

CHAIRMAN WHEELER'S PROPOSAL TO PROMOTE FAIRNESS, COMPETITION, AND INVESTMENT IN THE BUSINESS DATA SERVICES MARKET

Business Data Services: Networks That Support Essential Services

Business Data Services (BDS), sometimes referred to as “special access,” are enterprise data services that are a fundamental part of the U.S. economy. These dedicated network connections support essential services like ATMs, credit-card readers, and mobile-phone service. BDS carries the massive flows of data exchanged by business, industry, and institutions like hospitals, schools and universities, and provides essential infrastructure to support wireless innovation, including 5G. They can be provided over fiber or copper and use either TDM or packet-based (IP) Ethernet technology.

A New Framework: Targeted Action to Encourage Competition, Fair Access

To promote fairness, competition, and investment in this \$45 billion marketplace, FCC Chairman Tom Wheeler circulated to his fellow Commissioners proposed rules to take necessary and overdue steps to reform a long-broken regulatory regime. The Order provides a new framework for this market that strikes a balance between targeted regulation for legacy TDM (DS1 and DS3) services, where evidence of market power is strongest, and lighter-touch regulation of packet-based services, where there has been new entry and competition may be emerging. The Order also reaffirms that TDM and Ethernet BDS are both subject to the Commission's Title II oversight.

This framework supports the rapid deployment of innovative 5G mobile service by ensuring that wireless providers have fair access to BDS, including packet-based BDS, at just and reasonable rates, terms, and conditions. These requirements are enforced by strengthening our complaint process to expedite resolution of problems if they arise. The Chairman is also proposing a Further Notice on packet-based BDS, which will provide the Commission with a vehicle to take further action on Ethernet pricing if that proves necessary.

Overdue Reforms to Address the Lack of Competition in Legacy (TDM) Services

The Order would provide a long-overdue update of legacy TDM rules governing incumbent telephone companies (ILECs) designed to address the artificially high prices being charged to small businesses, schools, libraries, and, ultimately, consumers.

Price Caps: Adjusting for Efficiency after More Than A Decade

These TDM services will continue to be governed by what is known as “price cap” regulation. Price caps are designed to replicate the effects of a competitive market by setting a maximum price for services, which is continually adjusted downward to account for efficiency gains, offset by inflation. The rate of this downward productivity price adjustment is called the “X factor.”

Due to regulatory inaction, the current price caps have not been adjusted since 2004. The Order acts to restore fairness and address the lack of competition through four specific reforms:

- Updating price caps to account for over a decade of efficiency gains through a one-time downward adjustment of 11%, phased in over 3 years, beginning in July 2017 (specifically, 3% in year one, 4% in year two, and 4% in year three)
- Reducing price caps going forward by an annual X factor reduction of 3%, offset by inflation, beginning in July 2017, in addition to the one-time adjustment above
- Applying “Phase I” pricing rules to all price cap LECs, which allow contract negotiations for

service at rates that may, for example, be below the price cap filed in tariffs at the FCC. As a result, price cap carriers who lacked the ability to decrease their prices below the cap on an individualized basis obtain that flexibility for the first time. And customers of providers who sold legacy services at essentially whatever price they felt fit to charge—meaning that they had “Phase II” flexibility—will have protection from arbitrarily high prices

- Mandating fair terms and conditions based on the findings in the FCC’s May 2, 2016 [Tariff Investigation Order](#), including:
 - Barring new “all-or-nothing” plans that force users to make all of their purchases under one plan rather than split them among more tailored and cost-effective options
 - Reining in excessive penalties for early termination or failure to purchase a set minimum amount of capacity

A Simplified Framework to Promote Competition and Investment in Packet-Based Services

For packet-based services and circuit-based services above the level of DS3 (45 Mbps), there is evidence of emerging competition and falling prices. New entrants include cable companies that, with their already ubiquitous networks, are primed to challenge incumbent LECs. In addition, revenues from high-bandwidth offerings enable competitive LECs (CLECs) to deploy their own networks to serve the most attractive customers. Recognizing these trends, the Order applies a light-touch regulatory approach that promotes continued investment while ensuring just and reasonable prices and other terms. Key elements of this framework include:

- **Reaffirming that packet-based BDS is largely a “telecommunications service,” as are TDM-based services.** This means that, with rare exceptions, providers, including packet-based Ethernet providers, are common carriers and as such need to deal on reasonable and nondiscriminatory terms. The Order provides guidance on the FCC’s application of these basic statutory requirements. To be clear, the Order would not mandate more prescriptive requirements like network unbundling or wholesale rate discounts
- **No ex ante pricing regulation:** Based on the record and to promote continued investment in packet-based BDS, no price caps, benchmarking, or other forms of ex ante pricing regulation will apply
- **Robust complaint process:** Pricing and other disputes will be resolved through the FCC’s complaint process. Complaints will be expedited by guidance and requirements that include the following:
 - Wholesale rates are presumptively unreasonable if they exceed retail rates for like services. Also applies to TDM
 - The FCC expects to apply greater scrutiny when there is evidence of rates that are materially higher than those charged by the same provider for the same circuit in nearby buildings with competition
 - The FCC also expects to apply greater scrutiny when there is evidence of rates for low-bandwidth Ethernet service that are materially higher than rates for the nearest-bandwidth TDM rates
 - Rates of new entrants and parties with smaller market shares are unlikely to be questioned
 - Staff-supervised mediation is required prior to the filing of a complaint, which will expedite adjudication
 - Providers are required to furnish specific rate information during adjudication

- Requirements for the unreasonable terms and conditions banned for TDM providers (see above) will be applied as a yardstick for adjudication
- Non-disclosure agreements barring disclosure of information related to the provision of BDS to the FCC are prohibited. Also applies to TDM

Second Further Notice of Proposed Rulemaking

A Second Further Notice of Proposed Rulemaking would seek comment on how best to collect accurate data on market developments and what administrable means can be developed, if necessary, to deal with any concerns that may emerge with respect to pricing for packet-based BDS.

Leveling the Playing Field for Packet-Based BDS Providers

Since 2006, the Commission has granted incumbent LEC providers of Ethernet BDS service varying degrees of forbearance – or exemptions – from Title II of the Communications Act. The Order would level the playing field for all packet-based and circuit-based BDS providers delivering speeds in excess of 45 Mbps (DS3) by granting uniform forbearance to certain portions of Title II, including dominant carrier and tariffing requirements.

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