**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| 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 and USTelecom-The Broadband Association demonstrated in the Petition for Rulemaking ("Petition")[1] for many model-based rate-of-return carriers the costs of legacy regulations applicable to business data services ("BDS") now outweigh the benefits. The proposal is in line with Administration and Commission goals to reduce unnecessary regulations, while promoting competition and investment. The Commission should promptly initiate a Notice of Proposed Rulemaking to adopt the Petition's proposal.

## I. INTRODUCTION

Existing rate-of-return regulations impose lopsided and burdensome costs on model-based rate-of-return carriers.[2] The inflexibility of the 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

[1] 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").

[2] The proposal is limited to "model-based rate-of-return carriers," defined as those carriers that either (1) have elected to receive universal service support pursuant to the amounts specified in the Alternative-Connect America Cost Model ("ACAM") to support broadband and voice services; or (2) are otherwise affiliated with price cap carriers and receive support based on the Connect America Cost Model ("CACM") or reverse auctions. Petition at 2.

the modern communications needs of American businesses and other enterprises operating in rural America and other rate-of-return territories. The toxic mix of burdensome and unnecessary costs, inflexible rules straightjacketing BDS terms of service, and disincentives to broadband investment, often make the costs of traditional rate-of-return regulation exceed the benefits.

Not only do the comments in this proceeding provide ample support for the need to modernize regulations applicable to BDS offerings of model-based rate-of-return carriers, the single opposition lacks support and is misguided. The Petition's proposal is based on the same market competition findings and test already adopted by the Commission for price cap carrier BDS. The Petition's proposed rule is balanced, properly recognizing the risks and rewards that ensure adequate cost recovery, promote investment, and meet customer needs.

## II. COMMENTS WIDELY SUPPORT THE PROPOSAL AND NO COMMENT CONTESTS THAT THE PROPOSED RULE WILL PROVIDE NECESSARY REGULATORY RELIEF OR PROMOTE INVESTMENT IN RURAL NETWORKS

There is near unanimous support for the Petition's proposal. TDS Telecom states that "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."[3] Big Sky Companies note that "the Petition strikes the appropriate balance between spurring innovation, investment and competition and protecting businesses that do not have access to competitive or alternative BDS providers."[4] Smithville Telephone supports the Petition because it will "provide relief from the

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[3] Comments of TDS Telecommunications Corp., WC Docket No. 17-144, 1 (dated July 6, 2017) ("TDS Telecom Comments").

[4] Comments of Blackfoot Telephone Cooperative, Inc., Lincoln Telephone Company, Mid Rivers Telephone Cooperative, Inc., The Montana Telecommunications Association, Inc., Project Mutual Telephone Cooperative, Range Telephone Cooperative, Inc., and Southern Montana Telephone Company, WC Docket No. 17-144, 4 (dated July 6, 2017) ("Big Sky Companies Comments").

current costly regulations addressing the provision of BDS."[5] NTCA and WTA likewise "support the request."[6]

Importantly, not even the lone opposition[7] disputes the Petition's argument that the proposed rule is necessary to remove outdated and burdensome regulations and will promote investment in rural networks. As ITTA and USTelecom point out in their Petition, continued compliance with rate-of-return-based rate regulation, including tariffing, tariff review plans, cost studies, and associated requirements, entails significant costs that are difficult for model-based rate-of-return carriers to recover in the competitive BDS marketplace.[8] TDS Telecom and the Big Sky Companies aver that these costs are anti-competitive because their BDS competitors do not incur them.[9] For carriers receiving model-based universal service fund ("USF") support, these costs now are incurred *only* for BDS. With higher per unit costs, the resulting BDS rates can become unreasonable for customers because model-based carriers are forced to load an ever-increasing share of costs on a dwindling number of customers.

TDS Telecom states that adopting the Petition's proposal would "remove deterrents to infrastructure investment and enhance the ability of model-based carriers to direct capital to next-

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5 Comments of Smithville Telephone Co., Inc., WC Docket No. 17-144, unnumbered page 2 (dated July 6, 2017) ("Smithville Comments"). Smithville would add an additional mechanism that would expand upon the relief requested in the Petition. *See* note 22, *infra*.

6 Comments of NTCA-The Rural Broadband Association and WTA-Advocates for Rural Broadband, WC Docket No. 17-144, 1 (dated July 6, 2017) ("Rural Broadband Comments"). Rural Broadband Comments ask that the rulemaking address specific issues that may affect particular classes of rate-of-return carriers. Although AT&T raises some questions about how the proposal might be implemented, it does not object to the proposal. Comments of AT&T, Inc., WC Docket No. 17-144, 1 (dated July 6, 2017) ("AT&T Comments").

7 Comments of Sprint Corp., WC Docket No. 17-144 (dated July 6, 2017) ("Sprint Comments").

8 Petition at 3.

9 TDS Telecom Comments at 2; Big Sky Companies Comments at 4-5.

generation networks that will benefit consumers."[10] It is difficult for model-based carriers to justify and fund expensive upgrades necessary to deliver new BDS over rural networks, which makes it difficult to attract and retain enterprise customers seeking modern communications capabilities. The Commission recognized that deterring investment in networks is one of the more serious costs of over-regulation in the BDS marketplace.[11] This same investment disincentive undermines the model-based rate-of-return carriers' ability to transition to Internet Protocol-based ("IP-based") network services, which disserves customers seeking the advanced capabilities and features afforded by IP-based services.[12]

The Big Sky Companies state that rural incumbent local exchange carriers ("LECs ") "are hamstrung . . . in being able to offer a competitive response to these emerging providers," by giving a competitive advantage to competitive LECs, wireless Internet service providers, and cable companies.[13] The Commission itself recognized this point by identifying the serious costs that can result from improper ex ante regulation that sets prices inefficiently, which in turn sends incorrect price signals to the market that undermine competition.[14] TDS Telecom concludes that "complying with the legacy rate-of-return framework for BDS can make model-based rate-of-return carriers less competitive, less able to invest in next-generation networks, and poorly positioned to respond to customer preferences."[15]

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10 TDS Telecom Comments at 4.

11 *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143, *et al.*, Report & Order, FCC 17-43, ¶ 93 (rel. Apr. 28, 2017) ("*BDS R&O*"), *pet. for rev.*, *Ad Hoc Telecommunications Users Comm. v. FCC*, No. 17-2342 (8th Cir., docketed Jun. 19, 2017).

12 The Commission recognized the harm to customers by deterring investment in IP-based communications services. *Id.,* ¶ 123.

13 Big Sky Companies Comments at 3.

14 *BDS R&O*, ¶¶ 101, 124.

15 TDS Telecom Comments at 3

The toxic mix of burdensome and unnecessary costs, inflexible rules straightjacketing BDS terms of service, and disincentives to broadband investment, can—and often do—make the costs of traditional rate-of-return regulation of BDS services provided by model-based carriers exceed the benefits.

## III. THE FCC'S MARKETPLACE ANALYSIS FOR PRICE CAP CARRIER BDS APPLIES WITH EQUAL FORCE TO MODEL-BASED RATE-OF-RETURN CARRIER BDS.

Sprint is alone among the commenters in opposing the Petition's proposal. Sprint asserts that the Petition submitted no proof of BDS competition in rate-of-return geographic areas.[16] Sprint, however, offers no evidence that competition is lacking when it "assume[s]" that price cap carriers operate in rural territories "very different, economically and technologically" from those served by rate-of-return carriers.[17] Sprint could not be more wrong. Rate-of-return carriers operate in a large number of counties the Commission already found to be competitive for price cap carrier BDS. Indeed, commenters attest to the growing BDS competition in their rural territories.[18] Cable providers' BDS sales have grown by an astounding annual rate of twenty percent over the past several years.[19]

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[16] Sprint Comments at 3-4. Sprint contends the fact that some rate-of-return companies may seek to modify separations category relationships is inconsistent with the claim that competition precludes rate modifications in rate-of-return carrier territories. *Id*. at 3. This argument is illogical. That some individual carriers may seek *accounting* changes says nothing about the ability to change *rates* or the existence of competition in every rate-of-return territory. The BDS market test would, in any event, address different levels of competition in different counties.

[17] Sprint Comments at 4.

[18] TDS Telecom Comments at 2 ("significant, growing number of companies vying to participate in the burgeoning BDS market"); Big Sky Companies Comments at 3 (inflexible rate-of-return regulations hinder competitive response).

[19] *BDS R&O*, ¶ 62.

In any event, Sprint ignores the evidence already before the Commission. 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.[20] 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.[21] From this analysis, the Commission made findings of the type of competitive entry that would constrain ILEC BDS pricing, terms, and conditions. It follows, therefore, that if the same competitive presence exists in counties served by model-based rate-of-return carriers, the same constraining impact would occur. There is thus no need in this proceeding to collect and analyze data as to whether competition in rate-of-return territories resembles that occurring in price cap territories.[22]

Using Form 477 cable broadband data, the BDS market test can simply be applied to the facts existing in model-based rate-of-return carrier counties. The Commission has already

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[20] *Id.,* ¶¶ 86-87, 90.

[21] *Id.*, ¶¶ 10-85.

[22] Smithville Telephone asks the Commission to collect BDS data for rate-of-return carriers to address markets that would not be competitive under the Commission's BDS market test, but nonetheless face effective competition. Smithville Comments at unnumbered pages 2-3. USTelecom and ITTA do not believe additional data collections or revisions to the BDS market test are necessary. An additional data collection would be burdensome to many rate-of-return carriers and would delay adoption of the Petition's proposal. The Petitioners are not opposed, however, to the Commission conducting individualized proceedings to afford carriers the benefits of the BDS rule in particular rate-of-return counties not already on the competitive list.

published a list of counties that meet the BDS competitive market test,[23] 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.[24] The very few remaining counties that have not yet been evaluated can easily be added to the list in accordance with the Commission's market test.

## IV. THE PROPOSED BDS RATE-OF-RETURN RULE STRIKES THE APPROPRIATE BALANCE OF RISKS AND REWARDS

Sprint argues that the Petition's proposal does not strike the appropriate balance of risk and reward for model-based rate-of-return carriers offering BDS. It claims that the carrier's election would be entirely self-serving and therefore not in the public interest.[25] Sprint's arguments should be rejected.

As indicated in the Petition, BDS is the only regulated telecommunications service of model-based rate-of-return carriers that continues to be subject to legacy rate-of-return regulation and attendant burdens. Originating switched access rates are capped, broadband services are largely deregulated, and terminating switched access rates are being phased down to zero over a set number of years. The Commission has already established the risk-reward balance for those services. Sprint does not, indeed cannot, in this proceeding dispute the public interest equations applicable to those existing rate-of-return regulations.

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[23] 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).

[24] To be codified at 47 C.F.R. § 69.803(c).

[25] Sprint Comments at 2-4.

The application of price cap regulations to model-based rate-of-return BDS entails the same risk-reward conclusions afforded price cap carrier BDS, which was itself evaluated solely as to BDS regulations with no reference to other access service regulation.[26] Under either traditional rate-of-return regulation, price caps, or market competition, carrier profits would be limited. In addition, just as for price cap carriers, model-based rate-of-return carrier BDS competition will protect customers in markets defined as competitive, and price cap regulation will continue to apply to protect customers in markets not subject to effective competition. Thus, allowing model-based rate-of-return carriers to elect price cap regulation of BDS would be in the public interest and protect customers.[27]

Sprint implies that the risk-reward balance would be improved if price cap carrier transition periods and rules were applied to electing model-based rate-of-return carriers because the rate-of-return transitions are "one-sided."[28] Such an outcome would be highly disruptive to the carefully crafted, balanced approach adopted by the Commission in 2011, particularly given that the price cap terminating rate transition period is now one year from completion. The result would in effect be a flash-cut change to regulation that the Commission sought to avoid in

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[26] *BDS R&O*, ¶ 12. To the extent that Sprint disagrees with either price cap BDS rules or the price cap rules applicable to any price cap carrier services, such arguments are irrelevant here since the Petition addresses only model-based rate-of-return carriers' provision of BDS.

[27] Because ACAM adopters are now accepting model-based support in place of their previous HCLS and/or ICLS support, the level of USF payments is unaffected by the proposal.

[28] Sprint Comments at 1-2. AT&T argues that the all-or-nothing rules should not be waived. It argues that "gaming" is still possible because "terminating switched access transport is not reformed." AT&T Comments at 2. AT&T does not explain how such gaming would occur in today's regulatory environment, particularly because the size of the transport element is so small relative to other types of services. In any event, AT&T supports granting the Petition and AT&T's argument can be addressed in the rulemaking docket that would follow this Petition.

establishing the rate-of-return transitions.[29] Furthermore, failure to retain the existing rate-of-return regulations for other services likely would preclude carriers from opting into the new BDS regime, disserving the public interest.

The optionality of alternative regulations for regulated services is entirely consistent with past precedent because rate-of-return carriers face a wide degree of varying circumstances that cannot be accommodated by a mandatory rule. Thus, the Commission found that the optional nature of Section 61.39 was "consistent with our broader scheme of giving smaller carriers a continuum of choices of regulatory alternatives" which recognized "the inherent diversity of the smaller companies"[30] In another context, the Commission provided a "voluntary path" for rate-of-return carriers to receive model-based USF support for broadband in recognition of the "wide disparity among rate-of-return study areas" impacting carrier ability to deploy broadband in accordance with Commission parameters.[31] Because both existing rate-of-return regulation and the new BDS regulation contain their own protections for customers, there is little risk in making the proposed rule optional. It should be noted that the proposed rule requires a model-based rate-of-return carrier to opt into the new BDS mechanism for all study areas, and would not permit a more limited election, thereby mitigating the alleged ability to make a self-serving election.[32]

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[29] *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 242 (2011), *pet. for rev. denied*, *In re FCC 11-161*, 753 F.3d 1015, 1060 (10th Cir. 2014), *cert. denied, United States Cellular Corp. v. FCC*, 135 S. Ct. 2072 (2015).

[30] *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, Report & Order, CC Docket No. 92-135, 8 FCC Rcd 4545, ¶¶ 68-69 (1993).

[31] *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, ¶ 20 (2016).

[32] AT&T also asks that the Commission seek comment from interested parties whenever an electing carrier chooses to unfreeze "separations factors" when establishing "going in" rates. AT&T Comments at 2. The FCC is already seeking comment on these issues in a separate

## V. CONCLUSION

For the foregoing reasons, the undersigned request that the Commission promptly initiate a rulemaking to adopt a rule that would permit model-based rate-of-return carriers to elect price cap regulation of BDS services as specified in the Attachment to the Petition. The proposal is in line with Administration and Commission goals to reduce unnecessary regulations, while promoting competition and investment.

Respectfully submitted,

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proceeding, *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, and there is thus no need for additional comment.