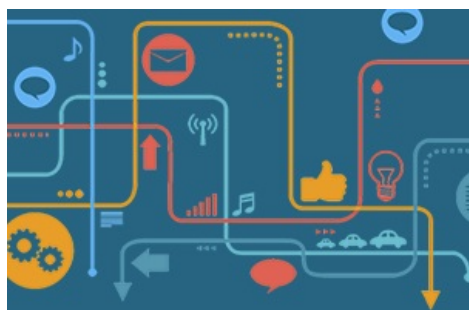


The FCC Deregulates Most Business Data Services

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Ending a decade-long examination of incumbent carrier special access and related services, the Federal Communications Commission (Commission or FCC), on April 28, 2017, released a [Report & Order](#) (the Order) setting forth a deregulatory framework for business data services (BDS). The Commission found that, in most instances, BDS – “dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections” – exists in “a dynamic and increasingly competitive marketplace.” The Order generally eliminates ex ante pricing regulation with the exception of end user channel termination services at DS1 and DS3 levels in counties that fail a competitive market test adopted in the Order, in the hope of stimulating growth and investment in new services.

Enterprises, non-profits, and government organizations use BDS 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 Commission historically referred to the relevant market for such services as the “special access” market, although its definition of BDS is broader than that historical term.

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” (based on criteria related to the frequent presence of “nearby” competitors to incumbents within a county or of facilities-based cable operators providing BDS within the county), the FCC will bolster the incentives of facilities-based providers to invest in the expansion and improvement of their BDS offerings.

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. The Commission examined circuit-based BDS, packet-based BDS, Ethernet over Hybrid-Fiber Coax, “best-efforts” Internet access services, unbundled network elements, dark fiber, satellite services, and fixed wireless services. The Commission also defined the relevant geographic market as being a distance of one mile. After examining a number of factors relating to market entry, the Commission:

- Removed price cap or any other type of pricing regulation on packet-switched BDS and also on

TDM-based BDS providing services in excess of DS3 bandwidth levels;

- Removed price cap or other type of pricing regulation on transport services;
- Adopted a competitive market test that dictates on a county-by-county basis whether it will retain price cap regulation for incumbent DS1 and DS3 end user channel termination services in counties deemed non-competitive, subject to review of non-competitive counties after a three-year period. That test adopted is whether 50 percent of the locations with BDS demand in the county are within a half mile of a location served by a competing provider or, alternatively, 75 percent of the census blocks in the county have a cable provider present;
- Declined to adopt ex ante price regulation for wholesale BDS (no general pricing rules for wholesale service or mandates about the relative prices of wholesale and retail BDS);
- Eliminated permissive detariffing of BDS by competitive carriers and after a six-month transition, eliminates mandatory tariffing for incumbent providers for BDS in competitive counties; after a 36-month transition period that commences on the effective date of the BDS Order (60 days after publication in the Federal Register) during which tariffing will be permissive for incumbents;
- Refrained from adopting ex ante pricing regulations for the relationship between wholesale and retail rates for BDS;
- Clarified 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
- Clarified that BDS is not inherently a common carrier service and specifically found that select competitive BDS offerings constitute private carriage offerings.

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.

In our companion [client advisory](#), we summarize the primary findings and rules of the Report & Order in greater depth.