

Business Data Services Order

Chip Yorkgitis

May 10, 2017

On April 28, 2017, the Federal Communications Commission (“Commission” or “FCC”) released a Report & Order (the “Order”) terminating a decade long examination of the market for business data services (“BDS”) by pronouncing deregulatory rules for what the Commission finds is “a dynamic and increasingly competitive marketplace.” Enterprises, non-profits, and government organizations use BDS – “dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections” – for secure and reliable data transfers, as a means of connecting to the Internet and cloud services, and for private or virtual private networks. The *Order* generally takes a decidedly deregulatory approach and forsakes ex ante pricing regulation, concerned that it will likely inhibit growth and investment in new services.

According to the Commission, the record in the BDS proceeding, which included the 2015 data collection responses to the FCC from almost five hundred facilities-based providers, reflects significant growth in competition in the provision of such service in areas served by legacy providers subject to price cap regulation. The core theory underpinning the *Order* is that by eliminating price cap regulations in counties with actual or potential competition that the Commission deems “sufficient” under the framework it adopted, the FCC can bolster the incentives of facilities-based providers to invest in the expansion and improvement of their BDS offerings.

In brief, the *Order*:

- Removes price caps on packet and TDM based BDS providing services in excess of DS3 bandwidth levels, as well as transport services;
- Creates a competitive market test that retains price cap regulation for incumbent DS1 and DS3 services in counties deemed non-competitive;
- Eliminates tariffs on competitive BDS after a 36-month transition period that commences on the effective date of the BDS Order (60 days after publication in the Federal Register); and
- Refrains from adopting generally applicable rules dealing with unjust or unreasonable practices or discrimination in the wholesale BDS marketplace or requiring any sort of relation between retail and wholesale BDS rates;
- Clarifies the continued applicability of Sections 201 and 202 to BDS services, and the availability of Section 208 complaints as a primary enforcement mechanism to ensure BDS rates are just, reasonable, and not unreasonably discriminatory; and
- Clarifies that select competitive BDS offerings constitute private carriage offerings.

Voting on the *Order* was along party lines. The Republican Commissioners, FCC Chairman Ajit Pai and Commissioner Michael O’Rielly voted in favor of the *Order*, while the sole Democratic Commissioner, Mignon Clyburn, vociferously dissented.

The *Order* and new rules become effective sixty days after publication in the Federal Register, which has not yet occurred as of May 10.

Below, we summarize the core components of the *Order*.

I. COMPETITIVE CONDITIONS FOR BDS

A. Introduction

According to the FCC, “[b]usiness data services refers to the dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections.” The Commission historically referred to the relevant market for such services as the “special access” market. The *Order* described special access as “DS1 and DS3 interoffice facilities and channel terminations between an incumbent LEC’s serving wire center and an interexchange carrier (“IXC”), and end user channel terminations.” The “BDS” term adopted by the *Order* is broader than “special access.”

In the *Order*, the Commission made findings regarding competitiveness in the BDS industry, choosing to look both at market concentration and market dynamics such as industry trends on competitive entry (especially among competitive providers in terms of upgrading and extending their facilities to meet demand). In assessing which segments of the BDS market, if any, should remain subject to price cap regulation, the Commission examined competitive conditions in the relevant markets. In conducting this investigation, the Commission in the *Order* first addressed the types of service offerings that fall within the scope of the BDS market, then the geographic scope of regions in which the degree of competition would be assessed (the “appropriate geographic measure,” and finally the role that barriers to entry may play in inhibiting competition.

The Commission’s principal conclusion is that the marketplace for packet-based business services is competitive. While the *Order* acknowledges that for TDM DS1 and DS3 services, incumbent providers have “a degree of concentration in certain geographies,” any pre-existing advantage the incumbents have is less relevant competitively as other providers upgrade and build out to meet the remaining demand. Thus, for TDM DS1 and DS3 BDS, the Commission finds that incumbent market power “in many cases” has been “largely eliminated” and “elsewhere is declining.” Finally, the FCC found substantial evidence of competition in TDM-based transport markets and that price regulation is unnecessary.

B. The Product Market for Business Data Services

In defining the scope of the BDS product market, the FCC assessed which services are sufficiently similar to qualify as substitutes for one another, focusing especially on differences in price, quality, and service capability.

1. Circuit- and Packet-Based Business Data Services

The legacy technology in the BDS market is circuit-based and relies on time division multiplexing (“TDM”), a technology the *Order* describes as “becoming obsolete.” The DS1 and DS3 services long provided by Incumbent Local Exchange Carriers (“ILECs”) are a prime example of such technology. However, the Commission found that packet-based networking services increasingly serve as a substitute for circuit-based services in the marketplace, and that the general trend of the market place is away from circuit-based offerings and towards packet-based ones. Although the Commission acknowledged that there are important functional distinctions between the two technologies, it nonetheless found that the two technologies are sufficiently similar to be considered substitutes.

2. Ethernet over Hybrid-Fiber Coax

The Commission recognized that while packet-based Ethernet services over fiber are widely considered the gold standard of the BDS market, the record showed that numerous customers make use of lower speed hybrid fiber-coax Ethernet solutions in manners that fall within the scope of the BDS market, qualifying Ethernet HFC as a substitute of packet-based BDS services.

3. “Best-Efforts” Internet Access Services

The Commission recognized that conventional broadband Internet offerings over the “best-efforts” public Internet lack the quality of service guarantees and service level assurances associated with other offerings. However, despite the material differences in quality of service, according to the Commission, the record showed that many businesses have nonetheless opted for best-efforts offerings due to the lower prices associated with such services. While the Order makes the observation that “substitution and best-efforts networks supporting business data services for some customers,” the FCC did not find “broad substitution or substantial similarities” with fiber-based BDS sufficient to put best-efforts service in the same product market. For that reason, the Commission found that while best-efforts services may qualify as BDS offerings, they can be distinguished from other BDS in the relevant product market.

4. Unbundled Network Elements

The Commission found that Unbundled Network Elements, a regulatory outgrowth of the Telecommunications Act of 1996, qualify as effective substitutes in low broadband categories of BDS that compete against DS1, but acknowledged that such services are seldom available and increasingly obsolete.

5. Dark Fiber

According to the Order, the utilization of previously dormant fiber to expand service availability bolsters facilities-based competition in wireless backhaul. The Commission found that dark fiber, therefore, is a substitute for fiber-based Ethernet special access services for wireless backhaul. The FCC also found it to be a substitute serving the needs of business customers.

6. Satellite Services

The FCC recognizes that certain highly price-sensitive customers rely on satellite services for BDS, but concluded in the *Order* that satellite falls outside the scope of services the Commission will consider for purposes of its competitive market test (explained further below).

7. Fixed Wireless Services

The FCC took a wait-and-see approach on fixed wireless services. The Commission noted that fixed wireless may become a more robust form of last-mile access with the proliferation of small cells and the shift to 5G networks, but acknowledged that fixed wireless services are more of a “gap filler” for purposes of building connectivity, not a full-fledged substitute for other BDS offerings. The *Order* found that fixed wireless still falls outside of the relevant BDS product market for the time being.

C. The Geographic Market for BDS

The FCC concluded that the relevant geographic market for the analysis of competition in the business data services market is half a mile radius. According to the Commission, “[t]he record demonstrates that most business data services providers are willing and able to profitably invest and

deploy facilities within a half mile of existing competitive facilities, and often have the ability to build out after winning a customer's bid for business, depending upon the scale of investment required to reach the customer." The Commission also found that "risk tolerant businesses and buildouts father than a half mile to be the exception." The *Order* also predicts that, over time, with increasing investment, more and more competing facilities supporting BDS will be located within a half mile of a building, something that will "provid[e] a strong disciplining force to the incumbent service providers of surrounding locations, and will grow over time." In short, the *Order* prognosticates that abuses of market power can be addressed through localized competitive pressures," such as competitive builds to locations where incumbents have priced supracompetitively. The *Order* takes an expansive view of what constitutes competition. Rather than requiring the presence of a bona fide competitor, the *Order* is structured in a manner such that the mere presence of a second potential BDS provider within a half a mile is deemed a competitor –even if they do not necessarily plan to serve the area.

D. Competitive Market Entry for BDS

The *Order* examines how varying market characteristics impact competitive entry. The Commission found that while there can be high barriers to entry in the BDS market, evidence shows that firms still choose to enter the market and make significant investments, particularly in areas with high demand. The Commission dismissed market concentration measures as a principal indicator whether market conditions exist that would preclude competitive pricing decisions for BDS services. The *Order* found that this prospect indicates the presence of sufficient competition to preclude the need for a direct regulatory intervention in most cases. The FCC put particular emphasis on the growing role of the cable industry as a competitor in the BDS market, and noted that last-mile broadband network outlays in the last decade have also had the salutary effect of decreasing the cost of satisfying demand in the BDS market.

E. Other Examples of Competitive Effects in the Market for BDS

The agency also analyzed additional effects of competition, stating that while TDM services such as DS1 and DS3 have been declining in revenue and importance, Ethernet business data services revenues have been growing by over 20 percent a year since [2013]." Moreover, while the specific data examined remains confidential and was redacted from the *Order*, the Commission observed that there have been decreases in prices for packet-based Ethernet services across all levels of bandwidth.

F. ILEC Pricing Regulation

The *Order* disagreed the prior Commission's Further Notice of Proposed Rulemaking that "the fact that the price capped incumbent LECs have kept their prices at the top of the cap is additional evidence of market power." The Commission stated that it expects competition to keep prices in check and further states that current price cap indices may be too low because the X-factors that were in effect 1997-2005 may have been unreasonably high, warranting upward corrections in pricing that would accompany the removal of such price caps. Because it found that there is competition in BDS services in the DS1, DS3, and transport markets, concerns about a lack of headroom between prices and caps are unwarranted.

G. Transport Market Competition

The *Order* continues to use the traditional division of markets between transport and end-user channel terminations inherited from the regulatory framework for special access. The FCC observed that transport services are often high volume services between traffic aggregation points "which can more easily justify competitive investment and deployment" than end user channel terminations. In

light of what it described as considerable record evidence of competition, the Commission found that price cap regulation for TDM transport and other non-end user channel termination services is not necessary.

II. PROSPECTIVE REGULATORY FRAMEWORK FOR BDS

Irrespective of the type of entity providing service, BDS will not be subject to ex ante pricing regulation except where “competition is expected to materially fail.” The Commission determined not to maintain any form of price cap or benchmark regulation on either packet-based business data services, TDM transport, or TDM-based end user channel termination services which provide bandwidth in excess of a DS3 level. Further, the *Order* eliminates price cap regulation on DS3 and DS1 channel terminations and certain other BDS services to the extent competition is present pursuant to the “bright-line” regulatory competitive market test that will be applied on a county-by-county basis that was adopted in the *Order*. Specifically, as explained below, under the FCC’s new competitive market test, a county is competitive if 50 percent of the locations with BDS demand in the county are within a half mile of a location served by a competing provider based on the 2015 Data Collection or, alternatively, 75 percent of the census blocks in the county have a cable provider present based on Form 477 data.

All BDS services remain subject to the Commission’s regulatory authority pursuant to Sections 201, 202, and 208 of the Act. The Commission intends to assess whether BDS rates, terms, conditions and practices are just, reasonable, and not unreasonably discriminatory in the context of Section 208 complaint proceedings.

A. Packet-Based BDS and TDM-Based Services Exceeding DS3 Bandwidth

The Commission refrained from reimposing any form of price cap, benchmark, tariffing, or any other form of ex ante pricing regulation on packet-based BDS or TDM-based BDS which provide bandwidth in excess of a DS3 level. Further, the *Order* eliminates that regulation to the extent it presently exists even in the absence of a nearby competitor in the relevant geographic market. With that said, such services remain subject to the Commission’s regulatory authority and complaints alleging rates, terms, and conditions for such services are unjust, unreasonable, or unreasonably discriminatory in the context of a Section 208 complaint proceeding.

B. TDM Transport Services

The FCC eliminated all ex ante price cap regulation of TDM transport and other transport (i.e., non-end user channel termination) special access services provided by price cap carriers. Although it allowed that a percentage of census blocks may not have immediate competitive transport options in wake of price cap deregulation, the Commission found that the resulting harm from deregulation would be less than the harms from regulation in those cases. The Commission believed that the administrative costs and complexities associated with such an approach would render it infeasible and, as with packet-switched and TDM services in excess of DS3 speeds, expressed confidence that the Section 208 complaint process still serves as a safeguard against unjust and unreasonable rates.

C. DS1 and DS3 End User Channel Terminations

The Commission took a different approach with DS1 and DS3 channel termination than the deregulatory outcome of the *Order* affecting packet-switched, transport, and service generally in excess of DS3 speeds. The Commission established a competitive market test that will maintain ex

ante price cap regulation in what it expects will be the relatively small number of areas where there is a predicted substantial likelihood that competition and market forces will not ensure just and reasonable rates.

1. Data by Which Competition Will Be Measured

The competitive market test uses data from the FCC's 2015 Data Collection to assess where competition currently is sufficient, and Form 477 data concerning the presence of facilities-based fixed broadband providers, especially broadband-capable facilities of cable operators, to determine which counties must remain subject to price cap regulation.

2. Scope of Geographic Measure

The test retains the half-mile geographic market discussed above but is applied on a county-based geographic unit. The county-based geographic measure, according to the FCC, significantly reduces the over- and under-inclusivity issues posed by larger MSAs, and avoids the administrability issues associated with using smaller geographic units such as census tracts or census blocks.

3. Appropriate Level of Competition and Methodology

The competitive market test will treat a county as competitive if either (i) 50 percent of the locations with BDS demand in the county are within a half mile of a location served by a competing provider based on the 2015 Data Collection, or (ii) 75 percent of the census blocks in the county have a cable provider present based on Form 477 data. The Commission acknowledged that the competitive market test does not delineate areas as perfectly as it would like, but found it strikes the right balances between precision and administrability and between the benefits of appropriate regulation and the costs of inappropriate regulation. The Commission was also satisfied that, because of the simplicity of the tests, the need for any post-decision challenges under the test will be minimized. No challenge process was implemented in the *Order*.

The Commission found that of the over 3,100 counties in the U.S. that they initially analyzed under the competitive market test, approximately 40 percent are non-competitive and 60 percent are competitive.

D. Triennial Updating of Competitive Market Test Results

On a forward going basis, the FCC will revisit the status of remaining non-competitive counties once every three years. The Wireline Competition Bureau will review the Form 477 data, which will continue to be collected semi-annually, as they are today, triennially to determine whether any additional regulated counties have surpassed the competitive market test's 75 percent threshold. The Bureau shall release a Public Notice that lists newly competitive counties and also provide such information on the Commission's website. Parties desiring to challenge these results may do so via petitions for reconsideration or applications for review.

E. Modifying BDS Forbearance of Section 203

1. Detariffing of Packet and Circuit-based Services above the DS3 Bandwidth Level, as well as Other Special Access Services

Pursuant to Section 10 of the Communications Act as amended by the 1996 Act, the Commission forbore from applying Section 203 tariffing requirements to price cap carriers for any packet-based or circuit-based business data services they offer which exceed a DS3 level of bandwidth. Furthermore, the Commission forbore from applying Section 203 tariffing requirements to price cap

carriers in providing BDS elements “that comprise transport pursuant to Section 69.709(a)(4) of the FCC’s rules, and to DS1 and DS3 end user channel terminations services and any other special access services currently tariffed in competitive counties or in non-competitive counties previously subject to Phase II pricing flexibility.”

2. Mandatory Detariffing After Transition

Detariffing actions to implement the *Order’s* determinations where Section 203 forbearance is appropriate will be mandatory after a 36-month transition beginning on the effective date of the *Order* (60 days after the *Order* is published in the Federal Register). Although competitive carriers are presently subject to a permissive detariffing regime, in wake of the transition, they will be required to detariff their business data services.

For six months after the effective date of the *Order*, price cap carriers must freeze tariffed rates for end-user channel terminations in newly deregulated counties pursuant to the *Order’s* competitive market test, provided those services remain subject to tariffs. Permissive tariffing will continue during the transition period. However, apart from the aforementioned rate freeze, carriers will no longer have to comply with price cap regulation for such services once the *Order* becomes effective.

The Commission sought to avoid disturbing existing contractual or other long-term arrangements. Accordingly, per the Commission, an arrangement by which services are obtained under a contract tariff remains in effect as a contract even after the arrangement is no longer part of a tariff. For that reason, contract tariffs, term and volume discount plans, and individual circuit plans will not become void upon detariffing.

3. Forbearance for Purposes of Regulatory Parity

The Commission took steps to conform the forbearance provided to Verizon, and its successors in interest (Hawaiian Telcom, and the legacy Verizon portions of FairPoint and Frontier), regarding enterprise broadband services, to the forbearance provided to other price cap carriers. According to the Commission, these grants of forbearance, when coupled with the agency’s other forbearance actions in the *Order*, “levels the playing field among price cap carriers providing packet-based and optical transmission business data services as telecommunications services.” In the interest of regulatory parity, the Commission reversed the prior Verizon forbearance for broadband services that had been deemed granted, because the FCC failed to act in a timely manner in 2006, to the extent that it exempted telecommunications services Verizon offers in the BDS market from the Title II provisions otherwise applicable to telecommunications services in that market (i.e. Sections 201 and 202 of the Act).

The FCC also recognized that modifying or reversing forbearance once granted by the Commission or by operation of law, while within the Commission’s authority when one or more of the forbearance criteria are no longer met, “is a step that should be taken with great care.” Nonetheless, the Commission found its action appropriate in the present case because its function was consistent with the substance of the Section 10 forbearance requirements.

III. REGULATORY FRAMEWORK IN NON-COMPETITIVE COUNTIES

A. Maintaining Price Cap Regulation in Non-Competitive Counties

The FCC will maintain price cap regulation in the form of Phase I pricing to DS1 and DS3 end user-channel terminations and other business data services classified as non-competitive offered by incumbent carriers in non-competitive counties as determined by the *Order's* competitive market test. However, in non-competitive counties that are located within former Phase II pricing areas, incumbent carriers that were previously granted Phase II pricing flexibility will not have to reinstitute price caps. Moreover, in order to encourage competitive entry into non-competitive counties, the FCC will not apply price cap regulation to DS1 and DS3 end user channel terminations provided by non-ILECs.

B. Enabling Pricing Flexibility in Non-Competitive Counties

All BDS that remain subject to price cap regulation under the framework adopted in the *Order* will be transitioned to Phase I pricing flexibility. In areas deemed non-competitive under the FCC's new competitive market test, price cap carriers will be able to engage in individualized bargaining over rates via contract tariffs, volume discounts, and term discounts. However, this relaxed approach will not apply to carriers in former Phase II pricing areas that are deemed non-competitive. Phase II price cap carriers in non-competitive counties must continue to offer generally-available rates for end user DS1 and DS3 channel terminations and for other special access services which remain subject to tariffs.

C. Forbidding Certain Nondisclosure Agreement Provisions in Non-Competitive Areas

In order to ensure that BDS users can fully participate in FCC proceedings and the FCC can conduct oversight of BDS, the Commission adopted a rule prohibiting the use of non-disclosure agreements in tariffs, contract tariffs, and commercial agreements for BDS provided in non-competitive areas that forbid or restrict the disclosure of information to the FCC. This new prohibition applies to all forms of agreements for the sale of TDM-based BDS, including price cap tariffs and contract tariffs in non-competitive areas.

In the interest of protecting sensitive information, providers can still require that BDS-related information be submitted to the Commission subject to a protective order and/or request for confidential treatment. Moreover, no provider of BDS in non-competitive areas may enter into or enforce a non-disclosure agreement in a manner that forbids or prevents parties from disclosing any information relevant to the FCC's BDS-related proceedings to the Commission. Specifically, the *Order* forbids provisions of non-disclosure agreements that prohibit outright the disclosure of confidential information to the Commission, and provisions that require a direct request or legal compulsion prior to allowing disclosure to the Commission.

D. Price Cap Level Adjustments

1. Overview

Despite the general deregulatory thrust of the *Order*, DS1 and DS3 end user channel terminations offered by ILECs in non-competitive counties remain subject to price cap regulation as noted earlier. The *Order* also addresses reforms to the price cap framework itself beyond service and geographic applicability. To ensure just and reasonable rates for the services that remain subject to ex ante price regulation, the FCC had included a price cap index subject to adjustments annually to account for productivity gains and inflation. The price cap regime included an X-factor to account for the productivity gains but has not been adjusted for more than a decade during which time an X-factor intentionally intended as a transitional mechanism to lower rates has been frozen. In the *Order*, the FCC adjusted the X-factor to 2 percent, and the Commission will continue to use Gross Domestic

Product-Price Index (“GDP-PI”) as the measure for inflation.

2. Creating a Productivity-based X-factor

The Commission’s X-factor relies on the KLEMS (Broadcasting and Telecommunications) dataset, which measures ILEC productivity and input prices. KLEMS provides yearly industry-level measures of input prices, as well as total factor productivity. The FCC’s X-Factor of 2 percent is designed to account for the diminishing share DS1 and DS3 services hold in the BDS market, contemporary BDS market trends in productivity and input prices, and the agency’s lack of ability to discern bias in the KLEMS data.

3. Measuring Inflation

The Commission retained GDP-PI as the measure of inflation that price cap carriers will use in their price cap index calculations because it found this measure captures medium and long-term inflation with greater accuracy than fixed-weighted indexes or other alternatives it reviewed.

4. Refraining From A Catch-Up Adjustment

The FCC will not use a catch-up adjustment for price cap carriers to adjust their cap levels. The Commission noted that any catch-up adjustment would apply only to lower bandwidth BDS such as DS1s and DS3s in non-competitive areas. Although the price cap indices have not changed since the expiration of the CALLS plan in 2005, the FCC concluded that a catch-up adjustment would only modestly decrease price cap levels, would risk exaggerating productivity growth for BDS subject to price caps, and would fail to account for the fact that carriers have entered price cap regulation at different points over the past twenty years.

5. Tariffs Reflecting the Adjusted X-factor

All price cap carriers still subject to tariffing requirements under the new framework must file their revised tariff review plans implementing the new X-factor. These revised plans must be filed with the FCC to become effective on December 1, 2017. The Order is unclear with respect to the filing deadline for such plans. Incumbent price cap carriers that file tariffs under the price cap ratemaking methodology must file revised annual access charge tariffs every year, which become effective on July 1. The FCC will release a public notice or order further specifying required materials (presumably including the deadline) for filing before the December 1, 2017 effective date for the X-factor.

E. Wholesale Pricing Untouched

The Commission declined to adopt ex ante rules governing the relationship between wholesale and retail rates for BDS, or to otherwise intervene in the marketplace for wholesale BDS by other means. In so doing, the Commission declined to adopt generally applicable rules dealing with unjust or unreasonable practices or discrimination in the wholesale BDS marketplace, disputed the notion that ILECS are pricing wholesale BDS in an unreasonably discriminatory manner relative to retail BDS, and declined to mandate that wholesale rates be lower than retail rates for like services.

IV. ADDITIONAL ACTIONS

A. Services Described In the Record Which Are Not Common Carrier Services

In the Further Notice of Proposed Rulemaking preceding the BDS Order, the Commission made certain statements that could be construed to suggest that all business data services are telecommunications services subject to Title II common carrier requirements. However, in the *Order*,

the Commission clarified that such statements were unduly broad and declined to endorse this outcome. Rather, the Commission found that some BDS actually constitutes private carriage (rather than common carriage) services, and that the record was insufficient for the Commission to make a broader categorical classification for all BDS.

The Commission clarified that certain services offered by Comcast and Charter (i.e. wholesale cellular backhaul service and E-Access service) constitute private carriage offerings. The Commission noted that the two companies engage in individualized bargaining in those categories and do not necessarily extend service to all comers.

The FCC also disputed arguments made by several commenters against classifying the aforementioned services offered by Comcast and Charter as private carriage offerings. Although the parties sought to characterize the aforementioned services as telecommunications services offered to the general public, the Commission was unpersuaded and characterized the arguments of such parties as generalized statements about broad marketplace trends, non-holistic assertions about particular aspects of the Comcast and Charter offerings, and inapposite comparisons to other service offerings.

Furthermore, the Commission will not mandate that BDS be offered on a common carriage basis where providers otherwise have elected to offer them on a private carriage basis.

B. Expiration of the Interim Wholesale Access Rule

In the *2015 Technology Transitions Order*, the FCC required as a condition of discontinuance for legacy TDM-based services used as wholesale input, an ILEC must provide access to unbundled network element platform (“UNE-P”) replacement services and BDS at DS1 speed and above on reasonably comparable rates, terms, and conditions to any requesting telecommunications carrier. However, in the BDS Order, the FCC found that this rule is no longer necessary. For that reason, it will expire upon the effective date of the new BDS rules.

V. POLITICAL ANALYSIS

The BDS proceeding was a matter of considerable controversy beginning with the prior administration. The change in party controlling the FCC shifted this proceeding from a more regulatory leaning to a decidedly deregulatory approach. Chairman Pai defended the *Order* as a methodical effort to ensure greater competition in the BDS market through selective deregulation based on extensive and careful study of the available data.

However, while Commissioner O’Rielly joined Chairman Pai in voting for the item, he issued a separate statement questioning the wisdom of the Commission’s decision to reverse the prior Verizon deemed grant forbearance. In particular, he warned that such action “could set dangerous precedent and lead to inappropriate regulation under a future Commission.”

Finally, Commissioner Clyburn dissented from the BDS Order on numerous grounds. She questioned the timeliness of the data which formed the basis of the *Order*, pointed to the lack of analysis of cross-elasticity of demand in the product market, accused the majority of overstating the degree of substitutability of services in their market analysis (especially for best-efforts Internet service and Ethernet over Hybrid-Fiber Coaxial), argued that the half mile geographic unit of measurement in defining the relevant market utilized was overly broad based on the data, and expressed skepticism about elements of the competitive analysis that, according to her, find potential rather than actual competition to serve as a sufficient discipline on pricing of BDS services.

For more information regarding this client advisory and the BDS Report & Order, please contact Chip Yorkgitis at (202) 342-8540, your usual Kelley Drye attorney or any member of the Communications practice group. For more information on the Communications practice group, please click [here](#).