Case Nos. 17-2296, 17-2342, 17-2344, 17-2685

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

CITIZENS TELECOMMUNICATIONS COMPANY OF MINNESOTA, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,

Respondents,

NCTA-THE INTERNET & TELEVISION ASSOCIATION; AD HOC TELECOMMUNICATINOS USERS COMMITTEE; GRANITE TELECOMMUNICATIONS, LLC; WINDSTREAM SERVICES, LLC; AT&T; US TELECOM; CENTURYLINK; COMCAST CORPORATION; BT AMERICAS, INC.; INCOMPAS; SPRINT CORPORATION,

Intervenors,

Petition for Review of an Order of the
Federal Communications Commission No. FCC 17-43

BRIEF OF AMICI CURIAE PUBLIC KNOWLEDGE, CONSUMER FEDERATION OF AMERICA, AND NEW NETWORKS INSTITUTE IN SUPPORT OF VACATING AND REMANDING THE FEDERAL COMMUNICATIONS COMMISSION'S BUSINESS DATA SERVICES ORDER

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October 4, 2017

STATEMENT ON CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties received appropriate notice regarding the filing of this Brief. AT&T, USTelecom, NCTA-The Internet & Television Association, and Comcast Corporation declined to take a position on the filing of the Brief. All other parties provided consent.

DISCLOSURE OF AUTHORSHIP AND FUNDING

Pursuant to Federal Rule of Appellate Procedure 29(a), the ensuing brief was authored in whole by counsel for *amici curiae*. No party or party's counsel contributed money intended to fund the preparation or submission of the brief. No person, other than *amici curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

October 4, 2017

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INTEREST OF AMICI CURIAE

Amici Curiae include Public Knowledge, Consumer Federation of America, and New Networks Institute. Public Knowledge, Consumer Federation of America, and New Networks Institute have been longstanding participants in the Federal Communications Commission's Business Data Services proceeding and have long advocated that just and reasonable rates in the Business Data Services market are essential to protecting enterprise customers, and ultimately, consumers, from the exercise of market power by incumbent, and often monopoly, service providers.

INTRODUCTION & SUMMARY OF ARGUMENT

Business Data Services ("BDS") are telecommunications services that supply businesses, non-profits, community anchor institutions, government agencies, mobile wireless carriers, and other organizations and enterprises with a dedicated connection to the internet at a specified bandwidth. BDS connections ensure that organizations are guaranteed to have access to the bandwidth they need to serve customers and meet operational needs, differentiating BDS from best efforts broadband service, like residential broadband. Because nearly every enterprise, non-profit, and government institution purchases BDS for essential connectivity, those charges are ultimately passed on and borne by consumers and taxpayers.

In 2017, after a dozen years of examining competition issues in the BDS market, the Federal Communications Commission ("Commission" or "FCC") issued the *Business Data Services Order*, largely deregulating and deeming competitive an overwhelmingly concentrated marketplace. *See Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd. 3459 (2017) ("*Order*").

The Court should vacate and remand the *Order*. The *Order* is arbitrary and capricious. The Commission departed from its past precedents without explanation or justification, and reached a conclusion that is contrary to the record in the Business Data Services docket. Further, the *Order* concludes, contrary to the record and established antitrust analysis, that duopoly markets are sufficiently competitive to discipline market power and prices, and that potential competition can effectively check market power, even by monopoly service providers.

Further, the record demonstrates that the Commission has adopted a novel theory, unsupported by the record, that deregulation of the BDS market is preferable to regulation, regardless of the facts before it and any consideration of the relative costs and benefits of any specific regulatory regime. The Commission's action will harm businesses, government institutions, and other organizations that rely on BDS for essential connectivity, and those costs, totaling approximately $20 billion per year, will ultimately be borne by consumers and

taxpayers. Lastly, application of the Commission's BDS framework and competition analysis would be catastrophic for competition and consumer protection if broadly applied to other markets under the FCC's jurisdiction. If such outcome-driven and analytically inconsistent regulatory action is allowed to stand, the agency would be able to contravene the direct mandate from Congress to ensure "just and reasonable rates," opening the door to potential price gouging and possibly chilling traditional antitrust enforcement which would be inconsistent with the Commission's newly contrived theory of competition.

ARGUMENT

I. THE BUSINESS DATA SERVICES ORDER IS ARBITRARY AND CAPRICIOUS

A. THE ORDER DEPARTS FROM PAST PRECEDENT WITHOUT EXPLANATION OR JUSTIFICATION

The Commission acknowledges, as it must, that it must follow the directive of Congress to protect the public from unjust and unreasonable rates and practices. *Order* at 3459. While the Commission has broad discretion in determining how to achieve this goal, it may not adopt means it has previously rejected without acknowledging the departure from past precedent, providing some reasoned explanation for why it has chosen to adopt the new policy, providing some reasoned explanation for why it now chooses to adopt the new policy, and why the new policy is permissible under the statute and not otherwise arbitrary and

capricious. *See FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 513-14 (2009) ("*Fox Television*"); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224-25 (10th Cir. 2012) ("*Qwest*"). While the Commission is not held to a higher standard of review when it reverses or changes course, *Fox Television*, 556 U.S. at 513, it must provide some explanation as to why the factors it previously found persuasive are no longer persuasive. *Qwest*, 689 F.3d. at 1225. "Brushing aside such matters would be arbitrary and capricious, and thus we would require the Commission to offer a 'reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by prior policy.'" *Id*. at 1225 (citing *Fox Television,* 556 U.S. at 515). The *Order* fails to satisfy this fundamental tenant of Administrative Law.

In analyzing how to evaluate whether there is adequate competition in the BDS market to justify unwinding the longstanding price cap regulatory regime, the Commission constructed its own competitive market test ("CMT"), carefully tailored to yield the desired result. *See Order* at 3499-3506. In doing so, the Commission combined elements of two tests it had previously rejected – reliance on potential future entry and reliance on duopoly competition. Under the "Potential Duopoly" test, a market will be considered suitably likely to enjoy the benefits of competitive entry at some undetermined time in the future. The Commission freely acknowledges that, as a result of removing regulatory constraints on prices, consumers may suffer for some undetermined period with unjust and unreasonable

prices. But the Commission rationalizes this abandonment of its core responsibility under the statute – to prevent unjust and unreasonable rates – on the grounds that competition will eventually blossom.

B. THE ORDER IS CONTRARY TO THE RECORD

Even if the Commission could simply ignore the prime directive of Congress to protect the public from unjust rates and practices, this hopeful conclusion finds no support in the record. To the contrary, as discussed further below, the Commission simply ignores contrary record evidence. To the extent it claims to find support in the record for its novel "Potential Duopoly" theory, an examination of the sources cited by the Commission shows that the *Order* went well beyond the limit of reasonable agency reliance and predictive judgment and crossed into a world of unsupported speculation.

The Commission's failure to acknowledge, let alone address, contrary evidence, while overgeneralizing from very limited evidence in the record is the very essence of arbitrary and capricious decision making.

Additionally, while the Commission acknowledges that it had previously rejected both the "Potential Competition" and the "Duopoly Test" in previous proceedings, the *Order* makes no effort – let alone a well reasoned one – for "brushing aside" the reasons given for rejecting these tests as adequate to protect

the public from unjust and unreasonable rates in accordance with Section 201(b) of the Communications Act. *See* 47 U.S.C. § 201(b).

II. THE ORDER'S FINDING THAT DUOPOLY COMPETITION AND POTENTIAL COMPETITION ARE SUFFICIENT TO DISCIPLINE MARKET POWER IS UNSUPPORTED BY THE RECORD AND DEPARTS FROM TRADITIONAL ANTITRUST ANALYSIS

A. TRADITIONAL ANTITRUST ANALYSIS ILLUSTRATES THAT DUOPOLY MARKETS ARE NOT COMPETITIVE

A duopoly is not competitive. The Department of Justice ("DoJ") and the Federal Trade Commission ("FTC") have published *Horizontal Merger Guidelines* and measure market concentration using the Herfindahl-Hirschman Index ("HHI"). United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* 18-19 (2010). The lowest HHI a duopoly market can be measured is 5,000 (two firms each with a fifty percent market share), which is already well above 2,500, the number above which antitrust regulators classify markets as "highly concentrated" (the equivalent of four equal sized firms). The economic literature shows that in market after market, there is a direct connection between the number of competitors and prices, and other factors such as the likelihood of collusion. *See e.g.* COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (2016). Duopoly markets are not competitive, and as a result, consumers pay higher prices as service providers are able to exercise market power.

The Commission's attempt to overcome this well-understood point is feeble. For example, the *Order* cites studies analyzing three-firm and four-firm markets, but fails to explain how its analysis is relevant to the one-firm and two-firm markets the Commission embraces as sufficiently competitive. *Order* at 3514 n.396. Additionally, the *Order* cites Shelanksi for the proposition that "there is a general expectation that the largest benefits from competition come from the presence of a second provider, with added benefits of additional providers falling thereafter." *Id.* at 3514. But Shelanski himself states that "as the number of firms in the market increases beyond two, market performance improves substantially for consumers." Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 YALE J. ON REG. 56, 89 (2007).

While the *Order* provides analysis for the well-known fact that broadband networks have high fixed costs, its analysis and justification for its position that two competitors is enough, and even desirable, is threadbare. Curiously, the Commission relies on a study involving ready-mix concrete for the proposition that the addition of competitors beyond a second has diminishing returns. *Order* at 3514 n.370. The Commission also fails to explain how any analysis depending on comparing high fixed-cost, low marginal-cost residential broadband networks is applicable to high fixed-costs, high marginal-cost BDS networks. The Commission

also cites confidential evidence from Sprint that a second entrant has a "disproportionate" impact. *Id.* at 3514 n.369. Even excusing the paucity of this evidence, the fact that the first entrant may be the most impactful does not mean that additional entrants are somehow not desirable or are superfluous. The Commission does not address this point.

B. THE ORDER'S RELIANCE ON POTENTIAL COMPETITION LACKS SUPPORT IN THE RECORD AND IS CONTRARY TO TRADITIONAL ANTITRUST ANALYSIS

Not content with redefining competition to include a duopoly, the Commission also redefines a duopoly to include a mere potential duopoly. It writes, " We found earlier that the presence of a second competitor in this industry is sufficient to place an effective competitive constraint on business data services supply. Given the likelihood of entry wherever a competitive wireline network is nearby, this will also ensure a similar effect over the medium term." *Id*. at 3484.

In this way the Commission has not only redefined "competition" to include just two firms, but also just one. This leap is unsupported by the record, by the economic literature, and by history.

In the record, Consumer Federation of America ("CFA") and the New Networks Institute ("NNI") submitted extensive, detailed comments documenting the structural characteristics of the market that directly challenge the Commission's factual and theoretical basis for adopting its hybrid "Potential

Duopoly" test. *See* Comments of the Consumer Federation of America and the New Networks Institute, WC Docket No. 16-143, *et al.* (filed June 27, 2016) ("CFA-NNI Comments"), Reply Comments of the Consumer Federation of America and the New Networks Institute, WC Docket No. 16-143, *et al.* (filed August 8, 2016) ("CFA-NNI Reply Comments).[1] The Commission makes no effort to address these arguments or the contrary evidence offered by CFA-NNI and other commenters. To the contrary, the Commission does not even cite to them or otherwise acknowledge their existence. This alone would warrant reversal as arbitrary and capricious.

As explained by CFA-NNI and others, numerous factors constrain the ability of competitors to extend their service over the distances adopted by the FCC for the purposes of making the rule work.[2] Well-established scholarship demonstrates that a similar theory of "potential competition," also known as "market contestability," was not only quickly rejected after the1980s but also rejected by

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[1] *See generally* Letter of Mark Cooper, Director of Research, Consumer Federation of America, and Philip Berenbroick, Senior Policy Counsel, Public Knowledge, WC Docket No. 16-143, *et al.* (filed March 30, 2017); Letter of Public Knowledge, Consumer Federation of America, National Digital Inclusion Alliance, Common Cause, Next Century Cities, New America's Open Technology Institute, Institute for Local Self-Reliance, and Engine Advocacy, WC Docket No. 16-143, *et al.* (filed April 13, 2017).

[2] *See e.g.* Reply Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket No. 05-25 (filed Feb. 19, 2016); Letter of Charles McKee, Vice President, Government Affairs, Sprint Corporation, WC Docket No. 16-143 (filed October 17, 2016).

the FCC as contrary to fact in the *Qwest Forbearance Order*. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622, 8642-50 (2010) ("*Qwest Forbearance Order*").

The economic literature suggests that regulators should proceed with caution before pronouncing that a market is "contestable." Avinash Dixit, for instance, stated that, "[i]n practice, careful empirical work in each specific context will have to be undertaken before we can say whether an industry is contestable and sustainable, and decide whether and what regulatory attention it requires." Avinash Dixit, *Recent Developments in Oligopoly Theory*, 72.2 AMERICAN ECONOMIC REVIEW 12, 16. The FCC has not undertaken this empirical work, and studies of other industries counsel great caution for armchair analyses that assume markets are contestable when in fact they are not. *See e.g.* Michael J. Mazzoe, *Competition and Service Quality in the U.S. Airline Industry*, 22 REV. INDUS. ORG. 275 (2003); Kang Hua Cao, et. al., *The Nonlinear Effects of Market Structure on Service Quality: Evidence from the U.S. Airline Industry*, 51 REV. INDUS. ORG. 43 (2016). The suggestion that a market with the structural and behavioral characteristic of BDS, not to mention two decades of high levels of concentration and abuse of market power, flies in the face of the explicit rejection of potential competition as a sufficient force to achieve competitive outcomes (i.e. the rejection of

contestability). *See e.g.* William Shepherd, "*Contestability" vs. Competition*, 74.4 AM. ECON. REV. 572 (1984); Rhys D. Evenden & Alan W. William, *Contestability: The Debate and Industry Policy*, 30 No. 1 ECON. ANALYS. & POL. 75 (2000). Yet, the *Order* simply ignores the economic literature and contrary evidence in the record.

While the Commission claimed to follow the same analytic framework as the DoJ and FTC *Horizontal Merger Guidelines*, CFA-NNI pointed to numerous discrepancies between the approach outlined in the *Horizontal Merger Guidelines* and the solution ultimately adopted by the Commission. For example, an HHI Index of 2,500 describes a market with four equally sized firms controlling the entire market as "highly concentrated." *Horizontal Merger Guidelines* at 18-19. As CFA-NNI demonstrated in their comments, BDS markets generally have an HHI Index of close to 7,000. Despite the fact that the HHI of BDS markets exceeds the levels of concentration considered safe by the DoJ and the FTC by orders of magnitude, the FCC's "Potential Duopoly" Test would find the same market sufficiently competitive to warrant deregulation.

Similarly, the *Horizontal Merger Guidelines* consider the ability of a firm in a concentrated market to raise rates for a relatively short-term ("non-transient") period of time without losing market share as evidence of market power. *Id*. at 9-12 (describing the "small but significant non-transitory increase in price"

("SSNIP") test and its application). The FCC does acknowledge in a footnote that a single nearby potential competitor "is not a rapid entrant as described in the 2010 Merger Guidelines." *Order* at 3514 n.368. But the Commission offers no explanation for why it finds it acceptable to deviate from the antitrust guidelines and permit as "just and reasonable" under section 201(b) rates that antitrust authorities would find contrary to consumer welfare under the antitrust statutes.

By contrast, the FCC explicitly states that "Potential Duopoly" competition cannot reasonably be expected to constrain price increases in the short term, but only in the "intermediate term (i.e. several years)." *Order* at 3467, 3516. The FCC does acknowledge in a footnote that a single nearby potential competitor "is not a rapid entrant as described in the *Horizontal Merger Guidelines*." *Id.* at 3514 n.368. But the Commission offers no explanation for why it finds it acceptable to deviate from the antitrust guidelines and permit as "just and reasonable" under Section 201(b) rates that antitrust authorities would find contrary to consumer welfare under the antitrust statutes.

The FCC is not, of course, obligated to follow the analysis of the antitrust agencies. But when the FCC claims to follow the course of the antitrust agencies, then inexplicably decides to permit as "just and reasonable" rates which traditional antitrust analysis would find to be the product of unfair market power, the FCC

must provide a "reasoned explanation" for why prices contrary to the consumer welfare standard are nevertheless just and reasonable under Section 201(b).

This unexplained willingness to permit as "just and reasonable" prices that standard antitrust analysis would find arise from the exercise of market power under Section 201(b) is wholly unreasonable and has extremely grave implications for consumers.

Traditionally, the entire point of FCC regulation under Title II was to protect consumers from anti-competitive prices. Indeed, the Commission has often stated that while its analysis includes traditional antitrust, *see, e.g.,* Applications of AT&T and DIRECTV for Consent to Assign or Transfer Control, *Memorandum Opinion & Order*, 30 FCC Rcd 9131, 9140-41(2015), the broader public interest standard requires the Commission to include additional protections over and above those provided by antitrust. Now, for the first time, and without any explanation for the change, the Commission explicitly proposes to permit firms to charge rates based the exercise of market power under traditional antitrust analysis in violation of the antitrust consumer welfare standard.

In the same way, the *Order* acknowledges, but does not explain, the departure from the analysis in the *Qwest Forbearance Order*. The Commission had specific and extensive evidence that it cited in 2012 for why it no longer believed that parties could easily enter BDS markets with a dominant incumbent, despite the

theoretical possibility of such entry. *Qwest Forbearance Order* at 8639-42. Likewise, the Commission also had specific reasons why, despite previously considering duopoly competition adequate, it rejected duopoly competition as inadequate. In the *Order*, the Commission fails to revisit these specific reasons from the *Qwest Forbearance Order* to explain why they are no longer persuasive. *Id.* at 8634-39.

Again, it is critical to distinguish between the deference given to the Commission for its "reasoned explanation" under *Chevron,* and the failure of the Commission to give a reasoned explanation or simply "brush aside" contradictory evidence and inconsistent past practice. *See Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *Fox Television*, 556 U.S. at 516. In 2012, the Commission determined that a dominant incumbent could successfully block entry by a potential competitor. *Qwest Forbearance Order* at 8634-39. The Commission does not attempt to explain how the supposed nearness of the new entrant changes this calculation. To the contrary, the Commission relies exclusively on the kind of general evidence about potential entry that it found insufficient in 2012.

The vague references to the emergence of 5G technologies fare no better. While the Commission claims the mantle of exercising its expert predictive judgment, it ignores the important fact that the two leading holders of 5G spectrum are Verizon and AT&T, and that 5G will remain vertically integrated with two of

the dominant 5G players. *See* Mike Dano, *AT&T, Verizon, FCC and the rest: These charts show who controls the nation's licensed millimeter-wave spectrum*, FIERCEWIRELESS (July 14, 2017, 3:23 PM), http://www.fiercewireless.com/5g/at-t-verizon-fcc-and-rest-these-charts-show-who-controls-nation-s-licensed-millimeter-wave. The Commission provides no evidence that 5G technologies will compete in the relevant product market, when they will be commercially deployed, or even what these new technologies will be. This is precisely the sort of evidence-free speculation to which the court owes no deference and should reject as arbitrary and capricious.

III. THE COMMISSION NAKEDLY ATTEMPTS TO JUSTIFY DEREGULATION AT ALL COSTS, WITHOUT SUPPORT IN THE RECORD

Perhaps cognizant of the flaws in its competition analysis, the Commission further claimed that even if the market were not competitive, the costs of regulation nevertheless would still exceed any potential benefits. *Order* at 3516-17. The order states,

> Finally, we find that there are substantial costs of regulating the supply of BDS and these likely outweigh any costs due to the residual exercise of market power that may occur in the absence of regulation.... The question is not whether today nearby competition is everywhere fully effective, or even whether it will become so over the next few years. The question is whether the costs of the lack of fully effective competition, even as these decline over time, are likely smaller than the net costs of regulation.

Id. at 3517. It argues that "even if" its novel competitive market test were not sufficient to "ensure[] reasonably competitive outcomes in the medium term," that if this now apparently meaningless test were satisfied, regulation would nonetheless be inappropriate. *Id*. at 3516. (Why this test would serve any purpose at all in a scenario where it is acknowledged to be faulty, and why some uncompetitive markets would be regulated and others not in this scenario, is unstated by the Commission.)

The *Order*'s true purpose is clear – deregulation at all costs, regardless of the facts and the record. If misrepresenting the record and constructing new economic theories is not enough to justify deregulating monopoly and duopoly markets, the Commission has also put forth a theory that justifies deregulation regardless of what the record shows.

However, this theory fails as well because it sets up a false contrast between regulation and competition. Regulation is a remedial action taken in the absence of competition; new entry, even if unlikely in the medium term, is always welcome. If new entry to an uncompetitive market would cause it to become competitive, and therefore deregulated, then a new entrant cannot be said to be discouraged by regulation. The Commission's discussion of the costs of competing in the BDS market and how firms would prefer to be unregulated fails to address how new

entry may change the level of regulation of a particular market and how many of the purported "net costs" of regulation are therefore illusory. *See Id*. at 3517-19.

A more standard theory, of course, is not that firms prefer competition, but that firms prefer profits. More profits are to be had in uncompetitive markets that provide firms with the ability to extract rents from their market power. Therefore, this theory goes, new entry into an unregulated, uncompetitive market is attractive, and firms are less likely to enter a market where they would not possess market power. Although unclear, this appears to be what the Commission was getting at in its discussion of the advantages of "residual market power," *Order* at 3517, and where it writes that "active supply occurs most rapidly in locations where the most profits are likely to be obtained." *Id*. at 3515. But applied here, this theory too fails to justify the Commission's action.

First, this dynamic does not lead to competition; just to varying levels of oligopoly, which are recognized to carry a high probability of the abuse of market power, OPTA, IS TWO ENOUGH (2006); BODY OF EUROPEAN REGULATORS FOR ELECTRONIC COMMUNICATIONS, REPORT ON OLIGOPOLY ANALYSIS AND REGULATION (2015), particularly when they are as concentrated and long lived as the tight oligopoly in BDS is. *See* MARK COOPER, CONSUMER FEDERATION OF AMERICA, THE SPECIAL PROBLEM OF SPECIAL ACCESS: CONSUMER OVERCHARGES AND TELEPHONE COMPANY EXCESSIVE PROFITS (2016) ("COOPER"). Since even

under its flawed theory of competition the Commission admits it must regulate in its absence, the Commission cannot consistently justify deregulation in the presence of residual, as opposed to total market power.

Second, the Commission proceeds as though regulation were simply an on/off switch, without accounting for the different effects of different levels and kinds of regulation. Naturally if the Commission were to set a price cap at a level that prevented all cost recovery, this would discourage entry, and drive incumbents out of the market. But it is equally natural that if the Commission set the price cap at a level identical to a monopolist's profit-maximizing price, it would not. The task set before the agency by Congress is to determine the right mix—how to provide enough of an incentive for firms to encourage potential new entry while limiting the ability of incumbents with market power to extract excessive rents from their customers. This is not an easy problem, but the Commission simply posits that it is impossible, ignoring the various proposals set before the Commission in the record. An explication of the worst-case scenario of poorly crafted regulation does not serve to demonstrate that all regulation must always fail, or that its costs always exceed its benefits. Indeed, given that the cost of regulatory inaction exceeds $20 billion per year, *see id*. at 1, 33-35, even an imperfectly-crafted regulation would be preferable to deregulation.

Third, the Commission's approach effectively nullifies the law with respect to many carriers. The Communications Act directs the Commission to ensure that the rates, terms, and conditions for services offered by common carriers are just and reasonable, and that services are not offered on an unreasonably discriminatory basis. 47 U.S.C. §§ 201(b), 202(a). The Commission has instead put forth a framework where, first, the very concept of "competition" is redefined, thus allowing the Commission to pretend that unreasonable rates are reasonable, and second, where any action taken to remedy unreasonable rates is posited to make them worse. Regardless of the substantive flaws with this analysis, the Commission's discretion does not extend to allowing it to simply disregard core portions of the Communications Act because its current leadership thinks they're a bad idea.

IV. WIDESPREAD APPLICATION OF THE ORDER'S COMPETITION ANALYSIS TO OTHER MARKETS WOULD BE CATASTROPHIC

The Commission's action does not just harm the businesses that depend on BDS. Because connectivity, like transport, fuel, energy, and a number of other basic inputs is so essential to so many areas of economic activity, consumers ultimately pay these overcharges in numerous ways: in higher prices for retail goods, in higher ticket prices for airlines, in transaction fees when using credit cards, in higher prices for mobile phone service, and even in higher food costs.

Any business—which is to say, nearly every business—that depends on reliable and affordable connectivity, particular those in rural areas, will be harmed by the Commission's inaction. These means consumers will be, too.

The CFA has estimated that overcharges and abusive pricing in the BDS market totaled approximately $20 billion per year over the past five years, and have indirectly cost American consumers $150 billion since 2010. COOPER at 1, 33-35. According to CFA, half of the $40 billion in annual BDS charges are overcharges that are the result of incumbent LEC market power. These are the costs that will be passed through to consumers. *Id*. at 1, 5.

Applying the Commission's purpose-built BDS framework to other areas within its jurisdiction would be catastrophic. To review, the Commission's theory is (1) duopolies are sufficient competition, (2) potential duopolies are also sufficient to restrain prices, and (3) the geographic proximity of just one firm is sufficient for there to be "potential" entry.

The FCC reviews license transfers to determine whether they are in the public interest. In practice, this means that it reviews many media and communications mergers. But under this new test, mergers would be almost *per se* allowed. Many communications markets are monopolistic, or highly concentrated, at a local level. Under the FCC's new theory, and contrary to years of precedent, the Commission would be compelled to forbear from telephony regulation in nearly every

circumstance. Indeed, under the Commission's theory, it is unclear how regulation of telecommunications common carriers could be justified at all, since most common carriers are geographically close to other firms that could, hypothetically, enter new markets.

Consumers would have no recourse in instances of price gouging or other abuse when it comes to basic services like fixed and mobile broadband and telephony. While the FCC currently exercises a light touch, its reserve power to step in (or un-forbear) from price regulation is an important check on abusive behavior by carriers. But under the FCC's new theory, price gouging is arguably beneficial means to attract new entry. In any case the Commission has explained how it now thinks that stepping in the protect consumers will have unknown future costs that exceed any current benefit.

CONCLUSION

The *Order* violates the Administrative Procedure Act and the Communications Act of 1934, as amended, and should be vacated and remanded.

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface, type-style, and type-volume limitations of the Rules 29(a) and 32(a) of the Federal Rules of Appellate Procedure. The document contains 4,651 words, excluding the parts of the document exempted by Rule 32(f).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 4, 2017, the foregoing Brief of Public Knowledge, Consumer Federation of America, and New Networks Institute as *Amici Curiae* in Support of Vacating and Remanding the Federal Communications Commission's Business Data Services Order was electronically filed with the Clerk of the Court of for the United States Court of Appeals for the Eight Circuit. The undersigned also certifies that the following participants in this case will be served a copy of the Brief via electronic mail.

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