Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

ORDER DENYING STAY MOTION

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

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

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

[1] Motion for Stay Pending Judicial Review, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25 (filed June 23, 2017), https://ecfsapi.fcc.gov/file/106230709109889/2017-06-23%20Motion%20for%20Stay%20(REDACTED).pdf (Motion for Stay); *see also Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, Report and Order, 32 FCC Rcd 3459 (2017) (*BDS Order*).

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

II. DISCUSSION

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

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

A. Petitioners are Unlikely to Prevail on the Merits

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

1. Competitive Market Test

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

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

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

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

a. The Nearby Competitor Standard

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

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

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

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

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

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

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

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

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

[10] Motion for Stay at 12.

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

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

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

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

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

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

[14] *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[30] Motion for Stay at 13, 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[46] Motion for Stay at 19-20.

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

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

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

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

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

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

[53] *Id.* (referring to *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557 (2012) (*2012 Suspension Order*)).

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

(continued….)

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

b. Effect of a Single BDS Competitor

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

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

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

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

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

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

[58] Motion for Stay at 22-29.

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

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

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

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

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

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

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

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

[64] Motion for Stay at 23.

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

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

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

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

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

[70] Motion for Stay at 29.

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

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

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

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

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

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

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

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

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

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

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

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

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

[80] Motion for Stay at 29-30.

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

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

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

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

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

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

[83] Motion for Stay at 30.

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

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

[86] Motion for Stay at 31.

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

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

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

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

[91] Motion for Stay at 31.

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

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

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

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

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

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

[93] *See* 47 U.S.C. § 208.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued….)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[120] Motion for Stay at 38.

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

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

[123] Motion for Stay at 39.

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

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

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

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

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

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

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

[125] Motion for Stay at 39.

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

[127] Motion for Stay at 39.

[128] *Id.* at 3.

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

[130] Motion for Stay at 3.

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

[132] Motion for Stay at 40.

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

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

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

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

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

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

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

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

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

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

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

[141] *Id.*

[142] *Id.*

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

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

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

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

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

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

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

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

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

[147] Motion for Stay at 50.

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

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

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

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

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

III. CONCLUSION

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

IV. ORDERING CLAUSES

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

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

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

[152] *Id.*