving the all-or-nothing rule in place would serve as a substantial disincentive to making the BDS election, which would delay needed regulatory reforms, undermine the expected investment incentives, and eliminate customer benefits. AT&T's argument should therefore be rejected.

IV. GOING-IN BDS RATES SHOULD BE BASED ON EXISTING TARIFFED RATES AT THE TIME OF THE ELECTION.

AT&T argues that going-in rates should be based on tariffed rates but adjusted downward to reflect a 9.75 percent rate-of-return.[35] Sprint argues that going-in BDS rates should be stepped down to reflect the existing transition to a 9.75 percent rate of return.[36] These proposals should be rejected because they are inconsistent with the theory of price cap regulation.

The *NPRM* correctly did not propose to make the adjustment suggested by either AT&T or Sprint.[37] Price cap going-in rates have relied on the then-existing rate-of-return prescription.

---

and the close monitoring of NECA rates. Cost shifting is not possible for ACAM companies, whether or not they participate in the NECA Switched Access pooling process. Interstate operations are assigned to three buckets: Common Line; Switched Access; and Special Access. Common Line reimbursement for ACAM companies is based on the CAF Model and not on current Common Line costs. Switched Access reimbursement is based on 2011 costs and revenue, *see* 47 C.F.R. § 51.917(b)(7) (2011 Rate-of-Return Carrier Base Period Revenue), frozen at that level and reduced 5 percent per year and thus are not based on current Switched Access costs. Only Special Access is currently based on cost studies and if the NPRM is adopted will no longer be based on costs. There is therefore simply no benefit to be gained in shifting interstate costs. Furthermore, despite AT&T's complaint regarding potential complications, existing rulemakings that may further modify switched access rates for rate-of-return services (such as rates for tandem switching or 8YY traffic) would not be difficult to apply to electing model-based carrier switched access services.

[35] AT&T Comments at 11-13.

[36] Sprint Comments at 4. The Commission decided in 2016 to modify rate-of-return carriers' allowed rate of return from 11.25 percent to 9.75 percent over a number of years. *Connect America Fund*, WC Docket No. 10-90, *et al*., Report & Order, Order & Order on Reconsideration, & Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, ¶ 325 (2016) On July 1, 2018, the prescribed rate-of-return is 10.5 percent.

[37] *NPRM*, ¶ 20.

No adjustments were made to price capped rates based on a prescribed rate-of-return allowance, including the most recent Commission represcription of 9.75 percent for rate-of-return carriers. Incentive regulation constrains rate changes to protect customers, but then provides a carrier an incentive to become more efficient and to obtain funds to invest in the network by allowing the carrier to retain any profits. "[A]n appropriate X-factor and periodic review by the Commission can ensure that carriers share some or all of these efficiencies with their customers."[38] Forced reductions based on antiquated rate-of-return rules undermine the incentives built into price cap regulation. Such forced reductions would also reduce the motivation of a carrier to opt into incentive regulation, which would be inconsistent with the goals of the *NPRM*. The proposals should therefore be rejected.

V. CONCLUSION

For the foregoing reasons, the undersigned request that the Commission promptly adopt rules that would permit model-based rate-of-return carriers to elect price cap regulation of BDS services as specified in the *NPRM*, but as modified by the ITTA-USTelecom Comments. The Commission should reject AT&T and Sprint's proposed modifications to the NPRM proposals.

[38] *Id.*, ¶ 10.

ITTA's and USTelecom's proposals are in line with Administration and Commission goals to reduce unnecessary regulations, while promoting competition and investment.

Respectfully submitted,

By: ____*/s/ Genevieve Morelli*

Genevieve Morelli
Michael J. Jacobs
ITTA-The Voice of America's
Broadband Providers
1101 Vermont Ave., NW
Suite 501
Washington, D.C. 20005

By: ____*/s/ Gregory J. Vogt*

Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
103 Black Mountain Ave., Suite 11
Black Mountain, NC 28611
(828) 669-2099

Counsel for ITTA and USTelecom

By: ____*/s/ B. Lynn Follansbee*

Lynn Follansbee
Jonathan Banks
US Telecom-the Broadband Association
601 New Jersey Ave., NW
Suite 600
Washington, D.C. 20001

July 2, 2018