

October 4, 2016

Chairman Tom Wheeler
Commissioner Mignon Clyburn
Commissioner Jessica Rosenworcel
Commissioner Ajit Pai
Commissioner Michael O’Rielly
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Business Data Services, WC Docket Nos. 16-143 & 05-25

Dear Chairman Wheeler and Commissioners Clyburn, Rosenworcel, Pai, and O’Rielly:

As we near the end of the process that will mark this Commission’s opportunity to reform the broken Business Data Services (BDS) marketplace, we write to reinforce our advocacy that reform must be comprehensive and meaningful. The FCC has spent over a decade scrutinizing this marketplace, and in the last few years has gathered the most robust record in perhaps any rulemaking proceeding in the Commission’s history. That record clearly demonstrates that incumbents are exercising market power by charging unreasonably high prices for packet-based business data services such as Ethernet, as well as legacy services, such as DS1 and DS3 services. These high prices harm consumers, small businesses, schools, libraries, universities, and government agencies at all levels across our economy. In fact, the Consumer Federation of America has estimated that, in the last 5 years, the total cost of overcharges to the economy and consumers has been \$150 billion.

We appreciate the Chairman’s commitment to reforming this broken market by the end of this year. Indeed, the Chairman has repeated the commitment to reform the BDS marketplace in several speeches this year, specifically stating most recently the importance of BDS for the delivery of 5G:

“[T]here needs to be fair access to backhaul. In many areas, competition in the supply of backhaul remains limited, and that can translate into higher costs for wireless networks, higher prices for consumers, and an adverse impact on competition.... Before the end of this year, I will present the Commission with a reform proposal that will tackle this issue and encourage innovation and investment in what we now call Business

Data Services, while ensuring that lack of competition in some places cannot be used to hold back wireless coverage.”¹

Similarly, Commissioner Clyburn recently stated that:

“Backhaul is a significant part of wireless providers’ bottom line, . . . as high as 30% of operating expenditures devoted to backhaul by mobile providers. In too many areas, the incumbent LEC is the only provider offering backhaul. That can mean gross market power, inflated prices, and bad deal terms.”

We appreciate that Commissioner Clyburn confirmed that the Commission is “working to fix that, so stay tuned.”²

As Commissioner Rosenworcel recognized, BDS “are the high-capacity dedicated services that sustain our wireless networks, facilitate commercial transactions, and underpin communications that American businesses rely on every day.”³ In fact, the backhaul needs of wireless carriers building out 4G and 5G will require high-bandwidth BDS—capacities exceeding 50 Mbps.⁴ Thus, failure or delay in sufficiently addressing the current excessive pricing of high-capacity Ethernet services would be contrary to the Commission’s stated commitments to promote competition, facilitate technology transitions, promote deployment of 5G wireless, and protect consumers.

Indeed, community anchor institutions increasingly need high-speed Ethernet services to serve their communities, but declining budgets often make it difficult for anchor institutions to afford to purchase the capacity that they need. The National Broadband Plan called for anchor institutions to have gigabit capacity by 2020, and as Commissioner Rosenworcel recognized when the Commission adopted the E-rate goal of 1 Gig to every school by the end of the decade: “[i]f you are a school and want to run the most up-to-date educational software, you need high-speed, high-capacity broadband.”⁵ However, TDM technologies will not deliver these results. Accordingly, the proposed price reductions for Ethernet services are needed to make high-

¹ Remarks of FCC Chairman Tom Wheeler as Prepared for Delivery at Competitive Carriers Association, Sept. 20, 2016, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0920/DOC-341337A1.pdf.

² Remarks of Commissioner Clyburn as Prepared for Delivery at Competitive Carriers Association, Sept. 20, 2016, *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0920/DOC-341346A1.pdf.

³ Statement of Commissioner Jessica Rosenworcel, *Order and Further Notice*, FCC 16-54.

⁴ *See, e.g.*, Competitive Carriers Association Reply Comments, at 8-10 & 20-21 (Aug. 9, 2016).

⁵ Statement of Commissioner Jessica Rosenworcel, *Report and Order and FNPRM*, FCC 14-99.

capacity broadband more affordable and to promote the nation's gigabit goals to community anchor institutions throughout the nation.

We urge you to ensure that comprehensive reform applies to both legacy TDM services and to more advanced Ethernet services that are used by millions of consumers, businesses, and anchor institutions every day. Allowing BDS providers to continue to abuse their market power and charge excessive prices for either TDM or Ethernet services in non-competitive markets would undermine many of the goals of this proceeding.⁶

In addition, to ignore the need for oversight of Ethernet pricing, terms, and conditions, even on this robust record that shows a lack of competition and market power over those services, would be contrary to the policies that the Obama administration espouses. Indeed, President Obama's Executive Order on Competition instructs agencies to identify specific actions they can take "to build upon efforts to detect abuses such as price fixing, anticompetitive behavior in labor and other input markets, exclusionary conduct, and blocking access to critical resources that are needed for competitive entry.... Agencies shall also identify specific actions they can take in their areas of responsibility to address undue burdens on competition."⁷ It is imperative that the Commission do so here based on the record it has before it.

Getting these reforms right will accelerate the future towards innovative and efficient new services. Getting them wrong will further entrench monopolists' power, maintain the economic rents they collect in the absence of competition and oversight, and retain competitors' and consumers' dependence on the legacy networks that the incumbents neglect. To act on reforms for TDM services and ignore the need for reform on Ethernet is contrary to the technology-neutral approach the FCC rightly demands.

This Commission has had a number of pro-consumer market reforms on many important issues, but coming up short in this decade-deep docket so critical to businesses, anchor institutions and consumers would fail the future of mobility, video, business services, and broadband competition. It would prevent getting high-speed broadband services to underserved schools, libraries and healthcare providers in a timely fashion and at affordable rates.

⁶ See generally INCOMPAS Ex Parte letter and Sprint attachment, WC Docket No. 16-143 (filed Sept. 30, 2016) (describing the support in the record for finding market abuse of incumbents for both TDM and Ethernet BDS).

⁷ Exec. Order No. 13,725, *Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (Apr. 15, 2016), available at <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers>.

We urge the Commission to make reforms that are comprehensive and meaningful, by applying rate regulation in markets where Ethernet and TDM-based services are not subject to competition.

Sincerely,

Benton Foundation

California Educational Technology
Professionals Association (CETPA)

Colorado Telehealth Network

Common Cause

Engine

Free Press

Kansas City Public Library

Kellogg & Sovereign Consulting, LLC

Public Knowledge

Open Technology Institute at New America

Schools, Health & Libraries Broadband
Coalition

Virginia Rural Health Association