

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matters of)	
)	
Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers)	WC Docket No. 17-144
)	
)	
Business Data Services in an Internet Protocol Environment)	WC Docket No. 16-143
)	
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Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
)	

COMMENTS OF ITTA AND USTELECOM

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COMMENTS OF ITTA AND USTELECOM

ITTA – The Voice of America’s Broadband Providers (ITTA) and USTelecom – The Broadband Association (USTelecom) hereby submit joint comments in response to the *Second FNPRM* seeking comment on the Commission’s proposal to eliminate ex ante pricing regulation of TDM transport services and other transport offered by price cap carriers, and the *FNPRM* seeking comment on further deregulating transport services provided by rate-of-return carriers that currently receive model-based or other forms of fixed high-cost universal service support and that elect to transition their business data services offerings out of rate-of-return regulation (electing rate-of-return carriers).¹

¹ *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers*, Report and Order, Second Further Notice of Proposed Rulemaking, and Further Notice of Proposed Rulemaking, FCC 18-146 (Oct. 24, 2018) (*Model-Based Rate-of-Return Order and/or Second FNPRM and/or FNPRM*). The *Model-Based Rate-of-Return Order, Second FNPRM, and FNPRM* defines “TDM transport” to refer to interoffice facilities and channel terminations between an incumbent local exchange carrier (ILEC) wire center and an interexchange carrier, *see, e.g., id.* at 51, para. 147 n.369, and references herein to “TDM transport” refer to *lower capacity* TDM transport, i.e., DS3 or below. Additionally, we note that USTelecom member companies AT&T, Inc., CenturyLink and Verizon are taking no position on
(continued...)

I. INTRODUCTION AND SUMMARY

The Commission properly found in the *Price Cap Business Data Services Order* that there is ““strong evidence of substantial competition”” to price cap TDM transport and ““widespread deployment of competitive transport networks’ in price cap areas.”² Although the Eighth Circuit determined that the Commission provided insufficient notice in the *Price Cap Business Data Services Order* to end ex ante pricing regulation of price cap carriers’ TDM transport services, it did not and could not have disputed the fact that the Commission has for years treated these services as competitive for regulatory purposes. The Commission’s decision to end ex ante pricing regulation of price cap carrier-provisioned TDM transport services was warranted in the *Price Cap Business Data Services Order* and is warranted again.

In the opening sentence of the *Model-Based Rate-of-Return Order, Second FNPRM, and FNPRM*, the Commission enunciates its very worthwhile goals in this proceeding of allowing and encouraging rate-of-return carriers that currently receive model-based or other forms of fixed, high-cost universal service support to move to a regulatory paradigm “that promotes efficiency, reduces regulatory burdens, and encourages competition.”³ ITTA and USTelecom appreciate the Commission’s actions in the *Model-Based Rate-of-Return Order* to eliminate ex ante pricing regulation of electing rate-of-return carriers’ packet-based and higher capacity circuit-based business data services offerings, provide a path for electing rate-of-return carriers to demonstrate that their lower capacity circuit-based end user channel termination offerings are

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our comments addressing issues raised in the *FNPRM* related to transport services provided by rate-of-return carriers.

² See *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, 32 FCC Rcd 3459, 3496, para. 79 (2017) (*Price Cap Business Data Services Order*), remanded in part sub. nom. *Citizens Telecomms. Co. of Minn. v. FCC*, 901 F.3d 991 (8th Cir. 2018) (*Citizens Telecomms. v. FCC*), stay of partial vacatur granted *Citizens Telecomms. Co. of Minn. v. FCC*, No. 17-2296 (8th Cir. Nov. 9, 2018).

³ *Model-Based Rate-of-Return Order, Second FNPRM, and FNPRM* at 2, para. 1.

competitive, and release electing rate-of-return carriers from the shackles of having to conduct annual cost studies to justify their business data services rates.

With the Commission's long history of recognizing the comparative lower barriers to entry in the transport market and requiring a lesser competitive showing for reduced transport pricing regulation, combined with the Commission's findings with respect to price cap carriers that denying ex ante pricing regulation relief for their TDM transport would discourage competitive transport entry and impose significant regulatory burdens, the Commission should be equally willing to grant potential electing rate-of-return carriers further pricing regulation relief with respect to their TDM transport services. In fact, it should do so without delay or unnecessary process in light of the Commission's acknowledgment that a large data collection would be a burden on potential electing rate-of-return carriers' limited resources. ITTA and USTelecom maintain that the same policy considerations that properly undergirded the Commission's previous grant to price cap carriers of nationwide relief from ex ante pricing regulation of their TDM transport – which it should grant again – likewise militate towards the Commission's grant of such relief to potential electing model-based rate-of-return carriers.

Both judicial and Commission precedent dictate that the Commission apply reasonable inferences in finding that the competitive characteristics of electing rate-of-return carriers' service areas merit the same relief as received by price cap carriers for their TDM transport, and ITTA and USTelecom already have submitted in the record of this proceeding information relevant to the status of competition for lower capacity TDM transport on which the Commission should rely in order to draw such reasonable inferences. Doing so will remove potential electing rate-of-return carriers from being proverbially stuck between a rock and a hard place, which is where the *FNPRM* constructively leaves them currently because it characterizes this information as insufficient while at the same time it acknowledges that a large data collection would be overkill. The Commission's concerns about the unnecessary burden on model-based rate-of-

return carriers of another large data collection similar to the business data services price cap carrier data collection are well-founded and should be heeded.

In the unfortunate event the Commission does not draw reasonable inferences to support nationwide relief from ex ante pricing regulation of electing rate-of-return carriers' TDM transport, any competitive market test the Commission adopts should be structured in a manner that is more flexible than the competitive market test the Commission adopted for determining which potential electing rate-of-return carriers' study areas are entitled to removal of ex ante pricing regulation of end user channel termination services. This result is eminently justified as the Commission consistently has applied lower thresholds for carriers to demonstrate competition for TDM transport services than end user channel terminations.

II. THE COMMISSION SHOULD AGAIN ELIMINATE EX ANTE PRICING REGULATION OF PRICE CAP CARRIERS' PROVISION OF TDM TRANSPORT BUSINESS DATA SERVICES

Although the Eighth Circuit determined that the Commission provided insufficient notice in the *Price Cap Business Data Services Order* to end ex ante pricing regulation of price cap carriers' TDM transport services, it did not and could not have disputed the fact that the Commission has for years treated these services as competitive for regulatory purposes,⁴ and has long recognized that the economics of building transport facilities and competing with incumbent transport services are relatively favorable.⁵ This is largely because transport facilities connect

⁴ For example, the pricing flexibility thresholds for price cap carriers to demonstrate competition have traditionally been lower for transport based on fewer barriers to entry for competitors and the higher traffic volume potential. *See id.* at 52, para. 148 (citing *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14279, para. 102 (1999), *aff'd sub nom. WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001)); *see also infra* 14.

⁵ *See, e.g., Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2579 para. 72 (2005) (explaining that "while there are significant sunk costs associated with transport deployment [for competing carriers], there are greater opportunities for recovering sunk costs with transport than with loop facilities").

places where traffic is aggregated at centralized locations in high volume, providing rich revenue opportunities.

Competitive providers began building their own transport networks in the mid-1980s in urban cores and have been expanding outwards ever since. The Commission's special access pricing flexibility orders in the 2000s endorsed the growing scope and scale of transport competition.⁶ Carrier hotels (outside of ILEC central offices) that provide locations for multiple competing carriers and others to interconnect with independent and incumbent transport networks are responsible for transporting vast amounts of traffic. These carrier hotels offer multiple paths to avoid or minimize the use of ILEC transport networks, adding to a strong competitive dynamic. In addition, as the Commission has also recognized, cable networks grew up entirely outside the incumbent structure for transport, and provide competitive transport alternatives to incumbent transport across the country.

A competitive market test or other granular, area-by-area analysis of TDM transport competition would take an enormous amount of time, and be extremely costly and otherwise burdensome to providers and Commission staff. Moreover, such analysis is not necessary to demonstrate what the Commission has known for some time – that there is ““strong evidence of substantial competition”” to price cap TDM transport and ““widespread deployment of competitive transport networks’ in price cap areas.”⁷ Additionally, the costs of price regulating transport services given the relatively low barriers to entry and current high levels of competition would be high. Such regulation would be far more likely to discourage than to improve the investment and competition that will best serve customers. Therefore, the Commission’s

⁶ See, e.g., *Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 16 FCC Rcd 13885 (CCB 2001).

⁷ *Price Cap Business Data Services Order*, 32 FCC Rcd at 3496, para. 79; see also *Second FNPRM* at 53, para. 151.

decision to end ex ante pricing regulation of price cap carrier-provisioned TDM transport services was warranted in the *Price Cap Business Data Services Order* and is warranted again.

III. THE COMMISSION SHOULD ACCORD ELECTING MODEL-BASED RATE-OF-RETURN CARRIERS THE SAME RELIEF WITH RESPECT TO TDM TRANSPORT AS RECEIVED BY PRICE CAP CARRIERS

In the *Price Cap Business Data Services Order*, the Commission concluded that competition for TDM transport services is sufficiently pervasive to justify relief from pricing regulation nationwide. In so concluding, the Commission recognized that its decision in all likelihood would leave a small percentage of census blocks price deregulated and without the immediate prospect of competitive transport options.⁸

However, greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach. In contrast, lower entry barriers for deploying transport services than for end user channel termination services and increasing demand for transport means that regulatory relief will provide incentives for competitive providers to deploy additional transport facilities to compete for this demand.⁹

Although the Eighth Circuit remanded the regulatory disposition of price cap carrier TDM transport to the Commission for further proceedings, it did so purely on procedural grounds, finding that the Commission had not provided sufficient notice under the Administrative Procedure Act of its decision to end ex ante pricing regulation of TDM transport offered by price cap carriers.¹⁰ As discussed above, re-adoption by the Commission of nationwide relief from ex ante pricing regulation of price cap carriers' TDM transport services is eminently justified. The Commission made that nationwide finding after conducting a less burdensome market-by-market analysis than it used to assess the competitiveness of other types

⁸ See *Price Cap Business Data Services Order*, 32 FCC Rcd at 3501, para. 92.

⁹ *Id.* at 3501-02, para. 92; see also *infra* note 39 (discussing lower entry barriers for transport relative to end user channel terminations).

¹⁰ See *Citizens Telecomms. v. FCC*, 901 F.3d at 1004-06; see also *Model-Based Rate-of-Return Order* at 51, para. 147.

of business data services, such as end user channel terminations, that traditionally have been less competitive.¹¹ And if, as it should, the Commission again grants this relief, it should reaffirm that “widespread competition in the market for [transport] services . . . generally support[s] using a deregulatory approach for TDM transport” with respect to electing model-based rate-of-return carriers as well.¹²

Subjecting electing rate-of-return carriers’ TDM transport services to a more granular scrutiny is unwarranted. The Commission opines that competition for electing model-based rate-of-return carriers’ TDM transport “may not be” as robust in the less dense, more rural areas that those carriers typically serve.¹³ However, as discussed below, both judicial and Commission precedent dictate that the Commission apply reasonable inferences in finding that the competitive characteristics of electing rate-of-return carriers’ service areas merit the same relief as received by price cap carriers for their TDM transport.¹⁴

In the *Price Cap Business Data Services Order*, the Commission did not require a showing of competition in every single census block in order to grant nationwide relief.¹⁵ Instead, the Commission concluded that competition for price cap TDM transport services is sufficiently pervasive based on, *inter alia*, 89.6 percent of all census blocks with business data

¹¹ See *Price Cap Business Data Services Order*, 32 FCC Rcd at 3502, para. 93 (“our goal is not absolute mathematical precision but an administratively feasible approach that avoids imposing undue regulatory burdens on this highly competitive segment of the market”).

¹² *Id.* at 3500-01, para. 90.

¹³ See *Model-Based Rate-of-Return Order* at 55, para. 157 (citing *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers*, Notice of Proposed Rulemaking, 33 FCC Rcd 4277, 4284, para. 14 (2018) (2018 NPRM) (seeking comment on this “assumption”).

¹⁴ See *infra* 9-10.

¹⁵ See *Price Cap Business Data Services Order*, 32 FCC Rcd at 3500-02, paras. 90-93; see also *id.* at 3495-96, paras. 77-78 (finding that the distinction between required competitive showings for TDM transport and for end user channel terminations remains valid in the current business data services marketplace, and employing this distinction in the Commission’s approach to reforming its regulation of TDM transport services).

services demand having at least one served building within a half mile of a competitor's transport facilities.¹⁶ As discussed below, ITTA and USTelecom already have submitted in the record of this proceeding information relevant to the status of competition for lower capacity TDM transport on which the Commission should rely in order to draw reasonable inferences of sufficient competitiveness to potential electing rate-of-return carriers' TDM transport to support relief from ex ante pricing regulation. And as further discussed below, there is no practical merit to imposing a full-blown, onerous data collection, akin to that conducted to evaluate price cap carrier business data services, to analyze the competitiveness of potential electing model-based rate-of-return carriers' TDM transport. Therefore, the record in this proceeding supports the same approach that the Commission employed with respect to price cap carrier TDM transport.¹⁷

IV. CONTRARY TO THE COMMISSION'S PRIOR FINDING, THE RECORD CONTAINS SUFFICIENT INFORMATION ON WHICH TO FIND MODEL-BASED RATE-OF-RETURN CARRIERS' TDM TRANSPORT MERITS NATIONWIDE RELIEF FROM EX ANTE PRICING REGULATION

In its joint comments in response to the *2018 NPRM*, ITTA and USTelecom submitted a study demonstrating the comparability of market conditions in areas of counties served by potential electing model-based rate-of-return carriers with the areas served by price cap carriers in these same counties.¹⁸ The *FNPRM* seeks comment on whether the competitive and demographic data presented in the study are useful proxies for TDM transport competition in

¹⁶ *Id.* at 3501, para. 91. In this regard, the “variability of competition in areas served by electing rate-of-return carriers” should hardly be relevant to the Commission’s analysis of showings of competitiveness of electing rate-of-return carriers’ TDM transport. *Model-Based Rate-of-Return Order* at 56, para. 161. This is because such variability is likewise present in price cap areas, which (justifiably) received nationwide relief and should do so again. In addition, just as with price cap carrier TDM transport, with respect to potential electing rate-of-return carriers’ TDM transport, “the presence or reasonable proximity of a single competitor’s facilities represents competition given the high sunk cost nature of the business data services market.” *Price Cap Business Data Services Order*, 32 FCC Rcd at 3501, para. 91; *see also id.* at 3499, para. 86.

¹⁷ *See Price Cap Business Data Services Order*, 32 FCC Rcd at 3502, para. 93.

¹⁸ *See Comments of ITTA and USTelecom*, WC Docket No. 17-144, Exh. D (June 18, 2018) (Joint *NPRM* Comments).

potential electing rate-of-return carriers' service areas.¹⁹ It further seeks comment on whether there are other proxies that “could provide a reasonable basis for Commission action,” and request that commenters provide or identify additional data “or other information relevant to the status of competition for lower capacity TDM transport” in the study areas served by potential electing rate-of-return carriers.²⁰

In *USTA II*, the D.C. Circuit vacated and remanded the Commission's third attempt at defining and applying the “impairment standard” for required unbundling contained in Section 251(d)(2) of the Communications Act of 1934, as amended.²¹ In doing so, the court held that “the Commission did not properly make inferences relating to the possibility of competitive deployment of [transport] facilities in one market from evidence of actual deployment of facilities in similar geographic markets.”²² The Commission, on remand, highlighted its reliance on the reasonable inferences that can be drawn with regard to one market from evidence of competitive deployment in other, similar markets.²³ In adopting an analytical approach that relied on such inferences, the Commission expressed its belief that, where warranted, its exercise of discretion to use reasonable inferences instead of fact-specific proceedings was reasonable and best served the public interest. “First, it would be impossible for this Commission to conduct the fact-intensive, market-specific inquiries that we previously asked Second . . . this approach

¹⁹ See *FNPRM* at 56, para. 162.

²⁰ *Id.*

²¹ See generally *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 125 S.Ct. 313, 316, 345 (2004); see also 47 U.S.C. § 251(d)(2).

²² *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2543, para. 16 (2005) (*Triennial Review Remand Order*), *aff'd sub nom. Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (citing *USTA II*, 359 F.3d at 575).

²³ See *id.* at 2558, para. 41. The Commission generally assessed “similarity” in terms of the expected revenue opportunities and/or the likely presence of competitive fiber facilities in the markets at issue. See *id.* at n.123.

assumes that competitors could enter into markets that have economic characteristics resembling those where competitors have entered”²⁴ This is precisely what the study appended to the Joint *NPRM* Comments demonstrates.

The Commission recognized in the *Price Cap Business Data Services Order* that there is “widespread competition in the market” for transport services,²⁵ and that even if some census blocks did not have immediate competitive options, “greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach.”²⁶ Eliminating disincentives to competition was considered so important, coupled with “sufficiently widespread” competition, that the Commission had “confidence that a combination of these factors will broadly protect against the risk of supracompetitive rates” in the short-to-medium term.²⁷ This same nationwide analysis applies with equal force to potential electing model-based rate-of-return carriers’ TDM transport services. The Commission should use the same “reasonable assessment” and “appropriate[] balanc[ing of] the relative risks of under- and overregulation”²⁸ of TDM transport provided by potential electing rate-of-return carriers employed in both the the *Price Cap*

²⁴ *Id.* at 2559-60, paras. 44-45.

²⁵ *Price Cap Business Data Services Order*, 32 FCC Rcd at 3500, para. 90.

²⁶ *Id.* at 3501, para. 92. *See also* Public Brief for Respondents at 22, *Citizens Telecommunications Co. v. FCC*, Nos. 17-2296, 17-2342, 17-2344, 17-2685 (8th Cir. Nov. 17, 2017) (“In excluding legacy transport services from ex ante pricing regulation, the Commission made a reasonable assessment of the record and appropriately balanced the relative risks of under- and overregulation. The record is replete with evidence that competition for transport services, if not universal, is extremely widespread.”).

²⁷ *Price Cap Business Data Services Order*, 32 FCC Rcd at 3502, para. 92.

²⁸ Public Brief for Respondents, *supra* note 26, at 22; *cf. also, e.g., Triennial Review Remand Order*, 20 FCC Rcd at 2619-20, para. 155 (defining geographic market for impairment analysis in a manner that balanced precision with administrability and was not excessively over- or under-inclusive (citing *USTA II*, 359 F.3d at 570, “noting ‘the inevitability of *some* over- and under-inclusiveness in the Commission’s unbundling rules”)).

Business Data Services Order and the *Triennial Review Remand Order* to justify eliminating ex ante regulation of such carriers' provision of TDM transport.

Furthermore, the Commission need not impose a resource- and time-intensive data collection on carriers and itself to conclude that TDM transport provided by potential electing rate-of-return carriers is competitive. In the 2017 *Price Cap Business Data Services Order*, the Commission relied on a four-year-old data set in finding TDM transport competitive in price cap carrier service areas. Because they do not reflect competition that has developed over the last five years, these data present a conservative portrait of the transport competition in price cap carrier service areas that the Commission found to justify nationwide relief from ex ante pricing regulation of price cap carriers' TDM transport services.²⁹ At the same time, the Commission perceived that higher-bandwidth, packet-based services, including transport, "represent the future of business data services," "will lead to greater returns on investment and in turn, greater incentives for facilities-based entry into the business data services market," and stand in contrast to legacy, lower capacity TDM transport services that now compete against packet-based broadband services in the same geographic markets and are experiencing decreasing demand.³⁰ The Commission concluded "this competition, or potential competition between legacy and packet-based services, [is] sufficient to discipline pricing."³¹ Thus, even if the Commission had the exact same type of data for potential electing model-based rate-of-return carriers' service areas as that on which it relied in granting price cap carriers nationwide relief from ex ante TDM transport pricing regulation, that data would likewise *understate* competition for TDM transport,

²⁹ See *Second FNPRM* at 52, para. 149 (citing *Price Cap Business Data Services Order*, 32 FCC Rcd at 3466, para. 10).

³⁰ *Price Cap Business Data Services Order*, 32 FCC Rcd at 3498, paras. 83-84.

³¹ *Id.* at para. 83.

and that competition would likewise impose discipline on potential electing rate-of-return carriers' TDM transport pricing.

In the *Model-Based Rate-of-Return Order*, the Commission declined to remove ex ante pricing regulation of potential electing rate-of-return carriers' TDM transport because, in the Commission's view, the record lacked data sufficient to justify such a step.³² As discussed above, ITTA and USTelecom already have submitted in the record of this proceeding information relevant to the status of competition for lower capacity TDM transport on which the Commission should rely in order to draw reasonable inferences of sufficient competitiveness to support relief from ex ante pricing regulation. Beyond that, as the Commission acknowledges, it is not clear that any data exist, short of the proceeds of another full-blown data collection, that would pass muster with the Commission.³³ What is abundantly clear, however, is that neither potential electing rate-of-return carriers nor the Commission relish the prospect of devoting the time and resources necessary to complete another comprehensive data collection akin to that endured with respect to price cap business data services.³⁴

³² See *Model-Based Rate-of-Return Order and FNPRM* at 56, para. 158; see also *id.* at 30, para. 81. ITTA and USTelecom dispute this view and, but for the Commission's issuance of the *FNPRM*, would have filed a petition for reconsideration of that holding.

³³ *Id.* at 56, paras. 158-59 (inviting commenters to identify data that would justify further pricing deregulation of electing rate-of-return carriers' TDM transport “[i]f there are such data”) (emphasis added).

³⁴ See *id.* at 56, para. 162 (“We recognize that a large data collection would be a burden on rate-of-return carriers' limited resources, and we want to avoid imposing unnecessary regulatory burdens on them.”); 30, para. 80 (“Commenters strongly oppose a new information collection, arguing it would be burdensome and unnecessary. *We agree.* A new information collection for electing carriers would be especially burdensome given their relatively smaller size. . . . Additionally, the burdens associated with an information collection could reduce incentives for eligible carriers to elect incentive regulation, counter to our goals.”) (emphasis added). The Commission also noted that it had similarly declined previously to require a catch-up data collection for analysis of price cap carrier competitive market test results, finding that the burdens would outweigh the benefits. See *id.*

The result presents the very real possibility of a classic conundrum, where potential electing rate-of-return carriers and the Commission recognize the undue burdensomeness of another comprehensive data collection, yet the Commission may characterize the information already offered by ITTA and USTelecom to demonstrate the status of TDM transport competition insufficient, and acknowledge the possibility that such data may not exist without a comprehensive data collection. The solution is for the Commission to follow both judicial and Commission precedent to apply reasonable inferences in finding, based on the information already submitted by ITTA and USTelecom in this proceeding, that the competitive characteristics of electing rate-of-return carriers' service areas merit the same relief as received by price cap carriers for their TDM transport.

V. IF THE COMMISSION ADOPTS A COMPETITIVE MARKET TEST FOR POTENTIAL ELECTING RATE-OF-RETURN CARRIERS' TDM TRANSPORT, IT SHOULD NOT MIRROR THE COMPETITIVE MARKET TEST ADOPTED FOR END USER CHANNEL TERMINATIONS

As discussed above, the Commission should grant potential electing model-based rate-of-return carriers nationwide relief from ex ante pricing regulation of their TDM transport services. The alternative on which the Commission seeks comment – a competitive market test for determining whether to relieve potential electing rate-of-return carriers' TDM transport of ex ante pricing regulation in particular study areas³⁵ – suffers from an even more skewed burdens v. benefits calculus than that discussed above with respect to a prospective large data collection to support nationwide relief.³⁶ As the Commission observed in the *Price Cap Business Data Services Order*, “a competitive market test for transport would necessarily be more detailed and more burdensome since it would regulate based on the level of competition on individual routes.

³⁵ See *FNPRM* at 56, para. 159.

³⁶ See *supra* note 34.

This significant additional complication does not appear warranted for a market that has seen considerable competitive investment”³⁷

While adopting a TDM transport competitive market test that largely mirrors the structure of the competitive market test adopted for lower capacity TDM end user channel terminations might appear at first glance to mitigate the burdens depicted above, such a structuring would be a pyrrhic victory. As the *FNPRM* acknowledges, the Commission “has long recognized transport is more competitive than end user channel terminations and required a different competitive showing for reduced pricing regulation,”³⁸ with “lower thresholds for carriers to demonstrate competition”³⁹ for TDM transport services than end user channel terminations. Therefore, in the unfortunate event that the Commission declines to grant nationwide relief in favor of a competitive market test, such a test should be structured in a manner that is characterized by lower thresholds for electing rate-of-return carriers to demonstrate transport competition than the competitive market test the Commission adopted for end user channel termination services. Further, in the absence of nationwide relief and in light of the lower threshold the Commission long has applied for carriers to demonstrate competition for TDM transport services, the Commission should, *without applying a competitive market test*, at least provide relief from ex

³⁷ *Price Cap Business Data Services Order*, 32 FCC Rcd at 3502, para. 92 n.294.

³⁸ *FNPRM* at 55, para. 158. *See also Price Cap Business Data Services Order*, 32 FCC Rcd at 3495-96, paras. 77-78 (“Transport services . . . can more easily justify competitive investment and deployment. . . . The provision and sale of TDM-based [business data] services has reflected, and continues to reflect, the different competitive dynamics that characterize” transport and end user channel terminations. The Commission long has distinguished between these two sets of business data services “and required price cap LECs to make different levels of competitive showings to obtain pricing flexibility for each. The Commission’s pricing flexibility rules also reflect this distinction. . . . We find that this distinction remains valid in the current [business data services] marketplace . . .”).

³⁹ *Second FNPRM* at 52, para. 148. *See also Price Cap Business Data Services Order*, 32 FCC Rcd at 3498, para. 82 (describing transport as the “low-hanging fruit” of the business data services circuit, making it particularly attractive to new entrants, and noting the Commission’s continued adherence to its long-held view that competitors are prone to enter the transport market before the channel termination market).

ante pricing regulation of TDM transport in every study area where the Commission found, based on the *Model-Based Rate-of-Return Order*'s competitive market test, that potential electing rate-of-return carriers' end user channel termination services are competitive.⁴⁰

VI. CONCLUSION

The Commission's goals in this proceeding of adopting a regulatory paradigm "that promotes efficiency, reduces regulatory burdens, and encourages competition"⁴¹ are highly meritorious, and ITTA and USTelecom greatly appreciate the Commission's prior actions in this proceeding to realize those aims. Confirming nationwide relief from ex ante pricing regulation for transport services provided by price cap carriers, and granting potential electing model-based rate-of-return carriers' TDM transport services nationwide relief from ex ante pricing regulation is fully in accord with those policy objectives. Regarding the latter, doing so is justified by information currently in the record upon which, under judicial and Commission precedent, the Commission should base reasonable inferences of comparable competitiveness, and refraining from imposition of another large data collection will avoid unnecessary burdens on potential electing rate-of-return carriers and Commission staff alike.. If the Commission nevertheless imposes a competitive market test for determining the competitiveness of transport services provided by electing model-based rate-of-return carriers, it should be structured in a manner that is characterized by lower thresholds for such carriers to demonstrate transport competition than the competitive market test the Commission applied in deciding which potential electing rate-of-

⁴⁰ See *Price Cap Business Data Services Order*, 32 FCC Rcd at 3496, para. 79 ("the record overall reflects a competitive landscape where customers often combine competitive transport with channel terminations supplied by incumbents"). Given the Commission's consistent acknowledgement of the lower barriers to entry for competitive transport, it would be extremely difficult to fathom the presence of competitive end user channel termination services without an accompanying presence of competitive transport.

⁴¹ *Model-Based Rate-of-Return Order, Second FNPRM, and FNPRM* at 2, para. 1.

return carriers' study areas received removal of ex ante pricing regulation of end user channel termination services.

Respectfully submitted,

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