

## DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

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.

After finishing her adventures in Wonderland, the eponymous Alice travels through the looking-glass to find a world where nothing makes sense. To go anywhere, Alice must walk in the opposite direction. To keep in the same place, Alice must run as fast as she can.<sup>1</sup> Reading today's *Notice*, it appears the Commission has followed Alice through the looking-glass. Because practically nothing in it makes any sense.

Let's start with the basics. "Special access" is a term as vague as this 193-page *Notice* is arcane. But the concept is simple: Some businesses want high-capacity data services. Many of those businesses are themselves communications companies, like big wireless carriers and publicly traded, middle-mile transport companies. And some of them are non-communications companies, from big department stores to coffee chains. For many years before the Internet age, the FCC took an intrusive approach to regulating these telecommunications services. It micromanaged the rates and terms of service offered by incumbent telephone companies, with the result that we essentially had not-so-competitive, regulated monopolies. But during the Clinton Administration, the FCC decided to spur competition by getting rid of central planning. It hoped that a market-based approach would incentivize greater competition.

Today, those efforts have borne fruit. Here are some undisputed facts. Many, many companies are competing in the enterprise data services market—491 facilities-based competitors to be exact.<sup>2</sup> Traditional telephone companies once dominated the market with DS1s and DS3s. But today, enterprise customers are quickly abandoning those services for unregulated, higher-capacity next-generation networks. In 2013, enterprise customers spent \$18.9 billion, or 42.2% of total revenues, on unregulated Ethernet and other packet-based services.<sup>3</sup> That year alone saw a 31.6% increase in Ethernet bandwidth provisioned by competitive providers compared to a 5.3% increase for incumbents.<sup>4</sup> And by 2013, competitors had deployed competing facilities in 83.92% of census blocks and 85.8% of buildings with enterprise customers.<sup>5</sup> Since then, competition has only become more intense. Revenues for enterprise data services grew almost \$2 billion over the next two years, but incumbents didn't see a new dime. Instead, their revenues dropped by \$3.3 billion, or by 5.1% on average.<sup>6</sup> The bottom line of all this? The Clinton-era framework has led to much more competition in the business broadband market than ever before. Incumbents have lost significant market share to new entrants. Special access customers are on the leading edge of the IP transition as they choose faster, more reliable IP-based services over slower, fading technologies. This is ultimately a good thing for every individual consumer, whether you're

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<sup>1</sup> LEWIS CARROLL, *THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE* (1871).

<sup>2</sup> Dr. Marc Rysman, *Empirics of Business Data Services* at 12 (Apr. 2016) (Rysman White Paper). Dr. Rysman's paper is attached as Appendix B of the *Notice*.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> Drs. Mark Israel, Daniel Rubinfeld, & Glenn Woroch, *Competitive Analysis of the FCC's Special Access Data Collection* at 24 (Jan. 26, 2016).

<sup>5</sup> *Notice* at Table 5.

<sup>6</sup> Rysman White Paper at 8.

buying a wireless service plan or a cup of coffee.

But in the world of the looking-glass, everything is backwards. Incumbents are losing customers and revenues every year—and so they must have market power. The competitive supply of unregulated Ethernet services is taking off—and so those and other next-generation services must now be regulated.<sup>7</sup> The *Notice* claims “competition is best”<sup>8</sup>—but then proposes to “reset” incumbents’ prices below competitive levels.<sup>9</sup> Despite the Chairman’s repeated promises over the last 16 months that *ex ante* broadband rate regulation was off the table, the *Notice* makes new *ex ante* rate regulation the main course. In short, after almost two decades of success with the Clinton Administration’s deregulatory policies, the *Notice* concludes that it is “time for a new start.”<sup>10</sup>

Perhaps most nonsensical of all is the treatment of new entrants. Recall the poem of *The Walrus and the Carpenter*, which Tweedledee recited to Alice. In that poem, a walrus and a carpenter invite a seabed of oysters to walk with them along the beach. Although the oldest oyster refuses, the younger ones rush to the shore, only to be eaten by their hosts a short while later.

So too here. Over the last several years, the FCC has implored cable operators to upgrade their networks and compete for enterprise customers.<sup>11</sup> Many cable operators obliged, investing billions in new fiber facilities and new technologies like Ethernet over hybrid fiber-coaxial cables<sup>12</sup> and successfully competing for new contracts every year at a rapid clip.<sup>13</sup> But now, what is the reward for taking those risks, for entering those markets? How does the agency treat those new entrants who accepted our invitation? By regulating them in the apparently *au courant* style of Ma Bell. As the oysters in the poem cried, what “a dismal thing to do.”

Our goal should be ubiquitous competition, not universal rate regulation. Our guide should be the data—wherever it leads us—not an ideological drive to regulate.<sup>14</sup> Our focus should be furthering the public interest in next-generation broadband deployment, not advancing the private interests of particular competitors. And our framework should be one that promotes competitive entry, not punishes it. Just as

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<sup>7</sup> See Dr. Hal Singer, Economists Incorporated, *Assessing the Consequences of Additional FCC Regulation of Business Broadband: An Empirical Analysis* (Apr. 7, 2016) (showing that price regulation is likely to reduce investment in fiber and Ethernet services by several billion dollars each year).

<sup>8</sup> *Notice* at para. 5.

<sup>9</sup> *Compare Notice* at paras. 404–15 (explaining how the Commission could cut price-cap rates by up to 13.54%, up to 20.30%, or up to 21.88% depending on the methodology used), *with* Rysman White Paper at 19–20 (explaining how competition within a census block reduces DS1 and DS3 “prices” by 3.9% to 11.4%).

<sup>10</sup> *Notice* at para. 4.

<sup>11</sup> See, e.g., *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators, Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, 27 FCC Rcd 11532, 11545–47, paras. 28–31 (2012).

<sup>12</sup> See *Notice* at para. 221.

<sup>13</sup> Mari Silbey, Moffett: Business Services Critical to Cable Growth, LightReading (Dec. 1, 2015) (reporting 20% compound annual growth in cable-operator revenues in the business data services market), <http://ubm.io/1Ox8Tvm>.

<sup>14</sup> See *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16443 (2012) (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part).

in 2012, I cannot support the *Notice*'s sentence-first, verdict-afterward nonsense,<sup>15</sup> and I accordingly dissent.

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<sup>15</sup> See *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, Report and Order, 27 FCC Rcd 10557, 10650 (2012) (Dissenting Statement of Commissioner Ajit Pai).