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*** * * PRESS STATEMENT * * ***

## Enhancing Data Services in Rural Areas

*Rural Telcos Propose Streamlining Regulations to Enable Provision of Beneficial Rates, Terms and Conditions for Business Services*

(Washington) Today, ITTA and USTelecom, national associations representing rural communications service providers, filed a petition asking the Federal Communications Commission (FCC) to better promote competition by modernizing the regulations that apply to the offering of business data services (BDS) in rural areas.

The legacy BDS regulations that currently apply to many rural telcos impose unnecessary costs and prevent these carriers from offering beneficial rates, terms, and conditions to their customers.

The new, streamlined regulatory paradigm will better promote competition by taking further steps towards implementing incentive-based "price cap" regulation. This relief, in turn, will promote the investment necessary to meet the modern communications needs of American businesses and other enterprises operating in rural America.

The following statements can be attributed to each Association accordingly:

**Genevieve Morelli, President, ITTA:** "Today's petition kicks off a process that will ultimately benefit competition, customers, and carriers alike. The companies seeking the regulatory relief proposed by the petition already have committed to significant broadband investment in rural America All they ask in return is for the flexibility to meet the needs of their business and institutional customers."

**Jonathan Spalter, President and CEO, USTelecom:** "Rural broadband providers are committed to connecting their customers with the best service at the lowest prices. This Petition will

streamline regulations and ensure businesses operating in rural America have access to modern broadband infrastructure. Swift action on this petition will promote competition, benefit communities and connect more customers."

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**About ITTA**
ITTA represents communications companies that provide a broad range of high quality wireline and wireless voice, broadband, Internet, and video services to residential and business customers in predominately rural areas across 43 states. For more information, please visit www.itta.us.

**About USTelecom**
USTelecom is the nation's leading trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications services to markets both urban and rural.

**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 | ) | RM No. _____ |
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# PETITION FOR RULEMAKING


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## SUMMARY

In line with Administration policies, further streamlining to modernize rate regulations of business data services ("BDS") would benefit carriers, competition, and customers alike. Under legacy regulations, rate-of-return carriers that receive universal service fund ("USF") support based on theoretical cost models (termed "model-based" rate-of-return carriers) must comply with legacy regulation only for their BDS offerings. The costs of such rate-of-return regulations for these carriers now outweigh the benefits of the regulation. This Petition for Rulemaking ("Petition") therefore requests that model-based rate-of-return carriers be permitted to opt into existing price cap regulation for their provision of BDS, subject to certain conditions specified in this Petition.

Continued compliance with rate-or-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 marketplace of BDS. For carriers receiving model-based support for universal service, these costs now are incurred only for BDS. In addition, the incentive of a model-based rate-of-return carrier to invest in facilities capable of providing robust, modern BDS and making the transition to an Internet Protocol-based network is undermined because of the inability to flexibly meet customer needs. Regulatory rigidity harms competition, and thus imposes unreasonable costs on customers.

For model-based rate-of-return carriers, these costs can exceed the benefits of rate-of-return regulation. Conversely, price cap regulation of TDM-based channel termination services of less than 50 Mbps offered in non-competitive counties holds the promise of producing a better outcome for some model-based rate-of-return carriers. The new paradigm could ensure

reasonable rates but better promote competition because price cap regulation generally mimics competitive pricing behavior.

The Commission can eliminate the unnecessary costs imposed on model-based rate-of-return carriers without causing harm to customers by granting to model-based carriers the ability to opt into recently adopted price cap carrier rules for BDS. The Commission established a new regulatory paradigm for price cap carrier BDS based on the growing and dynamic market for BDS. That paradigm established, among other things, that TDM-based BDS of less than 50 Mbps capacity would be regulated based on the competitive nature of the market. Form 477 data is available to make a county-by-county competitiveness designation for model-based rate-of-return carriers. Although model-based rate-of-return carriers tend to serve more rural markets subject to less competition for BDS than price cap carriers, there is no reason to expect rural counties served by price cap carriers to differ from rural counties served by rate-of-return carriers with respect to the competitive environment. Therefore the regulations applied to rural areas served by rate of return carriers would benefit from application of the same rules recently adopted for price cap carriers.

Given these cost and market factors, model-based rate-of-return carriers should have the option to have their BDS regulated in the same manner as price cap carriers. Notwithstanding such an election, there are a number of regulations applicable to rate-of-return carriers that should remain in place, such as those applicable to switched access. These recently adopted rules should be retained.

The rule proposed in this Petition also addresses specific implementation issues, such as going-in rates, including a one-time lifting of the category relationship freeze, and transition mechanisms. The Commission should promptly initiate a rulemaking to adopt the proposed rule.

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## PETITION FOR RULEMAKING

In line with Administration policies, the Commission has redoubled its efforts to reduce regulatory burdens whenever appropriate. Further streamlining to modernize rate regulation of business data services ("BDS") would benefit carriers, competition, and customers alike. Currently, rate-of-return carriers that receive universal service fund ("USF") support based on theoretical cost models must comply with burdensome regulation only for their BDS offerings. Not only do these legacy regulations impose unnecessary cost burdens, they also preclude these carriers from offering beneficial rates, terms, and conditions for BDS to their customers, including institutional customers like schools, universities, and hospitals. These undue cost burdens 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. The costs of such rate-of-return regulations for these rate-of-return carriers now outweigh the benefits achievable by the regulation.

The remedy rests with the current BDS price cap regulatory paradigm. The Commission recently concluded that the marketplace for BDS is robustly competitive.[1] As a consequence, the Commission overhauled the regulatory paradigm applicable to price cap carrier provision of BDS. The same competitive market characteristics exist for rate-of-return carriers providing BDS. This Petition for Rulemaking ("Petition") therefore requests that model-based rate-of-return carriers be permitted to opt into existing price cap regulation for their provision of BDS, subject to certain conditions specified in this Petition.

## I. RATE-OF-RETURN REGULATION PLACES UNDUE BURDENS ON MODEL-BASED RATE-OF-RETURN CARRIERS PROVIDING BDS AND OPERATING UNDER MODEL-BASED USF SUPPORT

As with all government regulation, there are costs and benefits associated with rate-of-return regulation of BDS for carriers that receive universal service support based on a cost model. These rate-of-return carriers either (1) have elected to receive broadband-only universal service support pursuant to the amounts specified in the Alternative-Connect America Cost Model ("ACAM") to support broadband and voice services;[2] or (2) are otherwise affiliated with price cap carriers and receive support based on the Connect America Cost Model ("CACM") or reverse auctions.[3] This Petition refers to such carriers as "model-based" rate-of-return carriers.

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[1] *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., Sprint Corp. v. FCC*, No. 17-1126 (D.C. Cir., filed May 8, 2017).

[2] *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) ("*ROR CAF II R&O*").

[3] *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 156 (2011) ("*USF-ICC Transformation Order*"), *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).

For model-based carriers, the costs of legacy rate-of-return regulation of BDS now outweigh the benefits from such regulation.

First, continued compliance with rate-or-return-based rate regulation, including tariffing, tariff review plans, and associated requirements entails significant costs that are increasingly difficult for model-based rate-of-return carriers to recover. Particularly for carriers that are operating pursuant to their own individual tariffs, cost studies, cost support, and related regulatory compliance requirements are a significant expense. Because the *USF-ICC Transformation Order* made costs irrelevant to the computation of switched access charges,[4] the need to perform annual cost studies now applies only with respect to BDS. These undue costs impose lopsided burdens on rate-of-return carriers facing competitors that do not operate under such regulatory conditions, such as competing CLECs or cable companies.

In addition, rate-of-return regulation imposes unreasonable burdens on model-based carriers because they have insufficient flexibility to respond to consumer needs and competition. A customer lost to competition imposes costs on a rate-of-return carrier because fewer remaining customers are left on the carrier's network to cover ongoing network and overhead costs, placing undue rate pressure on the remaining services.[5] The carrier is often unable to increase rates to replace these lost customers because either the service may become unaffordable for remaining subscribers or competition may preclude such a price increase.

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4 *USF-ICC Transformation Order*, ¶¶ 129, 847, *et seq*. *See* Section III., *infra*.

5 One of the primary reasons that rural voice and broadband services are more expensive than in urban areas is that there are fewer subscribers to fund a network that must span relatively longer transmission paths. Further reducing already lower subscriber numbers simply reduces the denominator (number of subscribers) to divide into a relatively static numerator (costs of building and maintaining a network), making the resulting per subscriber cost rise as customers are lost.

Second, the incentive of a model-based rate-of-return carrier to invest in facilities capable of providing robust modern BDS is undermined because of this same inflexibility to meet customer needs. It is difficult for model-based carriers to justify and fund expensive upgrades to rural networks, which makes it difficult to attract and retain 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.[6] This same investment disincentive undermines the model-based rate-of-return carrier's 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.[7]

Wireless carriers, for instance, are extremely aggressive in demanding competitive pricing for backhaul services to and from radio towers, even in remote locations served by rate-of-return carriers. Such demands will increase geometrically as CAF Mobility Fund II furthers rural deployment of 4G services and as 5G services become a reality. Demand for 5G-based services will not be confined to urban environments, but will also be demanded by agricultural, small business, vehicular, and other wireless uses in rate-of-return carrier geographic markets.

In addition to commercial interests, schools, universities, and hospitals currently demand competitive broadband services in their rural locations. Ensuring broadband access in rural areas of the country is crucial, a fact that Chairman Pai recognized at the outset of his tenure as

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6 *BDS R&O*, ¶ 93.

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

Chairman.[8] Indeed, Congress has frequently recognized the need to incentivize infrastructure investment in rural America to meet customer communications needs.[9]

Third, regulatory rigidity harms competition, thus imposing unreasonable costs on customers. The Commission recognized 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 undermines competition.[10] In particular, business customers, and other institutional customers like schools, universities, and hospitals, which may not be able to obtain flexible pricing from a carrier operating pursuant to rate-of-return regulation, can be harmed by being unable to find the less costly, more modern services to meet the needs of their students and patients.

Although there may be some benefits to ex ante rate-of-return rate regulation (e.g., ensuring that rates are just and reasonable), the aforementioned costs can exceed the benefits of rate-of-return regulation for model-based rate-of-return carriers. Rate-of-return principles might limit rates to costs, but the resulting rates can become unreasonable for customers because they are forced to bear an ever-increasing share of costs based on a dwindling number of customers. Costs imposed by rate-of-return regulation, such as the need for cost studies, can also be unreasonable for model-based rate-of-return carriers because rate-of-return regulation is now only applicable to a small subset of services (i.e., BDS), the customers of which are more sophisticated and in less need of regulatory protection.

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[8] FCC Chairman Ajit Pai, Infrastructure Month at the FCC, March 30, 2017, FCC blog post at https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc (last visited Apr. 27, 2017).

[9] *See, e.g.*, American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115 (2009).

[10] *BDS R&O*, ¶¶ 101, 124.

Instead, price cap regulation of TDM-based channel termination services of less than 50 Mbps offered in non-competitive counties holds the promise of producing a better outcome for some model-based rate-of-return carriers. Such regulation could ensure reasonable rates and could be more advantageous to competition because price cap regulation generally mimics competitive pricing behavior. "[P]rice cap regulation is the most effective regime for ensuring that rates for non-competitive [BDS] are just and reasonable."[11] Thus, price cap carrier BDS regulation strikes the correct balance where there is insufficient competition, and substantial deregulation does where sufficient competition is present.

## II. BDS REGULATIONS APPLICABLE TO PRICE CAP CARRIERS PROVIDES A BENEFICIAL PARADIGM FOR MODEL-BASED RATE-OF-RETURN CARRIERS

The Commission can eliminate the unnecessary costs associated with model-based rate-of-return carrier provision of BDS, without causing harm to customers, by making available to model-based carriers the ability to opt into recently adopted price cap rules for BDS. The Commission established a new regulatory paradigm for BDS provided by price cap carriers based on marketing, technological, and consumer demand trends and competition taking place throughout the country.[12] The Commission conducted a comprehensive product and geographic market analysis that identified the competitive factors necessary to constrain pricing, and imposed regulations based on these different product and geographic markets. Based on these trends and market analyses, the Commission refused to impose ex ante pricing regulations on packet-based transport services and TDM-based services greater than 50 Mbps on a nationwide

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[11] *Id.*, ¶ 179.

[12] *Id.*, ¶¶ 10-85.

basis.[13] For TDM-based BDS below 50 Mbps capacity, it adopted limited ex ante pricing regulations in non-competitive counties. These same marketplace analyses apply equally to BDS provided by rate-of-return carriers, although the regulatory paradigm selected may be governed by somewhat different public interest considerations.[14]

### A. Existing BDS Regulations

After twelve years of study, multiple rounds of comments, and the most extensive data collection ever conducted by the Commission, the FCC concluded that there is "substantial and growing competition" in the "dynamic" marketplace for BDS in the geographic areas of price cap carriers.[15] The Commission recognized that incumbent local exchange carriers ("LECs") used to be the dominant providers of special access services, now termed BDS. The market has changed dramatically, however. Legacy time-division multiplexing ("TDM") services, such as DS1 and DS3, are quickly being phased out in favor of newer IP-based services such as Ethernet.[16] Based on the Commission's economic analysis of the record in that proceeding, it concluded that competition from newer IP-based offerings constrained the pricing and practices of incumbent LEC-provided TDM BDS, which justified establishing a new regulatory paradigm for BDS. In making these regulatory changes, the Commission found that encouraging competitors to build their own facilities was a critically important goal. Thus, the Commission erred on the side of less regulation than necessary to constrain pricing because eliminating

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[13] *Id.*, ¶¶ 86-87, 90.

[14] Those differences are entirely based on the different costs and benefits of price cap and rate-of-return regulation, which are outlined below.

[15] *BDS R&O*, ¶ 1.

[16] *Id.*, ¶ 3.

deterrents to infrastructure investment would create more robust competitors and thereby ultimately constrain prices and produce long term benefits to customers.[17]

Based on the extensive record, the Commission concluded that TDM transport, all packet-based services, and TDM channel termination services that offered greater than 50 Mbps capacity should be substantially deregulated. For TDM channel termination services below 50 Mbps, such as TDM-based DS1 and DS3 services,[18] the Commission established a test for determining whether a particular market, which the FCC designated at the county level, was competitive.[19] The Commission published a list of counties that meet the BDS competitive market test,[20] 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.[21] The presence of one facilities-based competitor was deemed sufficient to constrain a price cap carrier's provision of BDS and thus meet the competitive market test.[22]

The Commission granted regulatory relief to price cap carriers for lower capacity TDM services offered in a competitive county by eliminating rate structure, price cap, and tariffing

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17 *Id.*, ¶¶ 4, 86.

18 *See id.*, ¶ 86 & note 281 (description of TDM-based services under 50 Mbps).

19 To be codified at 47 C.F.R. § 69.803(b). A county was defined as competitive if "[e]ither 50 percent of the locations with business data services demand within the county are within one half mile of a location served by a competitive provider" or "75 percent of the census blocks within the county are reported to have broadband connection availability by a cable operator."

20 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).

21 To be codified at 47 C.F.R. § 69.803(c).

22 *BDS R&O*, ¶ 117.

regulations.[23] Lower capacity TDM services offered in non-competitive counties are to be regulated pursuant to Phase I pricing flexibility rules to allow carriers to offer services with volume and term discounts and contract-based services.[24] For non-competitive markets, the Commission modified price cap rules applicable to special access services by establishing a new 2 percent X factor with the continued provision for a low-end adjustment mechanism for qualifying price cap incumbent LECs.[25] The Commission established for all price cap carrier BDS offerings the general statutory protections of Sections 201, 202, and 208 of the Communications Act[26] to ensure reasonable and not unreasonably discriminatory prices, terms, and conditions.[27] The Commission established a transition to the new form of regulation to give customers, including carrier-customers, of TDM-based DS1 and DS3 services time to adjust to the changed regulatory paradigm.[28] It refused to adopt special wholesale regulations of BDS.[29]

### B. Existing BDS Regulations Provide a Good Option for Model-Based Rate-of-Return Carriers if Appropriate to Their Circumstances

The same marketplace analyses the Commission undertook for price cap carriers apply equally to BDS provided by model-based rate-of-return carriers, although the regulatory paradigm selected may be governed by somewhat different public interest considerations.[30] Customers in areas served by rate-of-return carriers demand modern technological capabilities

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[23] To be codified at 47 C.F.R. § 69.807(a).

[24] To be codified at 47 C.F.R. § 69.807(b).

[25] *BDS R&O*, ¶¶ 236, 249.

[26] 47 U.S.C. §§ 201, 202, & 208

[27] *BDS R&O*, ¶ 89.

[28] *Id.*, ¶¶ 166, *et seq.*

[29] *Id.*, ¶ 260.

[30] Those differences are entirely based on the different costs and benefits of price cap and rate-of-return regulation set forth in Section I, *supra*.

that only IP-based networks can provide. Rate-of-return carriers have been experiencing growing competition for BDS from facilities-based carriers, particularly cable companies. Most importantly, rural America has a need for investment in broadband infrastructure so that rural areas can be on par with that available in urban environments.[31] Indeed, the Commission has recognized that making modern broadband communications available to all Americans, rural or not, is a primary goal.[32] In addition, the Communications Act mandates that the Commission promote the availability of communications services to all Americans that are similarly priced between urban and rural markets.[33]

Model-based rate-of-return carriers tend to serve more rural markets that may be less subject to competition for BDS than the more urban markets generally served by price cap carriers. However, there is no reason to believe that rural counties served by price cap carriers differ from rural counties served by rate-of-return carriers with respect to the competitive BDS marketplace. Therefore the regulations governing the rural areas served by rate-of-return carriers would benefit from application of the same rules recently adopted for price cap carriers.

The Commission's nationwide marketplace findings for certain BDS services and the more nuanced regulatory paradigm the Commission established for TDM-based BDS below 50 Mbps capacity take into account the varying degrees of competitiveness in different product and geographic markets. This same comprehensive paradigm could readily be extended to model-based rate-of-return carrier counties, as described below.[34]

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31 *ROR CAF II R&O*, ¶ 16.

32 *USF-ICC Transformation Order*, ¶ 5.

33 47 U.S.C. §§ 101, 254(b)(3).

34 While it is expected that more rate-of-return carriers will serve counties deemed non-competitive under the BDS competitive market test than price cap carrier-served counties, this

## III. PROPOSED OPTIONAL BDS REGULATION FOR MODEL-BASED RATE-OF-RETURN CARRIERS

Given these cost and market factors, model-based rate-of-return carriers should have the option to have their BDS regulated in the same manner as BDS provided by price cap carriers. Rate-of-return carriers that receive universal service support pursuant to the ACAM, CACM or auctions no longer receive USF support or any other interstate revenues based on embedded costs for any service other than BDS.[35] Therefore, these carriers would benefit from relief from the burdensome cost rules that now are only required for interstate BDS.

The proposed rule would provide model-based rate-of-return carriers with the option to place their BDS under price cap regulation. Under this proposal, the rules governing price cap carrier provision of BDS would be made applicable to model-based rate-of-return carriers that opt into such treatment.[36] TDM-based channel termination services under 50 Mbps would be regulated based on whether the particular county the model-based carrier served is classified as competitive or non-competitive as identified by the Commission's published competitive county list. Simply put, model-based rate-of-return carriers electing this option would operate based on the competitive or non-competitive classification of the county where they serve. Because Form 477 data are filed for all U.S. counties, the Commission can, if necessary, update its competitive

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difference does not undermine the validity of applying the new BDS regulatory paradigm applicable to competitive vs. non-competitive counties to rate-of-return carriers.

[35] *ROR CAF II R&O*, ¶ 20 (certain rate-of-return carriers elected ACAM support); *USF-ICC Transformation Order*, ¶ 128 (rate-of-return affiliates of price cap carriers receive CAF II-based support, governed by the CACM or reverse auctions).

[36] The attached Appendix contains draft rule revisions that would implement the proposal in this petition.

county list as contemplated by existing Rule 68.803(c) upon adoption of the proposed rule.[37] Pursuant to the BDS competitive market test, BDS offered in competitive markets would be substantially deregulated. BDS offered in non-competitive markets would be moved to price cap regulation, subject to the same rules applicable to price cap carriers offering BDS in non-competitive markets. Packet-based services, transport services, and TDM services above 50 Mbps would be deregulated in accordance with Section 69.807(a).

Notwithstanding an election by a model-based rate-of-return carrier to adopt price cap regulation for BDS, there are a number of regulations applicable to rate-of-return carriers that should remain in place. Terminating switched access charges and terminating intercarrier compensation are being phased out in accordance with a schedule specific to rate-of-return carriers.[38] The Commission carefully evaluated the contribution that terminating intercarrier compensation revenues made to network development costs, and devised a detailed transition process to phase down terminating compensation rates over a period of time.[39] It replaced those revenues with other cost recovery mechanisms, particularly the Access Recovery Charge and CAF-ICC support. The Commission established these transition mechanisms separately for rate-of-return and price cap carriers because rate-of-return carriers had a greater need for certainty about future revenue streams.[40]

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[37] There is no reason to duplicate the extensive and highly burdensome data request for 2013 information on special access services submitted by price cap carriers in 2015 because Form 477 data is filed on a quarterly basis. Providing data similar to the 2013-era building-by-building data provided by price cap carriers would not materially add to the results of a Form 477 data review, but would impose undue burdens on smaller rate-of-return carriers. *See BDS R&O*, ¶ 148.

[38] 47 C.F.R. § 51.909.

[39] *E.g.*, *USF-ICC Transformation Order*, ¶¶ 892-94.

[40] Cf. *id.*, ¶ 879 (price cap) with *id.*, ¶ 891 (rate-of-return).

We are now past the mid-point of the terminating rate reduction portion of that multiple-year transition process for rate-of-return carriers, whereas the price cap carrier transition is largely complete. In addition, originating switched access charges were originally set based on rate-of-return rules, and now are subject to a cap and other limitations imposed by the *USF-ICC Transformation Order*.[41] The rates for broadband service offered by some rate-of-return carriers to residential and small business consumers, termed consumer broadband loop service, are subject to the rate restructure and corresponding regulations adopted by the Commission in 2016.[42] Some electing model-based rate-of-return carriers could choose to continue to participate in the NECA traffic sensitive pool for switched access services (which is subject to its own rules), provided that BDS services would be excluded.

All of these non-BDS rate-of-return regulated services are subject to their own detailed regulations and customer safeguards that were recently adopted by the Commission. There is no reason to upset the business expectations and transition plans permitted by these regulations, which represent a balancing of competing interests and which were adopted pursuant to detailed public interest evaluations. Upsetting these carefully crafted regulations for model-based rate-of-return carriers would undoubtedly raise complex questions that would take time to evaluate and resolve and entail a real risk of unintended harm to rural rate-of-return carrier businesses, networks, and customers. In sum, requiring a rate-of-return carrier to move all of its regulated interstate services to price cap regulation, thereby also modifying pricing and universal service receipts for these other interstate services, would be substantially burdensome, deter model-

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[41] *Id.*, ¶ 651.

[42] *ROR CAF II R&O*, ¶¶ 80, *et seq*. A number of rate-of-return carriers have already deregulated broadband internet access services, either by providing service on a detariffed or private carrier basis.

based rate-of-return carriers from electing more efficient regulation of BDS, and would undermine investment incentives for building modern rural networks.

The proposed rule should be made optional in order to allow each model-based rate-of-return carrier to evaluate its own circumstances to determine whether the new regulations make sense for the provision of BDS in its service territory. Given that BDS offered by rate-of-return carriers has been regulated pursuant to rate-of-return rules for a number of years, there would be little harm in allowing carriers to choose to continue these legacy regulations until the carrier's market circumstances justify the change to price cap regulation. Providing an option for model-based rate-of-return carriers between two regulatory paradigms is consistent with precedent.[43]

## IV. SPECIAL IMPLEMENTATION ISSUES FOR MODEL-BASED RATE-OF-RETURN CARRIER PROVISION OF BDS

One of the primary benefits of establishing a new regulatory paradigm for model-based rate-of-return carrier provision of BDS is that individual petitions for price cap conversion and/or waivers will be unnecessary. Relying on price-cap-based rules will be more efficient, create greater regulatory and industry certainty, and reduce both carrier and FCC staff time in implementing the new BDS regulation.

As with all conversions from rate-of-return to price cap regulation, the going-in rates for price cap regulation purposes should be the then-existing tariffed rates. For NECA pool members, going-in rates would be based on historical costs and demand for each electing company, as the Commission normally does with price cap conversions. Since these rates are established based on rate-of-return principles, including provisions based on the prudent actual costs of providing service, the Commission has a firm basis to presume that the going-in rates are

[43] *See, e.g.*, 47 C.F.R. § 61.39.

reasonable. This approach is consistent with the manner in which all other going-in rates are established for price cap conversion purposes.[44]

One exception should be made to the establishment of going-in rates for model-based rate-of-return carriers. There has been a fifteen-year freeze in jurisdictional separations. Rate-of-return companies were given the option to adopt a voluntary freeze on Part 36 category relationships and were required to adopt a mandatory freeze on allocation factors. The FCC recently extended this very lengthy freeze for another eighteen months.[45] Both the initially voluntary category relationship freeze and the allocation factor freeze are now extended on a mandatory basis absent a waiver of the rules. Over the many years the freeze has been in effect, the category relationship freeze has created hardships for certain rate-of-return carriers, some of which have sought individual waivers. Filing and pursuing Commission action on these waivers entailed significant resources and cost burdens, and many of these waiver requests remain unresolved.[46] Failure to lift the category relationship freeze on a limited basis would distort cost recovery, which would harm carriers and thus should not be exported into price cap regulated rules. The Petition's proposed rule therefore allows model-based rate-of-return carriers electing

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[44] *See, e.g., Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report & Order, 5 FCC Rcd. 6786,, ¶ 230 (1990); *CenturyTel, Inc. Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, WC Docket No. 08-191, Order, 24 FCC Rcd. 4677, ¶ 14 (Wir. Comp. Bur., 2009).

[45] *Jurisdictional Separations and Referral to the Federal-State Joint Board*, CC Docket No. 80-286, Report & Order, FCC 17-55 (rel. May 15, 2017). Delaying this relief until jurisdictional separations reform is complete would disserve BDS customers and model-based carriers alike. This limited one-time category relationships rule change will not undermine the orderly evaluation of the entire separations process. *Cf. id.*, ¶ 13 (denial of one-time lifting of category relationships freeze).

[46] *See, e.g., In The Matter of Petition by Eastex Telephone Cooperative, Inc. Pursuant to 47 C.F.R Sections 36.3, 36.123-126, 36.141, 36.152-157, 36.191, and 36.372-382 for Commission Approval to Unfreeze Part 36 Category Relationships*, CC Docket No. 80-286, Order, 27 FCC Rcd. 6357 (Wir. Comp. Bur., 2012).

BDS price cap treatment to be afforded a one-time opportunity to unfreeze category relationships in establishing going-in rates. Bureau staff, of course, would be able to review the modification to ensure that the resulting rates are reasonable. This one-time modification would contribute to establishing valid and reasonably compensatory rates from the beginning of price cap regulation. Absent this one-time modification, these carriers, who elected sixteen years ago to freeze categories for five years, will likely never have the opportunity to align their BDS rates with their costs even if the FCC eventually reforms separations. Finally, separations requirements should be eliminated for model-based rate-of-return carriers if the Commission ultimately takes that action with respect to price cap carriers.[47]

Adopting the rule as proposed would also require adoption of an exception to the price cap all or nothing rule to allow the electing rate-of-return carrier to remain a rate-of-return carrier for all purposes other than BDS regulation. Currently, in order to convert to price cap regulation, all of the company's study areas and rates would have to be converted to price caps, except for affiliates that are regulated as average schedule rate-of-return carriers.[48] The all or nothing rule was adopted initially to prevent gaming, where a carrier might be motivated to reduce costs allocated to its price cap regulated study areas and then increase costs in its rate-of-return study areas where it could recover those costs pursuant to rate-of-return formulas. Such theoretical gaming is not possible in the current regulatory environment for model-based rate-of-return carriers. First, the remaining services subject to rate-of-return regulation are already price-constrained, precluding the ability to load costs on those service rates: (1) terminating switched access and intercarrier compensation rates are capped and are being phased out; (2) originating

[47] Comments of ITTA- The Voice of America's Broadband Providers, CC Docket No. 80-286, 11 (filed May 24, 2017).

[48] 47 C.F.R. § 61.41.

switched access and intercarrier compensation rates are capped; and (3) consumer broadband services are largely deregulated by companies that would be eligible to elect the proposed BDS rule. Second, since USF support is no longer cost-based for these carriers, the original concern that carriers would shift costs no longer applies.

Because model-based carriers would make an election to bring their BDS under price cap regulation, the proposed rule would allow the change in regulation to occur as of January 1, 2018, or any July 1 thereafter.[49] The election would be made with at least 60 days' notice in order to provide the FCC and NECA with adequate notice to prepare for the change. In competitive counties, deregulated pricing would not be a problem for customers because the presence of competition would deter unreasonable pricing. In non-competitive counties, customers would be protected because going-in rates would largely be based on existing tariffed rates that are set based on actual costs.

Because the electing rate-of-return carrier would have all of its interstate telecommunications services either (1) price-cap regulated; (2) constrained by terms of the rate-of-return intercarrier compensation rules; or (3) deregulated, there would be no significant reason to continue to maintain Part 32 accounting for the electing rate-of-return carrier. Therefore, as the Commission recently did for price cap carriers, the proposed rule would allow an electing rate-of-return carrier to eliminate Part 32 accounting in favor of GAAP accounting, subject to the conditions imposed by the Commission.[50]

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[49] Allowing carriers to elect this option on January 1, 2018 would reduce burdens because cost studies are performed on a calendar year basis. Carriers electing this option effective January 1, 2018 would only have to complete the 2017 cost separations study and then would be relieved of that burden.

[50] *Comprehensive Review of the Part 32 Uniform System of Accounts*, WC Docket No. 14-130, *et al.*, Report & Order, FCC 17-15 (rel. Feb. 24, 2017). In particular, a price cap carrier that

## 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 and this Petition.

Respectfully submitted,

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eliminates Part 32 accounting must maintain then-existing accounting for pole attachment rates for a certain period of time, which would, under this proposed rule, be made applicable to an electing rate-of-return carrier.

**Appendix**
**Rate-of-Return Carrier Business Data Services Price Cap Regulation Rules**

Section 61.41:

Add new subsection (f):

(f) Notwithstanding the requirements of paragraphs (c) and (d) of this section, a telephone company subject to rate-of-return regulation may provide business data services pursuant to § 61.50 without converting other services to price cap regulation.

Add new Section 61.50:

**Section 61.50. Price cap regulation of rate-of-return carrier provision of business data services.**

(a) A rate-of-return carrier, as defined in § 51.903(g), has the option to offer business data services to customers pursuant to this section if

(1) the carrier receives universal service payments pursuant to the Alternative-Connect America Cost Model pursuant to § 54.311, or

(2) the carrier is an affiliate of a price cap local exchange carrier operating pursuant to a waiver of § 61.41.

(b) If a rate-of-return carrier elects to offer its business data services to customers pursuant to this section it shall notify the FCC at least 60 days before the effective date of the election. Carriers may elect this option to be effective January 1, 2018 or at any July 1 thereafter.

(c) A rate-of-return carrier making an election to offer business data services pursuant to this section shall offer business data services pursuant to price cap regulation applicable to price cap carriers pursuant to §§ 69.801 through .809, and §§ 61.41 through .49 to the extent those sections are applicable to business data services.

(d) A rate-of-return carrier making an election to offer business data services pursuant to this section shall comply with the requirements of § 61.201, if applicable by the terms of that section. Tariffs offering BDS services, if permitted or required, may offer those business data services at different rates in different study areas.

(e) A rate of return carrier making an election to offer business data services under this section may continue to participate in the NECA Traffic Sensitive Pool for non-Business Data Services. A carrier that elects this option to be effective January 1, 2018 must notify NECA of its election by September 1, 2017.

(f) A rate of return carrier making an election to offer business data services under this section and which made an election under § 36.3(b) to assign costs to separations categories

pursuant to § 36.3(b), may update the assignment of costs to separations categories for this election prior to establishing going-in rates under this section.

(g) At the same time as a rate-of-return carrier makes an election to offer business data services under this section, it shall also have the same right to make an election to opt-out of Part 32 accounting pursuant to § 32.1, except that such carrier shall comply with §§ 1.1409(g) and 32.11(g).

(h) A rate-of return carrier that offers business data services pursuant to this section shall continue to be treated as a rate-of-return carrier for all other purposes in this Title.

§§ 69.801 through .809 and § 69.201:

Add the phrase "and incumbent rate-of-return local exchange carriers pursuant to § 61.50(a)" after the term "carriers subject to price cap regulation as defined by § 61.3(bb)" each time the latter phrase appears in Part 69 of the rules, §§ 69.701 through .809.