DISSENTING STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Business Data Services in an Internet Protocol Environment*, WC Docket No. 16-143; *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247; *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.

The Commission, industry, and Congress have been grappling with special access for more than a decade—a fact well known to me as I have worked on the issue more than most, and have dealt with the various permutations over the years. In all candor, I am somewhat sympathetic to the argument that a previous Commission went too far in one direction. However, that does not mean that the Commission should swing to the opposite side of the pendulum, casting aside logic, precedent, and basic economic principles in a quest to check off another special interest box by the end of this year. If there is anything that all stakeholders in this proceeding agree on, it is that getting special access regulation wrong could cause significant harm to the marketplace. And, a lot of proposals in this item would qualify as "wrong".

Undeterred by the prospect of distorting competition and investment incentives, the Commission puts forth a brand new plan, seemingly with the mindset that it's so crazy it just might work. It won't. This is plain, old fashioned rate regulation, repackaged with a new narrative. One of the best ways to ensure that providers invest to meet the growing demand for backhaul is to free them from legacy rules that hamstring competition. We cannot regulate our way to deployment.

This "technology-neutral" framework is really just another massive power grab by the Commission. If the agency proceeds down the current path, I expect it will be challenged and ultimately overturned. That may not matter to those who are only seeking a quick win, but it will further damage the agency's credibility.

The Commission begins by abrogating specific terms and conditions in incumbent LECs' pricing plans. I am not surprised given this Commission's propensity to meddle with contracts—from declaring that certain terms of service violate the Telephone Consumer Protection Act (TCPA) to eliminating Joint Sales Agreements (JSAs). This latest intervention is unwarranted as well. The provisions are clear and purchasers entered into them with full knowledge of the consequences for not fulfilling the terms of the deal. Additionally, purchasers had a number of options to buy service without these terms. They may not have received the corresponding benefits—more flexibility or deeper discounts—but that was their choice to make.

Furthermore, these are agreements between sophisticated and well-represented buyers and sellers. Those purchasers, in turn, serve some of the largest banks, health care providers, and big box retailers in the country. It is hard to see the need to intervene in contractual disputes on behalf of some of the major companies represented here, and I am surprised that this is the position of the Commission majority. At the same time politicians are vilifying our nation's bankers, especially big banks—which own tens of thousands of ATMs nationwide[1]—the Commission seems intent on using regulatory process to lower these companies' cost of operations. Oh, the irony.

[1] Bankrate, These 10 Banks Have the Most ATMs, http://www.bankrate.com/finance/banking/banks-have-the-most-atms-1.aspx (last visited Apr. 28, 2016).

It is even more vexing that the Commission determines these provisions to be unlawful on their face without having made any determinations about how common these provisions are across providers, whether there is competition in a given market, and what impact that should have on the analysis. In places where there is competition, one would think that would substantially reduce the need to scrutinize ILECs' pricing provisions as purchasers could select amongst the providers and choose the most favorable rates, terms, and conditions. You know, along the lines of the "competition, competition, competition" slogan. Notably, in the very next section, the Further Notice proclaims that the "Commission seeks to enter a new era where regulatory determinations are made based on whether a market is competitive". It asks whether to apply the order's requirements to other offerings in non-competitive markets, acknowledging that competition could be relevant to the lawfulness of these provisions. Yet somehow these ILEC provisions are stuck in the "old" era. Any subsequent determinations will come too late to impact the ILEC terms that have been declared unlawful. So much for a "technology-neutral" framework.

Moreover, in unwinding these terms, the Commission is giving one side an undue advantage after the fact. The order determines that early termination and shortfall penalties—common in many parts of the economy, including the housing industry where most people cannot just pay off their mortgage whenever they desire without a prepayment penalty—cannot exceed the amount the customer would have paid otherwise. The agency views any amounts in excess of such "expectation damages" to be "punitive" and a "windfall" to the incumbents, as if they are ill-gotten gains, rather than mutually agreed upon payments. The Commission seeks to avoid penalties that are "so extravagant…as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression". However, prohibiting any amount that is more than a carrier's opportunity cost arbitrarily forecloses reasonable penalties above that amount that are neither excessive nor coercive, and that parties freely agreed to as part of the deal. That is the very definition of a penalty, designed to act as a legal and reasonable financial deterrent, not just make a provider financially whole.

With respect to the so called "all or nothing" provisions, the concern seems to be that they might constrain purchasers that did not adequately plan ahead for the possibility of falling demand or switching providers. Those purchasers could have selected different plans or options that might have provided more flexibility at the end of the term, but instead, they made certain commitments in exchange for flexibility during the term. ILECs put evidence in the record that purchasers have a number of options, that many customers did not use these plans, and that those that did were able to move circuits or change their commitment levels. Nonetheless, the Commission rejects one provider's evidence—in a footnote—before proceeding to seek comment on how to unwind the provisions. It is unclear how ILECs that already made good on their obligation to provide circuit portability will receive the benefit of the bargain if customers are able remove circuits of their choosing, and without incurring the specified shortfall or early termination penalties. Given how the Commission is handling the penalty provisions, I have no confidence that the outcome here will be fair or reasonable.

Not content to stop there, in the Further Notice, the Commission proposes a brand new scheme to rate regulate *anyone* who provides enterprise-level broadband service. I cannot stress enough how radical a departure this is from history and precedent. For years, special access has focused on regulating ILECs' provision of DSn services through the dominant carrier safeguards of tariffing and rate regulation. Over time, as competition developed, price cap carriers received certain relief, including pricing flexibility and even forbearance from many of the dominant carrier safeguards for enterprise broadband service. Meanwhile, consistent with Commission precedent dating back to 1980, and embodied in the 1996 Act, facilities-based competitors have been largely unregulated, in part to encourage entry and promote competition. As the Further Notice rightly points out: "The great entry success story has been that of

cable."

Now the Commission would roll back the relief for price cap carriers despite plenty of evidence already in the record that pricing flexibility was not only warranted but insufficient, and that enterprise forbearance led to more competition and lower Ethernet prices. And it attempts to do so despite the fact that forbearance cannot be reversed and the services cannot be re-regulated simply by changing their name. Moreover, all of this is premised on the notion that markets—that have not yet been defined—are not competitive. This may be labeled a Further Notice but it seems pretty clear that the outcome is predetermined. As a preview of things to come, this final version has significantly walked back earlier suggestions that markets could be defined in rational ways and that at least some could be found to be competitive.

At the same time that the Commission's new mantra is to streamline regulation of ILECs, who were bestowed certain benefits by the government in the past, it plans instead to regulate every provider, even new entrants. In particular, the Commission would expand the universe of regulated providers to include cable companies—new competitors that already risked capital to deploy service without any warning that they might be "rewarded" for their success with restrictions on how they price and market their products. With the incumbents having already received forbearance for many packet-based services, there would have been no reason to think that their own comparable services would ever be subject to that type of regulation. Indeed, the Commission does not have authority to do so, and labeling it a "technology-neutral" approach cannot solve that threshold problem. What possible incentive would a cable provider have to pursue an aggressive business broadband deployment strategy only to get regulated coming and going by the Commission? Just awful.

In other words, the agency has a lot of explaining to do. I will reserve the bulk of my critiques until it has done so. However, I do want to highlight a few additional points and inconsistencies in the meantime.

First, I want to call attention to the fact that the principle of competitive or technological neutrality does not mean what you or I may think it means. Instead, it has devolved into whatever the Commission wants it to mean in a given item. In universal service, the Commission has defined it as a prohibition on "treating competitors differently in 'unfair' ways", and it has used this interpretation to justify rules that actually *favor* providers of certain technologies over all others. Here, the Commission says it wants to treat all technologies the same, so it invokes the principle to justify regulating new providers, regardless of whether that would be "fair". But even here it is not actually neutral because TDM-based services would continue to be regulated under the price cap system while packet-based services would fall under a benchmarking regime.

Second, I have been struck by the lack of consistency when it comes to measures of inflation and productivity at the Commission. This Further Notice proposes to continue to use the Bureau of Economic Analysis' chain-weighted gross domestic product price index, or GDP-PI, and re-set the X-factor using one of several methods proposed in the item. The goal, of course, is to significantly lower rates. In general, chain-weighted inflation measures yield lower inflation rates than standard inflation rates, but as this item notes, they are "significantly more accurate".

In contrast, in certain universal service programs, where the Commission wants to be more generous, it has used other methodologies with no accompanying productivity adjustments. In E-rate, the Commission selected the gross domestic product chain-type consumer price index, or GDP-CPI, but determined that in times of deflation, it would hold the budget constant. More recently, in the Lifeline

reform order, the Commission picked a completely different inflationary measure with no explanation at all: the Bureau of Labor Statistics' consumer price index for all urban consumers, or CPI-U, which is not chained. In the rate-of-return reform order, however, there was no adjustment for inflation whatsoever.

Perhaps there is some justification that escapes me for different measures for different rules, but the Commission should at least explain the rationale. Instead, it appears that the Commission, shockingly, chooses the measures that best fit the desired outcome, even if it means approving the use of chain-weighting, something that Democrats have strongly opposed in other contexts. Whether the selected measure makes sense from an economic standpoint seems to be a secondary consideration at best.

For all of these reasons, I dissent.