

STATEMENT OF CHAIRMAN AJIT PAI

Re: *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.

As Alice explores the great hall following her trip down the rabbit hole, she sees an attractive garden through a small, locked door. While a key rests on a table near the door, the door is so small that Alice cannot fit through it. Imbibing from a nearby bottle labeled “DRINK ME,” Alice then shrinks to the point where she can’t reach the key to unlock the garden door.¹

He surely didn’t anticipate it, but Lewis Carroll gave us a parable on the dangers of over-regulation in the communications sector.

For several years, the Commission has longed for something akin to Alice’s garden. It sought a business data services (BDS) marketplace with a perfect array of competitive options. And so, for a time, the Commission drank deep of heavy-handed economic regulation of the BDS market. But as tempting as the tonic of regulation may be for an agency, it often locks consumers out of longer-term benefits. Let me explain why.

Price regulation—that is, the government setting the rates, terms, and conditions for special access services—is seductive. Who can possibly resist the promise of forcing prices lower *right now*? But in reality, price regulation threatens competition and investment. That’s because regulators will always struggle to set the “right” price. If it’s too low, network owners won’t have an incentive to invest in more modern networks. Why would they if by law they can’t get a return on that investment? And if it’s too high, competitive providers also won’t have an incentive to build their own facilities. Why would they when they can cheaply and profitably use someone else’s network? Each of these incentives is poisonous to consumer welfare: over time, fewer new or upgraded networks means worse and/or more expensive connectivity. In this sense, government-run pricing *is* Alice’s bottle.

This isn’t theoretical. For in the last two decades, the FCC has had much experience with unbundled network elements (UNE)—essentially, a system under which Company A builds something and Company B gets to lease it at government-approved rates. The UNE rabbit hole shows how forcing carriers to offer their networks at regulated rates can wreak havoc. Incumbents naturally invested less. Competitors did too. As a result, real facilities-based competition didn’t materialize. A bubble inflated with regulatory arbitrage popped. Conversely, when the FCC exempted next-generation fiber facilities from unbundling and sharing requirements after 2003, fiber deployment boomed. The lesson is clear: The government can’t manufacture competition through unbundling.

There’s an allure, I’ll concede, to micromanaging prices, terms, and conditions. But hopes and good intentions can’t override economic analysis and hard data. Micromanagement can thwart competition. It can stifle investment. It can prevent us from ever achieving long-term results that benefit consumers.

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So today, we choose a different path. We adopt a competitive market test, based on a thorough analysis of the Commission’s massive data collection, to determine where there’s competition and where there’s not. The test finds a particular county competitive if 50% of the locations with BDS demand in

¹ LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND (1865).

that county are within a half-mile of a location served by a competitive provider or if 75% of the census blocks in that county have a cable provider present.

The record shows many providers are willing to build out at least by a half-mile, with some going further. What's more, there's strong competition well within the half-mile threshold; about half of buildings with demand are within 88 feet of competitive fiber facilities, and 75% are within 456 feet.

In counties where the test finds sufficient facilities-based competition to discipline prices, we allow for pricing flexibility and begin the process of de-tariffing special access service. In areas where there is not sufficient competition, we recognize a continued role for price cap regulation to prevent unreasonable and unjust rates (specifically, we allow downward but not upward pricing flexibility to prevent the exercise of potential market power).

Now, some believe this *Order* doesn't go far enough. Others think it goes too far. I think we've got it just right. In crafting the test, we sought to minimize the number of BDS locations that were either inappropriately regulated or inappropriately deregulated by analyzing the data we collected. The record also shows that basing our test on the fraction of locations within a half-mile of competitive fiber is actually *conservative*. That's because some providers have stated they consider new builds when their existing plant is within one mile of buildings. Considering this evidence, and the fact that most providers will be located far closer than half a mile, we believe the test is sound.

At the same time—and this is an important point for those who suggest our competitive market test won't always get it right—there is a tried-and-true safety valve. Sections 201 and 202, along with the section 208 complaint process, will continue to serve as safeguards against any attempts by incumbents to charge unjust or unreasonable rates for common-carriage DS1 and DS3 services.

We also adopt a reasonable transition period in this *Order* to ensure the market can adequately adjust to the new rules. During this transition, all market participants will have an opportunity to reach private agreements that will work for their businesses going forward.

Some have urged the Commission to delay today's vote. But this proceeding was launched way back in 2005. A dozen years of deliberation is enough. We have collected the data. We have analyzed the data. We have compiled plenty of public input. And now is the time to act.

Moreover, many of the same people and companies who are now calling for delay were saying exactly the opposite late last year. Back then, they called the need for Commission action “urgent.”² They vouched that “the Commission has before it one of the most robust records of evidence ever compiled by the agency.”³ They urged the Commission to vote on BDS reform last November.⁴ None of the facts have changed since then. So it's pretty clear that these new calls for delay are little more than a smokescreen for disagreements with the policy choices made in this *Order*.

Finally, I'd like to address the argument that the county lists were inappropriately withheld. Three weeks in advance of this meeting, I made the redacted text of the proposed order available for anyone to read. That was a level of transparency that far exceeded anything regarding last fall's circulation of a BDS order, or indeed the circulation of *any* Commission order during the prior

² INCOMPAS Comments at 3, available at http://www.incompas.org/Files/filings/2016/6-29-16_INCOMPAS_Files_in_Support_of_Proposed_Framework_for_Business_Data_Services_Markets.pdf.

³ INCOMPAS Reply at 29, available at http://www.incompas.org/Files/filings/2016/8-10-16_INCOMPAS_Files_Replies_and_Addresses_New_Proposal_in_Business_Data_Service_Proceeding.pdf.

⁴ Letter from INCOMPAS, Competitive Carriers Association, Computer & Communications Industry Association, Public Knowledge, Open Technology Institute at New America Foundation, Engine, Sprint Corporation, Level 3 Communications, US Cellular, and BT Americas Inc. (Oct. 27, 2016), available at <http://www.incompas.org/files/Letter%20to%20the%20Chairman%2010-27-16.pdf>.

Administration. Yet I don't recall any Democratic Commissioner calling for last fall's BDS order to be published. And I don't recall anyone demanding a public list of affected areas.

Moreover, the county list was not and is not part of the *Order*. There was never an appendix to the *Order* that contained this information. And INCOMPAS, which requested the Commission release a county list, already had the full ability and opportunity to compile a county list itself. (To be sure, though, the Wireline Competition Bureau responded without hesitation to requests by Commissioners' offices for results of the competitive market test, but that's simply what a Commission that prioritizes collegiality and comity does.) To top it off, in an April 6, 2016 Public Notice, the prior administration made clear that releasing specific state-level results, let alone specific results at the county level, would violate federal law.⁵

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In my 2012 dissent to the special access *Suspension Order*, I expressed hope that someday—just as Alice eventually awoke to realize it had all been a dream—we would look back and see “merely a fleeting departure from the pursuit of policies that provide strong incentives for infrastructure investment and facilities-based competition.”⁶ It's been a long journey through Wonderland. But today, that hope is a reality.

I'd like to thank the incredible staff who I know worked long and hard to get to this point today. Thank you to Pam Arluk, Irina Asokov, Greg Capobianco, Ben Childers, Bill Dever, Lynn Engledow, Justin Faulb, Lisa Hone, Alex Johns, Dan Kahn, Bill Kehoe, Doug Klein, Chris Koves, Dick Kwiatkowski, Paul Lafontaine, Wai Sam Lao, Billy Layton, Rhonda Lien, Marcus Maher, Jodi May, Kris Monteith, Terri Natoli, Omar Nayeem, Belinda Nixon, Thom Parisi, Joe Price, Joel Rabinovitz, Eric Ralph, Bill Richardson, Steve Rosenberg, Marvin Sacks, Katja Seim, Deena Shetler, Shane Taylor, Tracy Waldon, and David Zesiger.

⁵ *Public Statements Derived from Highly Confidential Data Filed in Response to the business Data Services (Special Access) Data Collection*, WC Docket No. 05-25, RM-10593, Public Notice, 31 FCC Rcd 3420 (Wireline Comp. Bur. 2016).

⁶ *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, 10662 (2012) (Statement of Commissioner Ajit Pai).